



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

BJG
Docket No: 8253-01
5 December 2001

CAPT [REDACTED] USMC
[REDACTED]
[REDACTED]

Dear Capt [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 returned the contested fitness report to the reviewing officer for completion of items K1 through K3.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 5 December 2001. 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 Performance Evaluation Review Board (PERB), dated 31 October 2001, a copy of which is attached. They also considered your letters dated 4 October and 15 November 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 report of the PERB. Although the Board did not condone the late submission of the fitness report at issue, they were unable to find the delay was unjustified, or that it prejudiced your ability to rebut the report effectively. In view of the above, 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

Enclosure



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

IN REPLY REFER TO:
1610
MMER/PERB
31 OCT 2001

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

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
CAPTAIN [REDACTED] USMC

Ref: (a) Captain [REDACTED] DD Form 149 of 10 Aug 01
(b) MCO P1610.7E w/Ch 1-2
(c) MCO P5102.1 (Marine Corps Ground Mishap Reporting)

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 24 October 2001 to consider Captain [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 000707 to 010305 (TR) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner contends the report represents a substantive injustice and contains administrative/policy errors. Specifically, the petitioner argues the following:

a. The Reporting Senior used information prohibited by reference (c) in preparing the report

b. The report contains specific allegations of pending administrative/judicial proceedings

c. Including paraphrased statements from the JAG manual investigations is precluded by reference (b)

d. The JAG manual investigation was not completed until after the ending date of the fitness report

e. The report identifies a "relief for cause"; however, he remained in command for nearly three months after the incident

f. The Reviewing Officer never resolved the issues identified in his rebuttal as prescribed by reference (b)

g. The Reviewing Officer failed to complete actions required by reference (b)

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF CAPTAIN
[REDACTED] SMC

To support his appeal, the petitioner furnishes his own detailed statement, a copy of the 3 March 2001 Command Investigation into the death of Corporal [REDACTED], a copy of the 15 March 2001 First Endorsement to the Command Investigation, excerpts from a Formal Safety Investigation Report and an NCIS Interim Report, and a copy of the challenged fitness report. Under separate cover, the petitioner provided the document charging him with violating Article 92 of the UCMJ, and the letter from the Commanding General, 2d Marine Division withdrawing/dismissing said charges and specifications.

3. In its proceedings, the PERB concluded that, with one minor exception, the report is both administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. The petitioner's relief for cause was clearly and concisely presented by the Reporting Senior. To wit: "The sanctity and preservation of the institution of command and that of its inherent and most essential element, the trust and confidence in the commander from subordinates and superiors, was breeched by his failures and mandated his relief." The Reviewing Officer concurred in the overall assessment and affirmed that the facts of what occurred warranted and supported the relief for cause.

b. It is apparent the Reporting Senior determined relief was warranted because those directly responsible for live fire exercise procedure briefings and safety procedure briefings to the participants were in turn not properly briefed and subsequently supervised by the petitioner. The Reporting Senior evidently believed those incontrovertible facts were sufficient to relieve the petitioner. Once he identified such facts, he was not somehow obligated to wait for formal signings of pertinent investigations before acting. The Board acknowledges that Maj [REDACTED] did not sign his command JAG Manual Investigation (enclosure (1) to reference (a)) until 8 March 2001. However, it is reasonable to believe that since the Reporting Senior was the one who assigned him to conduct the investigation, he had sufficient knowledge of the facts to relieve the petitioner three days earlier, on 5 March 2001.

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
CAPT [REDACTED] USMC

c. The facts were sufficient for the Reporting Senior to act as he did. Therefore, it is immaterial when the NCIS and Ground Safety Mishap investigations were completed. Colonel [REDACTED] did not need them to affirm his command prerogative to not only relieve the petitioner, but his Battalion Commander as well. Further, there is no proof the Reporting Senior violated the relative confidentiality intent of ground safety reports as outlined in reference (c). The main tenant of that directive is that safety reports will not be used to determine direct individual criminal negligence or culpability. The petitioner was relieved for his failure to exercise proper command responsibility, not as the person directly responsible for loss of life.

d. The Reporting Senior's appraisal comments are concise and clear as to the petitioner's failings. Contrary to the petitioner's implications, there is no proof the Reporting Senior somehow needed the wording from the investigations or that he plagiarized those investigations to arrive at his own recording of the facts.

e. While the petitioner alleges the Reporting Senior needed all three investigations to arrive at his conclusions, that was apparently not the case. The Reviewing Officer also states it was the results of the command JAG Manual investigation that convinced him. The petitioner further argues the Reviewing Officer didn't have any first-hand knowledge of his performance and, therefore, had to rely on briefings and investigations to arrive at his conclusion. If, in fact, that was the case, the Board discerns no error or injustice. As long as the Reviewing Officer addressed known facts in his adjudication, which he apparently did, he accomplished his responsibility as prescribed in reference (b).

f. The fitness report mentions no pending administrative or judicial proceedings. Likewise, none is implied. The fact that charges were ultimately withdrawn and dismissed ("with prejudice") does not somehow invalidate the recording of poor judgment. The UCMJ is a different forum and in this case has no "cause and effect" relationship to the facts as recorded in the fitness report under consideration. Finally, we observe that it was the petitioner who surfaced pending legal action in his

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
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rebuttal. That issue was properly addressed and resolved by the Reviewing Officer.

g. The petitioner is correct that the occasion of the report should be a "TR" vice a "DC." That is precisely what is reflected in Item 3a and on all remaining pages/Addendum Pages of the official report of record.

f. The Board notes that Major General [REDACTED] overlooked the completion of Items K1, K2, and K3 of the report. We have initiated action to have the report returned to him for correction and will ensure the modified version is incorporated into the petitioner's official record. Such an oversight is not viewed as invalidating the entire report.

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of Captain [REDACTED] official military record. The limited corrective action identified in subparagraph 3f is considered sufficient.

5. The case is forwarded for final action.

[REDACTED]

Colonel, U.S. Marine Corps
Deputy Director
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps