



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

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BJG
Docket No: 5572-03
20 August 2003

[REDACTED] USMC
[REDACTED]
[REDACTED]

Dear Gunnery 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.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 14 August 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 26 June 2003, a copy of which is attached. The Board also considered your undated rebuttal letter with enclosures.

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.

The Board was unable to find the contested fitness report was given as a form of punishment. The Board noted the reporting senior (RS) did not state he was away throughout the reporting period, only that he was away too much to permit submission of an observed report on you. The Board was unable to find the RS had enough observation to submit a fully observed report. The Board did not find the limited comments provided were inconsistent with a "not observed" report. The Board further noted you acknowledged, in paragraph 1 of your undated rebuttal letter, that you were not officially reassigned during the period. The Board was unable to find you were not counseled, noting that both the RS and reviewing officer stated that you were. In this regard, the Board generally does not grant relief on the basis of an alleged absence of counseling, since counseling takes many forms, so the recipient may not recognize it as such when it is provided. The Board noted that enclosure (1) to Marine

Corps Order 1000.9, paragraph 3.c includes, in the definition of "sexual harassment," conduct of a sexual nature that "...has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment." The three criteria you cited appear in paragraph 10.a(4) of the order; they are the three circumstances of sexual harassment under which separation processing is mandatory. The Board was unable to find it unlawful that the contested fitness report was submitted after the preliminary investigation, nor could the Board find any basis to question the validity of the preliminary investigation's findings. The Board did not accept your contention that the investigation was no longer a preliminary investigation when the investigating officer (IO) read you your rights. Finally, the Board noted the IO did not say you were unwilling to give a statement, but said that except for you, all individuals interviewed were "without reservation." You acknowledge you told the IO, after the IO read you your rights, that you wanted to consult a lawyer. The Board did not find it objectionable if the IO did not contact you after that.

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

5572-02



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

IN REPLY REFER TO:
1610
MMER/PERB
JUN 26 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
GUNNERY SERGEANT [REDACTED] USMC

Ref: (a) GySgt [REDACTED] Form 149 of 24 Mar 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 25 June 2003 to consider Gunnery Sergeant [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 20010809 to 20011001 (TR) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

NOTE: The report has been administratively corrected to reflect the inclusive dates: 20010630 to 20011001.

2. The petitioner contends the report at issued was used as a form of punishment for a situation he believes was totally unfounded. He also indicates there was a period of four months during which he was reassigned awaiting the outcome of the investigation, yet the report only covers a three-month period. To support his appeal, the petitioner furnishes his own statement, a copy of the challenged fitness report, and a copy of the redacted Command Investigation.

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. There are no "to TAD" (TD) or "from TAD" (FD) reports that prove the petitioner's claim he was reassigned. However, in Section I the Reporting Senior identifies periods of non-availability for himself for convalescent leave, annual leave, and hospitalization, and documents the petitioner's reassignment from 15 September 2001 until the end of the reporting period.

b. Subparagraphs 4003.6b(7)(a) and (b) of reference (b) furnish guidance concerning the administrative disposition of

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misconduct and the proper recording of that action in Section I of the fitness report. In this particular case, the petitioner received a Page 11 entry resulting from a Command Investigation conducted during the reporting period. The Commanding Officer non-concurred in recommendation 6(a) of the Investigation Officer's report; however, since that portion (along with the majority of the investigation) has been redacted, it cannot be determined precisely what was contained in that recommendation. The Board opines the recommendation may have included some type of disciplinary action. This conclusion is based on the verbiage in subparagraph 1a of the Commanding Officer's endorsement of 12 Oct 01 and his decision that formal counseling and removal from the command was appropriate. This is further solidified by the Commanding Officer/Reviewing Officer's final statement on his Addendum Page of 16 November 2001 (i.e., "After careful consideration by the command of the MRO's record of service and Marines involved, it was decided that this matter would be best dealt with administratively.").

c. In all respects, the fitness report appears legitimate and factual. Understanding that any type of harassment should not be taken lightly, and if this harassment was identified through the Request Mast process, the command was obligated to take whatever action they considered appropriate to resolve the situation.

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

5. The case is forwarded for final action.

[REDACTED]

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