DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 3056-00
12 April 2002

MAJ [redacted] USMC RET
[redacted]

Dear [redacted]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

You requested, in effect, correction of your record to show that you were not removed on 10 October 1990 from the list of selectees by the June 1990 special selection board for promotion to lieutenant colonel; that you were promoted to lieutenant colonel pursuant to selection by the special selection board; and that you retired as a lieutenant colonel.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 11 April 2002. 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, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by Headquarters Marine Corps dated 31 January and 9 July 2001, copies of which are attached. They also considered your rebuttal letters dated 15 April and 13 October 2001.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion dated 9 July 2001, except they noted that paragraph 3.c, line three, should refer to 1990, rather than 1991. The evidence of record, including your statement of 12 January 1991, did not persuade them that your removal from the promotion list was unwarranted. The more lenient disposition of other officers' cases did not convince them that your case was handled improperly. In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

3056-00

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously 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,

W. DEAN PFEIFFER
Executive Director

Enclosures

3056-00

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:
1070
JAM2
31 JAN 2001

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF MAJOR [redacted] U.S. MARINE CORPS (RET)

1. We are asked to provide an opinion on Petitioner's request to modify his record to reflect retirement at the rank of lieutenant colonel.

2. We recommend against consideration of this petition. It was submitted substantially out of time, and no cause whatsoever has been proffered to justify an exception to the three-year time limit. Our analysis follows.

3. Background

a. By Petitioner's own chronology, he was aware of the claimed injustices nearly a decade ago. In fact, the matters asserted in his 12 January 1991 letter to the Secretary of the Navy (SecNav), regarding his removal from the report of the Special Selection Board (SSB), could easily have been presented to this Board at that time. Instead, Petitioner submitted a complaint to the Inspector General of the Department of Defense (DoD IG) alleging official misconduct on the part of senior officers involved in his initial failure to select for promotion, as well as his subsequent removal from the SSB report. DoD IG forwarded Petitioner's complaint to the Department of the Navy IG (DoN IG), and informed Petitioner accordingly in June 1991.

b. DoN IG found no evidence of official impropriety in Petitioner's case, since SecNav's ordering an SSB had remedied the error committed when the fiscal year 1991 lieutenant colonel selection board (FY91 Board) considered Petitioner's 1987 misconduct. Further, the report concluded that there was nothing improper about SecNav being informed of that same 1987 misconduct and removing Petitioner from the SSB selection report based upon it. DoN IG provided Petitioner a redacted copy of its investigation report in June 1992.

c. Almost eight years later[1], Petitioner submitted this application for relief, asserting in block 11.a. of that document that he discovered the alleged injustice in December 1997. According to Petitioner, this "discovery" occurred when he read about the circumstances surrounding the nomination of U.S. Air Force General[redacted] to the chairmanship of the Joint Chiefs of Staff (JCS), and the withdrawal of that nomination following the discovery of a decade-old adulterous affair. Petitioner maintains that, when he learned that General [redacted] was not only allowed to remain in his billet as Vice Chairman of the JCS, but was also subsequently nominated and confirmed as Supreme Allied Commander, Europe (SACEUR), the injustice of his own case became apparent to him.

4. Discussion

a. Petitioner's argument benefits from neither law nor logic and is, in a word, nonsense. Petitioner clearly believed in 1990 that he had been wronged, and actively sought redress at that time, to include raising the matter with DoD IG. In 1992, however, he received the DoN IG report that concluded that his complaint was factually unsubstantiated. Petitioner then completed the remaining two years of his career, and retired in July 1994. After another three years had passed, Petitioner heard about the handling of a completely unrelated case that was, procedurally and factually, completely distinguishable from his, and decided that he had been treated unfairly in comparison. He then allowed nearly two-and-a-half more years to pass before submitting his present complaint to this Board. In sum, then, Petitioner sat on his right to petition this Board for redress for nearly ten years. While the period from 1991 until 1992 might be excused, albeit generously, on the theory that Petitioner was pursuing administrative remedies, there is no apparent reason, nor does Petitioner provide one, for him to have waited eight more years after receiving a copy of the DoN IG report to address his grievances to this Board.

b. Not only is Petitioner's application five years out-of-time under even the most charitable interpretation of the facts, but he offers no credible argument why the interests of justice

[1] We note that although the stamped date "May 1 1999" appears on the bottom right corner of Petitioner's application to this Board, block 15 of the form records the document as having been signed on 24 April 2000. Accordingly, "1999" is an apparent scrivener's error that should properly read "2000."

should excuse the significant staleness of the filing. Instead, Petitioner simply asserts that his belief that he was treated unfairly is shared by others. The Government, however, has a legitimate interest in finality in cases like Petitioner's, the alternative being to license any retired servicemember to revisit the issue of his or her retirement-grade long after he or she leaves active service. If the timeliness requirement of sections 3.b. and c. of SECNAVINST 5420.193 is to be given any force, it must be applied to exclude petitions such as this one.

5. Conclusion. Accordingly, for the reasons noted, we recommend rejection of this petition as substantially out of time.

[redacted]
Assistant Head, Military Law Branch
Judge Advocate Division

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:
1070
JAM4
9 JUL 2001

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF MAJOR [redacted] USMC

1. We are asked to provide an opinion on Petitioner's request that BCNR modify his record to reflect retirement at the rank of lieutenant colonel. Specifically, we are asked to address the following: (1) the alleged difference between the Assistant Commandant of the Marine Corps (ACMC) Memorandum to the Secretary of the Navy (SecNav) and the Navy Inspector General's (Navy IG) report as to the facts of Petitioner's misconduct; (2) the allegation that the regulations relied on by Headquarters Marine Corps to deny Petitioner a chance to rebut his removal from the promotion list prior to the Secretary of the Navy removing his name were not effective until September 1990, and; (3) the alleged due process violation in not allowing Petitioner to comment prior to the Secretary of the Navy making the decision to remove Petitioner's from the selection list.

2. We stand by our previous recommendation of 31 January 2001 that the requested relief be denied. Our analysis follows.

3. Analysis

a. Petitioner's claim that there were factual differences between ACMC's Memorandum and the Navy IG's report does not provide grounds for relief. Petitioner is troubled by the fact that the Navy IG's report described his adulterous affair as "brief," whereas, the ACMC's Memorandum described his affair as "lengthy." As we emphasized in our initial response, Petitioner's application is nearly 5 years out of time under the timeliness requirement of section 3.b. and c. of SECNAVINST 5420.193 and nearly a decade after the events in question. As a result, the details of Petitioner's misconduct have been obscured by the passage of time. What is clear, however, is that the ACMC, whose focus was on the nature of Petitioner's misconduct, characterized Petitioner's affair as lengthy. In contrast, the individual drafting the Navy IG's report, whose focus was on the procedures used in removing Petitioner's name from the promotion list, considered the duration of Petitioner's

misconduct brief. There is nothing troubling about two individuals with different perspectives characterizing Petitioner's misconduct differently. Moreover, Petitioner's focus on the characterization of the length of his affair misses the mark. Whether it was lengthy or brief does not alter the fact that Petitioner engaged in an adulterous relationship with the wife of a staff non-commissioned officer. In addition, it should be noted that neither the Navy IG nor the ACMC determined Petitioner's adultery to be a one-time incident.

c. Petitioner's request for relief because Headquarters Marine Corps relied upon regulations that were not effective until September of 1991 is specious. While Petitioner fails to identify a specific regulation, we assume he is referring to either Department of Defense Directive 1320.12 or Secretary of the Navy Instruction 1420.1A. Regardless of which regulation Petitioner is referring to, his claim is without merit. Petitioner's name was not removed from a "report of the a selection board." Rather, it was removed from a "promotion (promotion selection) list." There is a significant legal difference between the two lists with regards to the removal of an officer's name. In accordance with 10 U.S.C. § 624 (a)(1), a "report of a selection board" becomes a "promotion list" when it has been approved by the Secretary of Defense. Removal from the report of selection is governed by 10 U.S.C. § 618, which contains provisions for allowing an officer to comment prior to his or her removal from the "report of selection." Removal from a "promotion list," however, is controlled by 10 U.S.C. § 629. Unlike 10 U.S.C. § 618, 10 U.S.C. § 629 does not contain provisions providing an officer with notice or an opportunity to respond prior to his or her removal from a "promotion list." Additionally, Executive Order 12396 delegates the presidential authority to remove an officer from a promotion list to the Secretary of Defense. Executive Order 12396 also allows the Secretary of Defense to further delegate that authority. That authority was delegated to the Service Secretaries in a Secretary of Defense memorandum dated 12 January 1983 and reconfirmed in a subsequent memorandum dated 19 January 1989. Accordingly, no legal error occurred when the Secretary of the Navy acted within his authority and removed Petitioner's name from the promotion list.

d. Petitioner's allegation of a due process violation by the Marine Corps in not allowing him to comment prior to the Secretary of the Navy removing his name from the promotion list

3056-00

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF MAJOR [redacted] USMC

is without merit. Under Board of [redacted] 408 U.S. 564 (1972), a right to due process only attaches where a protected liberty or property interest is involved. To be entitled, therefore, to notice and an opportunity to comment on the Secretary of the Navy's removal of his name from the promotion list Petitioner would have to establish that he had a protected property or liberty interest in that promotion.[1] Petitioner cannot do so because it is well established that military officers are commissioned and serve at the pleasure of the President, and, therefore, they do not possess a constitutionally protected liberty or property interest in being promoted or even retained in service.[2]

5. Conclusion. Accordingly, we recommend that Petitioner's request for relief be denied.

[redacted]
Head, Military Law Branch
Judge Advocate Division

---

[1] See [redacted] 657 F.Supp 1243 (D. Vt. 1987). See also, [redacted] Secretary of Army, 504 F.Supp 39 (D. Md. 1980).

[2] See Law v. United States, 26 Cl.Ct. 382 (1992). See also [redacted] States, 1986 WL 1167 (S.D.N.Y.) (citing [redacted] Secretary of Air Force, [redacted] F.2d 294, 297 (1st Cir. 1972). Accord, [redacted] 345 U.S. 83,91 (1953) [redacted] 613 F.2d 767, 768 (9th Cir. 1980); [redacted] 447 F.2d 245,253-54 (2d Cir. 1971), cert. Denied, 405 U.S. 965 (1972); [redacted] 403 F. Supp 290,296 (D.D.C. 1975), aff'd. sub nom. [redacted] 556 F.2d 312 (D.D.C. 1977), cert. denied, 435 U.S. 995 (1978).