



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

BJG
Docket No: 8305-00
2 February 2001

[REDACTED] USMC
[REDACTED]
[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.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 1 February 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 (HQMC) Performance Evaluation Review Board (PERB), dated 6 December 2000, and the advisory opinion from the HQMC Officer Assignment Branch, Personnel Management Division (MMOA-4), dated 24 January 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 report of the PERB. Since the Board found no defect in your performance record, they had no basis to strike your failure by the Fiscal Year 2002 Lieutenant Colonel Selection Board. 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.

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
6 DEC 2000

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 MAJOR
██████████, USMC

Ref: (a) Major ██████████ DD Form 149 of 7 Sep 00
(b) MCO P1610.7C w/Ch 1-6

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 29 November 2000 to consider Major ██████████ petition contained in reference (a). Removal of the fitness report for the period 940809 to 940902 (CH) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner argues that the report should not have been processed as an "adverse" evaluation. It is his position that he was never provided with any documentation, other than the report itself, nor was there a determination made as to how a .08 blood alcohol content (BAC) is defined a driving "under the influence of alcohol." The petitioner cites the Manual for Courts-Martial (MCM), 1994, and the elements of Article 111 of the Uniform Code of Military Justice (UCMJ), in pointing out that neither document mentions "driving under the influence of alcohol" as constituting an offense. He cites further provisions concerning BAC issues, and in the final analysis, believes he did not violate the UCMJ or commit a comparable civilian offense.

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

a. At the outset, the Board emphasizes that the petitioner was provided with and ignored opportunities by both the Reporting Senior and this Headquarters to respond to the adverse nature of the report. In so doing, we must presume that he passively concurred in the accuracy of the recorded information and indicated he had no extenuating or mitigating circumstances to present. It was when the petitioner acknowledged the report in September 1994 that he should have raised the issues which he now surfaces in reference (a). To do so some six years after the fact lacks timeliness and credibility. We also stress that the appeal process is not a substitution for proper resolution of an

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ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF MAJOR
[REDACTED] SMC

adverse report at the time the report is prepared. Paragraph 5007 of reference (b) applies.

b. One of the options under the UCMJ was for the Commanding Officer with non judicial punishment (NJP) authority to choose to handle the offense in an administrative manner vice prosecuting under the UCMJ. Clearly the challenged fitness report is an appropriate administrative action. Further, the petitioner fails to prove his .08 BAC was not an uncontroverted fact had NJP been the chosen course of action. Likewise, we find nothing showing that the petitioner was not administered a BAC, or that the BAC was faulty.

c. A .08 BAC was, at the time of the challenged report, and now, the basis for prosecution before a Federal Magistrate in the State of California (where the incident occurred). The very extracts from the MCM provided by the petitioner define drunk or impaired as "...any intoxication which is sufficient to impair the rational and full exercise of the mental or physical facilities." A .08 BAC is recognized by the preponderance of jurisdictions (Federal, State, and County) as being "under the influence."

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of [REDACTED] official military record.

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

830500



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

IN REPLY REFER TO:

1600
MMA-4
24 Jan 01

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

Subj: BCNR PETITION FOR MAJOR [REDACTED] USMC

Ref: (a) MMER Request for Advisory Opinion in the case of
Major [REDACTED] USMC
of 17 Jan 01

1. Recommend disapproval of [REDACTED]' request for removal
of his failure of selection.

2. Per the reference, we reviewed [REDACTED] record and
petition. He failed selection on the FY02 USMC Lieutenant Colonel
Selection Board. Subsequently, he unsuccessfully petitioned the
Performance Evaluation Review Board (PERB) for removal of the
Change of Reporting Senior fitness report of 940809 to 940901.
[REDACTED] requests removal of his failure of selection.

3. In our opinion, removing the petitioned report would have
increased the competitiveness of the record. However, the
unfavorable PERB action does not reflect a material change in the
record as it appeared before the FY02 Board and his record
received a substantially complete and fair evaluation by the
Board. Therefore, we recommend disapproval of [REDACTED]
request for removal of his failure of selection.

4. Point of contact is Lieutenant Colonel [REDACTED] (703)
[REDACTED]

[REDACTED]

Colonel, U. S. Marine Corps
Head, Officer Assignment Branch
Personnel Management Division

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6 DEC 2000

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NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
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[REDACTED] USMC

Ref: (a) [REDACTED] DD Form 149 of 7 Sep 00
(b) MCO P1610.7C w/Ch 1-6

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 29 November 2000 to consider [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 940809 to 940902 (CH) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner argues that the report should not have been processed as an "adverse" evaluation. It is his position that he was never provided with any documentation, other than the report itself, nor was there a determination made as to how a .08 blood alcohol content (BAC) is defined a driving "under the influence of alcohol." The petitioner cites the Manual for Courts-Martial (MCM), 1994, and the elements of Article 111 of the Uniform Code of Military Justice (UCMJ), in pointing out that neither document mentions "driving under the influence of alcohol" as constituting an offense. He cites further provisions concerning BAC issues, and in the final analysis, believes he did not violate the UCMJ or commit a comparable civilian offense.

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

a. At the outset, the Board emphasizes that the petitioner was provided with and ignored opportunities by both the Reporting Senior and this Headquarters to respond to the adverse nature of the report. In so doing, we must presume that he passively concurred in the accuracy of the recorded information and indicated he had no extenuating or mitigating circumstances to present. It was when the petitioner acknowledged the report in September 1994 that he should have raised the issues which he now surfaces in reference (a). To do so some six years after the fact lacks timeliness and credibility. We also stress that the appeal process is not a substitution for proper resolution of an

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[REDACTED] USMC

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b. One of the options under the UCMJ was for the Commanding Officer with non judicial punishment (NJP) authority to choose to handle the offense in an administrative manner vice prosecuting under the UCMJ. Clearly the challenged fitness report is an appropriate administrative action. Further, the petitioner fails to prove his .08 BAC was not an uncontroverted fact had NJP been the chosen course of action. Likewise, we find nothing showing that the petitioner was not administered a BAC, or that the BAC was faulty.

c. A .08 BAC was, at the time of the challenged report, and now, the basis for prosecution before a Federal Magistrate in the State of California (where the incident occurred). The very extracts from the MCM provided by the petitioner define drunk or impaired as "...any intoxication which is sufficient to impair the rational and full exercise of the mental or physical facilities." A .08 BAC is recognized by the preponderance of jurisdictions (Federal, State, and County) as being "under the influence."

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of [REDACTED] official military record.

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



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[REDACTED] USMC

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Change of Reporting Senior fitness report of 940809 to 940901.
[REDACTED] requests removal of his failure of selection.

3. In our opinion, removing the petitioned report would have
increased the competitiveness of the record. However, the
unfavorable PERB action does not reflect a material change in the
record as it appeared before the FY02 Board and his record
received a substantially complete and fair evaluation by the
Board. Therefore, we recommend disapproval of Major Norcross'
request for removal of his failure of selection.

4. Point of contact is Lieutenant Colonel [REDACTED] (703)
[REDACTED]

[REDACTED]

Colonel, U. S. Marine Corps
Head, Officer Assignment Branch
Personnel Management Division