



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

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Docket No. 2318-24
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board, sitting in executive session, considered your application on 11 June 2024. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations, and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations, and policies.

The Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

The Board carefully considered your request to remove the Report of Misconduct (ROM), Report of Board of Inquiry (BOI), and all related adverse material. The Board considered your contentions that the complainant made a patently false, baseless, and later unfounded allegation that you indecently exposed yourself. You assert that the BOI unanimously and completely unfounded the allegation despite the low burden/standard of proof. You also assert that the Commanding General, █ (CG, █ recommended the adverse material not be included in your record. You further contend:

(1) The command failed to follow procedures according to the Marine Corps Prohibited Activities and Conduct (PAC) Manual. Specifically, you referenced a statement from the CG, █'s endorsement to the ROM which states, "although the means by which the underlying conduct was originally reported resulted in the initial investigation being conducted outside the

procedures, the unit was able to coordinate with the EOA and SJA for guidance as appropriate.” Additionally, the PAC Manual gives a Marine the right to appeal an adverse finding to the next General Court Martial Convening Authority (GCMCA) and then to the Secretary of the Navy.

(2) The CG, ██████████ (CG, ██████████) improperly issued the ROM according to the Marine Corps Legal Support Administration Manual (LSAM) and Individual Records Administration Manual (IRAM). Additionally, the ROM was not written according to the LSAM, it was not concise and did not provide an even handed explanation. The inaccuracy of the ROM is due in part to your inability to rebut the investigative findings. The Naval Criminal Investigative Service (NCIS) declined to open an investigation paving the way for the command to conduct a botched investigation pursuant to the PAC Manual.

(3) The Deputy Commandant, Manpower and Reserve Affairs (DC, M&RA) improperly directed the placement of the ROM and all related adverse material in your record and erroneously relied on the mere definition of adverse material. The DC, M&RA failed to consider a favorable recommendation by the CG, ██████████. The record failed to consider and consciously removed a favorable recommendation to not include adverse material.

(4) Due process was violated according to the Administrative Procedure Act (APA). The ROM and BOI are not separate and independent matters, they are all in the progression of disposing of the allegation of misconduct. The decision on review by the BOI not only over-ruled the initial decisions of the command, but it was also binding on the command and the agency as a whole.

(5) The Marine Corps wrongfully interfered with your timely promotion to the next rank.

The Board, however, substantially concurred with the previous Board’s decision that your ROM is valid, and the adverse material was properly filed in your official military personnel file (OMPF). In this regard, the Board noted that the allegation originated as an anonymous complaint but later was reported in accordance with the PAC Manual. Upon the conclusion of the Preliminary Inquiry into your alleged violation of Uniform Code of Military Justice (UCMJ) Article 102C (indecent exposure), the Commanding Officer, ██████████ ██████████ issued a Non-Punitive Letter of Caution advising you to follow the orders of those appointed over you and the regulations that pertain to you. The Board also noted a subsequent Command Investigations (CI) found that misconduct occurred. In consideration of the CIs findings, the CG, ██████████ submitted the ROM and recommended that you be required to show cause for retention in the Marine Corps at a BOI. The Board noted, too, that the CG, ██████████ reviewed the evidence and concurred with the recommendation that you be required to show cause. The BOI found that the preponderance of evidence did not support a basis for separation.

Concerning the submission of the ROM, the Board reaffirmed the determination that the ROM was written and issued in accordance with the LSAM. According to the LSAM, a ROM is a non-punitive measure available to the GCMCA as an option to taking disciplinary action. The LSAM requires a ROM to be generated in all cases where the GCMCA determines that the officer committed misconduct. The ROM serves two purposes. First, it provides the Alternate Show Cause Authority and the Show Cause Authority with sufficient information to make a

decision on whether to process the officer for administrative separation. Second, it provides a complete record of the misconduct and its disposition for inclusion in the officer's OMPF. In accordance with the LSAM, the ROM included the factual basis for the ROM, a concise explanation of the circumstances, a recommendation that you be required to show cause, and it included the associated investigations as enclosures. The Board further noted that you were properly notified of the reimbursement requirement for advanced education assistance, and you were afforded the opportunity to read the ROM and to submit matters in response. You also acknowledged receipt of the ROM and your understanding that adverse information pertaining to the incident may be included in your OMPF. In rebuttal to the ROM, you provided an eight-page statement, in which you acknowledged reviewing the material attached to the ROM and the recommendation that you be required to show cause. Your rebuttal included your concerns regarding the evidence in the investigation and information, and a statement related to your performance in the Marine Corps and your character. The Board determined, the CG, █, acted within his discretionary authority and relied upon sufficient evidence, that included command investigations, when determining that you demonstrated very poor judgement and committed misconduct.

The Board noted the Staff Judge Advocate's (SJA) correspondence to the Commandant of the Marine Corps (CMC) (JPL) regarding the ROM. The SJA explained that the case originated as an anonymous complaint submitted to the squadron and subsequently to the equal opportunity representative, and it was resolved informally at the squadron level. A few months later, the incident was reported according to the PAC Manual. When the case was routed to the Headquarters Marine Corps Opportunity, Diversity and Inclusion Management Branch (MPE), requests for information regarding the handling of the case came back to the SJA office. The SJA reached out to NCIS requesting a review of the case; however, the special agent believed that while the allegation did meet the elements of Article 120 (c) this was not a case for which NCIS would take jurisdiction. As a result, the command completed additional investigative steps reflected in the command investigations. The Board also noted the CG, █'s endorsement to the ROM addressed the original reporting of the allegations, NCIS's decision to decline investigative jurisdiction, and his phone conversation with the Marine Corps Military Personnel Policy Branch confirming the ROM satisfies the requirement to document the misconduct. The Board found the SJA and CG, █ statements sufficient to determine that due diligence was exercised to ensure the PAC Manual complaint was properly reported, investigated, and documented. The PAC Manual permits 30 days to submit an appeal. The Board determined your dissatisfaction with the disposition of a complaint does not constitute a valid basis of appeal. You must argue that an existing Department of Defense (DoD) or Department of the Navy (DoN) regulations were incorrectly applied. Ultimately, the Board found your evidence insufficient to conclude you were not afforded the opportunity to appeal the findings. Aside from your dissatisfaction with the outcome of the investigation and the disposition of the complaint, the Board found no evidence that you previously identified an incorrect application of a DoD or DoN regulation. Moreover, your rebuttal was reviewed and considered by the CG, █, █ when he concurred with the show cause recommendation.

The Board determined your contention that DC M&RA improperly directed the placement of the ROM in your record and erroneously relied on the mere definition of adverse material lacks merit. According to DoD Instruction 1320.04, adverse information is any substantiated adverse

finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved, and supported by a preponderance of the evidence. To be adverse, the information must be derogatory, unfavorable, or of a nature, that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual. In accordance with the Marine Corps Individual Records Administration Manual (IRAM), the CMC will file correspondence containing adverse material that the Marine reported on has had the opportunity to contest, explain, or rebut. The Board noted that your misconduct was substantiated in officially documented investigations, the information was deemed credible based on a preponderance of the evidence, was unfavorable, and reflected clearly unacceptable conduct and judgment on your part. Moreover, in compliance with regulations, you had an opportunity to rebut the ROM and your statement was filed in your OMPF.

The Board determined your assertion that the CG, ██████████'s recommendation regarding the inclusion of adverse material was consciously removed, and DC, M&RA failed to consider the recommendation also lacks merit. The Board found no evidence, other than your statement, that the CG, ██████████'s recommendation was consciously removed or that DC, M&RA failed to consider the recommendation. Even assuming, arguendo, that the CG, ██████████'s recommendation was not considered, pursuant to SECNAVINST 1920.6D, the DC, M&RA is designated the Show Cause Authority for the Marine Corps. Thus, he is delegated the authority to determine the disposition of adverse material and the CG, ██████████'s recommendation was merely that, a recommendation. Ultimately, the DC, M&RA has discretionary authority to determine if the ROM is adverse and should be filed in your record. In your case, based upon the evidence and his considerable experience with officer misconduct matters, DC, M&RA determined the ROM met the definition of adverse material according to the IRAM.

The Board noted that the APA was originally enacted in 1946, to establish procedures that federal agencies use for rulemakings and adjudications. The Board also determined that the APA is superseded by properly promulgated Marine Corps, DoD, and DoN regulations. In this regard, the Board determined the applicable PAC Manual, LSAM, IRAM, DoD and DoN policies were adhered to in your case. The Board also reaffirmed the previous Board's determination that your BOI and submission of the ROM are separate and distinct processes. The BOI's finding that the preponderance of evidence substantiated none of the reasons for separation for cause is not binding on your chain of command or DC, M&RA's finding that you committed misconduct. Moreover, the BOI's finding is not sufficient evidence of an error or injustice regarding the submission and inclusion of a properly submitted ROM.

According to DoD Instruction 1320.04, adverse or reportable information is subject to review by promotion selection boards to determine if an officer is fully qualified for promotion to the next higher grade. The Board found no evidence of any purported interference with your "timely" promotion to the next rank. As previously determined your adverse material was properly submitted for inclusion in your OMPF and thus available to promotion boards for consideration. Moreover, the Board relies on a presumption of regularity to support the official actions of public officers, in the absence of substantial evidence to the contrary, the Board will presume that they have properly discharged their official duties. The Board found your evidence insufficient to overcome this presumption. The Board thus concluded that there is no probable material error,

substantive inaccuracy, or injustice warranting corrective action. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

7/16/2024

