



**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. 2671-24  
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 13 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, as well as the 10 January 2024 decision by the Marine Corps Performance Evaluation Review Board (PERB), the 4 August 2023 Advisory Opinion (AO) provided to the PERB by the Manpower Management Division Records and Performance Branch (MMRP-30), and your 13 March 2024 rebuttal to the AO.

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

The Board carefully considered your request to modify the fitness report for the reporting period 1 June 2021 to 1 November 2021 by removing the Reviewing Officer (RO) Section K comments and markings. Additionally, you requested removal of the failures of selection<sup>1</sup> incurred while the contested report was in your record and the granting of a special selection board (SSB). You contend the RO's objectivity was compromised since you identified his "ongoing criminal activity and declined to participate in it." You further contend that, according to the Performance Evaluation System (PES) Manual, your reporting chain should have been modified

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<sup>1</sup> Prior action by the Board in BCNR Docket NR. 10442-23 removed the applicable failures of selection so no action was taken by this Board regarding this request.

when these “compromising circumstances” occurred. Specifically, you contend that, even if one assumed the RO made a “good faith effort” to write a fair fitness report, the RO “could not have possibly exercised professional objectivity in evaluating [your] billet performance separately from [your] analysis and advice that he was breaking the law” because your duty was to “conduct legal research and analysis and provide [the RO] legal advice.” Additionally, you contend the RO’s remarks reference pending legal action, fail to comment on your potential, imply he did not sincerely recommend promotion, and contain “velvet daggers.” Lastly, you contend there is an “overarching injustice” in your case because you “have been punished for being one of a very few judge advocates to both correctly recognize violations of 10 United States Code §1107A and the Religious Freedom Restoration Act and have the integrity to call them for what they are.”

The Board, however, concurred with the AO<sup>2</sup> and the PERB decision that the report is valid as written and filed, in accordance with the applicable PES Manual guidance. As part of its review, the Board carefully considered the timeline of events and noted by your statement and formal notice, dated 28 February 2022, that you advised the RO in the beginning of September 2021 an order to service members to take an Emergency Use Authorized (EUA) vaccine was unlawful under 10 United States Code (USC) §1107A. Additionally, during the reporting period covered by the contested report, you submitted a request for religious accommodation which was unfavorably endorsed by your chain of command and denied by the Deputy Commandant of the Marine Corps (Manpower and Reserve Affairs) (DC (M&RA)) on 20 October 2021. The Board also noted the Reporting Senior’s (RS’s) Section I comment that your “fortitude and resilience under pressure were evident repeatedly during the reporting period through [your] delivery of succinct, principled legal opinion even when those positions were known to be unpopular and would come with professional risk.” The Board further noted the AO for your companion case requesting modification to the subsequent fitness report for the reporting period 2 November 2021 to 30 April 2022, which was relied upon by the PERB to grant your request to remove the RO comments and markings, stated “while the contested comments and RO markings are not adverse and do not qualify for removal, the Article 138 Complaint of Wrongs was submitted during the reporting period.” The AO goes on to say that “[t]he filing of a formal complaint against one’s RO is likely to negatively impact the RO’s professional objectivity” which appears to have served as the rationale for granting your relief. However, in the case before this Board, the Board determined the circumstances were different. Although the evidence supports you had advised the RO that an order to be vaccinated with an EUA vaccine was unlawful and the RO had not followed that advice, the Board determined there is insufficient evidence to support your contention the RO lost professional objectivity because of your advice. The Board also substantially concurred with the AO’s general comments about the adversity of the Section K comments and determined the comments were not adverse. The Board considered your contention that, as a career-designated Major, your report should not include a “retention” recommendation but determined it was too speculative to say the RO was alluding to pending legal action by making that recommendation. The Board also concurred with the AO and determined the RO’s comments were not “laced” with velvet daggers nor did they lack addressing your potential for continued professional development because, although they did not

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<sup>2</sup> The Board was not influenced by the “irrelevant factors” introduced by the AO author nor the “commentaries” on [your] character and “ad hominem attacks.” The Board disregarded the AO’s repeated comments that your contentions were “disingenuous” or that your “focus on the RO’s comment seems unbalanced.”

address each of the ways a RO could choose to address potential, the comments did include a recommendation for promotion. Based on the available evidence, the Board concluded there is insufficient evidence of an error or injustice warranting removal of the contested fitness report. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Finally, since the Board declined to grant your requested relief to modify the contested fitness report, it did not consider your request for a SSB.

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,

6/25/2024

