



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

BJG  
Docket No: 5816-01  
11 June 2003

[REDACTED]

[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. It is noted that the Commandant of the Marine Corps (CMC) has directed removal of your adverse fitness report for 6 April 1996 to 16 May 1997.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 11 June 2003. 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 report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB), dated 19 July 2001 with enclosure, and the advisory opinion from the HQMC Military law Branch, Judge Advocate Division (JAM3), dated 3 May 2001, copies of which are attached.

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 from JAM3. Accordingly, your application for relief beyond that effected by CMC has been denied. The names and votes of the members of the panel will be furnished upon request.

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



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3280 RUSSELL ROAD  
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1610

MMER/PERB

19 Jul 01

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

Subj: BCNR APPLICATION IN THE CASE OF FORMER SECOND LIEUTENANT  
[REDACTED]

Encl: (1) Copy of CMC ltr 1610 MMER/PERB of 18 Jul 01  
(2) SJA to CMC Comment 1070 JAM3 of 3 May 01

1. As evidenced by enclosure (1), PERB removed from [REDACTED] official military record, the fitness report for the period 960406 to 970516 (EN). In this particular case, the Board finds it necessary to emphasize that the report was not removed because of any substantive issue. Instead, serious administrative and procedural flaws bothered the Board. These included an incorrect Reporting Senior and an incorrect reporting period/occasion. [REDACTED] should have received one report when he completed the Ground Officer Supply Course on 2 July 1996 and then another report from 3 July 1996 until his separation from the Marine Corps on 16 May 1997. It was the Board's conclusion that the only proper remedy in this situation was to completely expunge the report.

2. Enclosure (2) is furnished to assist in resolving [REDACTED] claim that the Board of inquiry was in error or unjust.

[REDACTED]  
Head, Performance Evaluation  
Review Branch  
Personnel Management Division  
By direction of the Commandant  
of the Marine Corps



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3280 RUSSELL ROAD  
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:  
1610  
MMER/PERB  
10 JUL 2007

[REDACTED]

Dear [REDACTED]

Per Marine Corps Order 1610.11C, the Performance Evaluation Review Board has reviewed allegations of error and injustice in your Naval record. Having reviewed all the facts of record, the Board has directed that your Naval record will be corrected by removing therefrom the following fitness report:

<u>Date of Report</u>	<u>Reporting Senior</u>	<u>Period of Report</u>
12 May 97	[REDACTED]	960406 to 970516 (EN)

There will be inserted in your Naval record a memorandum in place of the removed report. The memorandum will contain appropriate identifying data concerning the report and state that it has been removed by direction of the Commandant of the Marine Corps and cannot be made available in any form to selection boards and reviewing authorities. It will also state that such boards may not conjecture or draw any inference as to the nature of the report or the events which may have precipitated it, unless such events are otherwise properly a part of the official record. The Automated Fitness Report System (the data base which generates your Master Brief Sheet) will be corrected accordingly.

Since the remainder of your requests do not fall within the purview of this Headquarters, your case is being forwarded to the Board for Correction of Naval Records (BCNR) for final

ENCL (1)

resolution. Additional inquiries should be made directly to that agency at [REDACTED]

Sincerely,

[REDACTED]

Head, Performance Evaluation  
Review Branch  
Personnel Management Division  
Manpower and Reserve Affairs  
Department  
By direction of the Commandant  
Of the Marine Corps

Copy to:

[REDACTED]

ENCL (1)

03 MAY 2001

SJA to CMC Comment on MMER r/s of 2 Mar 01

Subj: PERFORMANCE EVALUATION REVIEW BOARD (PERB): REQUEST FOR  
OPINION IN THE CASE OF SECOND [REDACTED]  
[REDACTED] U.S. MARINE CORPS

1. Issue. We are asked to comment on whether a fitness report on the subject named officer (SNO), prepared because he was administratively discharged from the Marine Corps, should be expunged from his official military file (OMPF) because of SNO's claim that the Board of Inquiry (BOI) which initially recommended his discharge was "in error or unjust."

2. Comment. We do not believe the facts support SNO's claim that the BOI was "in error or unjust." Whether a fitness report properly submitted following that BOI should be expunged based on the alleged lack of compliance with fitness report regulations is an issue outside of our purview.

3. Background

a. On 20 June 1996, SNO received non-judicial punishment (NJP) for conduct unbecoming an officer and gentleman, and adultery, in violation of Articles 133 and 134 of the Uniform Code of Military Justice (UCMJ), respectively. Petitioner was awarded a punitive letter of censure and forfeiture of \$1,162.00 pay per month for 2 months. Second Lieutenant McIrvin did not appeal.

b. On 6 August 1996, SNO submitted his request for resignation in lieu of administrative proceedings. On 23 October 1996, the Deputy Chief of Staff for Manpower and Reserve Affairs, the Show Cause Authority for the Marine Corps, denied Petitioner's request for resignation and directed Petitioner to show cause for his retention in the U.S. Marine Corps. The basis for show cause determination was substandard performance of duty and misconduct. On 26 November 1996, SNO requested individual military counsel.

c. On 14 January 1997, the BOI substantiated that SNO performed in a substandard manner and committed misconduct, and then unanimously recommended that SNO be administratively separated with an Under Other Than Honorable conditions

ENCL (1)

Subj: PERFORMANCE EVALUATION REVIEW BOARD (PERB): REQUEST FOR  
OPINION IN THE CASE OF [REDACTED]  
[REDACTED] U.S. MARINE CORPS

characterization of service. On 30 April 1997, the Secretary of the Navy (SecNav) discharged SNO Under Other Than Honorable conditions (OTH).

### 3. Analysis

a. [REDACTED] does not deny that he was involved in a sexual relationship with a woman that he knew was married to a Marine sergeant. Instead, SNO raises a variety of reasons to support his contention that his BOI was "unjust and in error." Specifically, he argues the following: that he was denied effective assistance of counsel; that his command took measures to prevent him from obtaining mitigating evidence that he hoped to submit at the BOI; that the government was improperly allowed to submit his earlier resignation request and show cause recommendation to the BOI; that he was the victim of improper command influence; that the separation board members lacked integrity; and that the separation board's recommendation was defective. None of Petitioner's arguments have merit.

b. Petitioner claims that he was denied effective assistance of counsel because his request for individual military counsel did not receive a written response. Although it would have been preferable for SNO to receive a written response to his request, his own petition acknowledges that he received an oral response indicating the request had been denied because the requested counsel was not available. As a result, Petitioner was represented by his original counsel, who was a lawyer certified in accordance with Article 27(b)(1), UCMJ. Petitioner argues that his attorney's failure to object to the board members because they were in the same chain of command as the general officer who appointed them to the board, demonstrates that he was denied effective assistance of counsel. Petitioner's argument fails to acknowledge that his attorney conducted voir dire of the members and found them to be capable of serving in that capacity. In addition, Petitioner does not claim that he asked his attorney to object to any of the members or that his attorney refused to follow his request. Petitioner also claims he was denied effective counsel because his attorney failed to object at specific points during the BOI. Simply disagreeing in hindsight with counsel's tactical decisions

ENCL (2)

Subj: PERFORMANCE EVALUATION REVIEW BOARD (PERB): REQUEST FOR  
OPINION IN THE CASE OF [REDACTED]  
[REDACTED] U.S. MARINE CORPS

during the BOI, however, does not establish that Petitioner's was denied effective counsel. Moreover, Petitioner points to specific military rules of evidence to support the potential objections without recognizing that the military rules of evidence are not applicable at a BOI.

c. Petitioner claims that his BOI was unjust because his command took steps to prevent him from acquiring a fitness report he intended to submit at the BOI. This argument is without merit. Petitioner does not provide any evidence, besides his own statement, to prove that his command took the above action. Moreover, the fitness report in question only covered a 30 day period and had no relevance to whether or not Petitioner committed the misconduct in question.

d. Petitioner argues that it was unjust for the recorder to be able to introduce his resignation request and show cause recommendation at the BOI. He claims that the introduction of the documents demonstrates an attempt to impose "improper command influence" on the BOI proceedings. Petitioner then questions the integrity of the board members and their ability to make an independent decision. None of these arguments have merit. As indicated above, the military rules of evidence are not applicable at BOI proceedings. Therefore, both documents were admissible and appropriate for consideration. Moreover, the introduction of these documents alone does not prove Petitioner's bare assertion that the board members lacked integrity or were influenced to reach a particular decision. Furthermore, this assertion fails to acknowledge the fact that Petitioner admitted his misconduct, adultery with the wife of a fellow Marine, and thus provided the members with more than a sufficient basis to recommend Petitioner's separation with an OTH.

e. Petitioner claims that the board's recommendation is defective because the board recommended that his service be characterized as "other than honorable" as opposed to "under other than honorable conditions." Petitioner believes this demonstrates that the board may have desired that he receive a general discharge. This argument has no merit and is directly contradicted by the evidence. Petitioner fails to acknowledge that Under Other Than Honorable Conditions is commonly referred

ENCL (2)



Subj: PERFORMANCE EVALUATION REVIEW BOARD (PERB): REQUEST FOR  
OPINION IN THE CASE OF [REDACTED]  
[REDACTED] U.S. MARINE CORPS

to as an "Other Than Honorable" and is categorized as an "OTH" for administrative purposes. Moreover, the Determinations Worksheet, included as an attachment to the Report of the BOI, was completed by the members at the conclusion of hearing. On this worksheet, directly above the members signatures, the notations "HONORABLE" and "GENERAL (UNDER HONORABLE CONDITIONS)" are crossed out to leave only the notation "OTHER THAN HONORABLE." This action demonstrates that the board believed an other than honorable characterization of service was appropriate and that a general discharge was not appropriate. This is confirmed by the verbatim transcript of the BOI which also states that the members recommended that Petitioner receive an other than honorable characterization of service. Finally, it should be noted that the Secretary of the Navy, not the board members, was the ultimate decision maker regarding Petitioner's separation and characterization of service.

4. Recommendation. For the above reason, we recommend that PERB disregard Petitioner's claim that his BOI was "in error or unjust." Whether a fitness report properly submitted following that BOI should be expunged based on the alleged lack of compliance with fitness report regulations is an issue outside of our purview. We defer to PERB on that issue.

[REDACTED]  
Head, Military Law Branch  
Judge Advocate Division

ENCL (2)