



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

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BJG
Docket No: 4790-03
20 October 2003

SSGT [REDACTED] USMC
[REDACTED]
[REDACTED]

Dear Staff Sergeant [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.

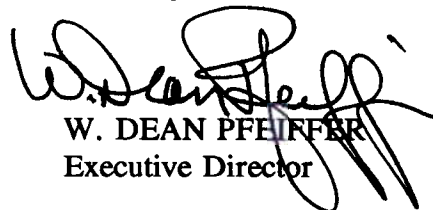
You requested removal of the fitness report for 6 September to 12 October 2000; remedial consideration for promotion to gunnery sergeant; and by implication, removal of your status as having failed of selection for promotion to gunnery sergeant.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 17 October 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 Performance Evaluation Review Board (PERB), dated 2 June 2003, a copy of which is attached. The Board also considered your counsel's rebuttal letter dated 16 September 2003 with enclosures.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish probable material error or injustice. In this connection, the Board substantially concurred with the PERB report in concluding that the contested fitness report should stand. The Board noted that Marine Corps Order P1610.7E, paragraph 4003.b.(6), concerning section A, item 8b (physical fitness test (PFT)) of the fitness report form, says "Use code 'NMED' [not medically qualified] if the MRO [Marine reported on] is unable to take or pass the PFT because of a physical (medical) condition." It does not indicate the PFT must be semi-annual for "NMED" to be a proper entry. Finally, the Board was unable to find you should have been recycled to drill instructor school, whether or not spaces were available, so it could not find your not having been recycled unjustly harmed your chances for promotion. 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

Enclosure

Copy to:
Charles W. Gittins, Esq.



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

IN REPLY REFER TO:
1610
MMER/PERB
JUN 02 2003

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 STAFF
SERGEANT [REDACTED] USMC

Ref: (a) SSgt [REDACTED] DD Form 149 of 15 Feb 03
(b) MCO P1610.7E w/Ch 1-2

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 29 May 2003 to consider Staff Sergeant [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 20000906 to 20001012 (FD) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner, via legal counsel, argues that the nature of the report (i.e., disenrollment from Drill Instructor School), coupled with the "unfair adverse" entry of "NMED" in Item 8b, mandated referral of the report for acknowledgement and the opportunity to respond. Counsel points out that the petitioner was dropped from the course for failure to meet required standards, and that such an occurrence required the fitness report to be referred to the petitioner.

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. Contrary to the arguments presented in reference (a), the petitioner's disenrollment from Drill Instructor School was not adverse. Likewise, the fitness report at issue is not adverse and nothing in the overall evaluation implies the petitioner was not up to the Marine Corps' physical standards. Competent medical authorities determined the petitioner was suffering the early stages of pneumonia, an illness obviously beyond his control. Simply stated, being sick does not constitute adversity for the purpose of a fitness report.

b. The "NMED" entry in Item 8b of the fitness report, which is further explained in Section I, correctly indicates the

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petitioner did not take the physical fitness test (PFT) because of his medical condition. It does not mean or infer he "failed to complete the school PFT." Likewise, it is not a negative reflection on the petitioner's conditioning and physical fitness. That issue notwithstanding, PFT testing is normal SOP at formal schools, especially Drill Instructor School. Recording the results of that testing on fitness reports is totally within the spirit and intent of reference (b).

c. Subparagraph 6004.4b(2) of reference (b) states as follows: "If the MRO is dropped or disenrolled from a formal course or school in less than 90 days, the RS must complete an FD report and fully explain the reasons in section I. **NOTE:** Drops or disenrollments for cause are adverse and require the appropriate processing per Chapter 5." Section I of the challenged fitness report states the petitioner was **administratively disenrolled**, not relieved for cause. Clearly, the circumstances were not the result of any neglect or adverse action on his part.

d. That the petitioner was not immediately recycled is not an automatic provision. Obviously, either his illness would not have allowed recycling or there simply were no vacant seats for the next class.

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

5. The case is forwarded for final action.

[REDACTED SIGNATURE]

Chairperson, Performance
Evaluation Review Board
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps