



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

BJG

Docket No: 9077-07

7 November 2008

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: [REDACTED]  
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Forms 149 (2) dtd 19 Oct and 21 Dec 05, each  
w/attachments  
(2) HQMC MMR/PERB memo dtd 8 Jan 08  
(3) HQMC JAM7 memo dtd 7 Mar 06  
(4) HQMC MMOA-4 memo dtd 1 May 06  
(5) Counsel ltr dtd 1 May 07 w/encls  
(6) HQMC JAM7 undtd memo  
(7) CG 1st Mar Div ltr dtd 13 Jun 07  
(8) Counsel ltr dtd 12 Sep 07 w/encl  
(9) CG II MEF ltr dtd 28 Nov 07  
(10) HQMC MMR memo dtd 12 Mar 08  
(11) HQMC JAR memo dtd 12 May 08  
(12) Counsel ltr dtd 18 Jun 08  
(13) Memo for record dtd 11 Jul 08  
(14) HQMC MMR memo dtd 25 Jul 08  
(15) HQMC MMR-1 e-mail dtd 30 Jul 08  
(16) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that his naval record be corrected by removing his adverse fitness report for 18 August to 2 October 2004, a copy of which is at Tab A. As shown in enclosure (2), the report has been removed by the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB). He further requested removal of the HQMC Routing Sheet dated 6 December 2004 with enclosures, a copy of which is at Tab B (documentation of Petitioner's withholding and removal from the Fiscal Year (FY) 2006 Colonel Promotion List). He also requested removal of documentation of his relief from command of Marine Light Attack Helicopter Squadron (HMLA) 367. This request was not considered as there

is no reference to his relief outside of the removed adverse fitness report and the HQMC Routing Sheet with enclosures. He also requested removal of his deemed failure of selection by the FY 2006 Colonel Selection Board, together with his failures of selection by the FY 2008 and 2009 Colonel Selection Boards. He further requested reinstatement on the FY 2006 Colonel Promotion List, as well as promotion to colonel with the date of rank and effective date he would have received but for having been withheld from the FY 2006 Colonel Promotion List. Finally, he requested a special selection board (SSB) for the FY 2006 Colonel Selection Board. His request for an SSB was not considered as he was selected for colonel by the FY 2006 Colonel Selection Board, and therefore he is no longer eligible for SSB consideration.

2. The Board, consisting of Ms. Guill and Messrs. McBride and Shy, began considering Petitioner's allegations of error and injustice on 28 August 2008, and completed deliberations on 22 October 2008. Pursuant to its regulations, the Board determined that relief should be granted. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. On 18 August 2004, Petitioner, as squadron commander of HMLA 367, deployed to Iraq. He was considered and selected by the FY 2006 Colonel Selection Board, convened on 9 September 2004. Had he been promoted to colonel pursuant to his selection, he would have received a date of rank and effective <sup>date</sup> of 1 June 2006. On 2 October 2004, Petitioner was relieved of his command and flown back to Camp Pendleton, California. He received an adverse fitness report for 18 August to 2 October 2004 (which has been removed by the HQMC PERB as stated in paragraph 1 above). This report reflects that Major General S---, the reviewing officer (RO), decided to relieve him because of his loss of confidence in Petitioner's abilities on the basis of the rate at which his squadron was losing aircraft, which involved three aircraft mishaps. He also recommended against

Petitioner's promotion. The reporting senior (RS) on the adverse fitness report, Colonel C---, the Marine Aircraft Group (MAG) 16 commanding officer (CO), recommended him for promotion notwithstanding his relief by the RO. On 2 December 2004, the FY 2006 Colonel Selection List was released and Petitioner's name was not on it. By letter dated 13 December 2004, Petitioner was advised that he was being considered for removal from the FY 2006 Colonel Promotion List by reason of his relief from command and the adverse fitness report. By letter dated 7 June 2005, the Commandant of the Marine Corps (CMC) recommended to the Secretary of the Navy (SECNAV) that Petitioner's name be withheld from the FY 2006 Colonel Promotion List. On 16 September 2005, SECNAV approved CMC's recommendation. Petitioner subsequently failed of selection before the FY 2008 and 2009 Colonel Selection Boards. Petitioner argues that he inherited a squadron with severe equipment problems and was individually blamed for a somewhat high mishap rate during combat operations in Iraq. He also states that he believes he was relieved of his command because of an inaccurate newspaper article.

d. In enclosure (3), the HQMC Military Law Branch, Judge Advocate Division (JAM7) has commented to the effect that Petitioner's request to be reinstated to the FY 2006 Colonel Promotion List should be denied. JAM7 stated the adverse fitness report did not trigger the adverse promotion process, but rather the fact Petitioner was relieved of command for loss of confidence.

e. In enclosure (4), the HQMC Officer Counseling and Evaluation Section, Personnel Management Division (MMOA-4) has commented to the effect that Petitioner's request to remove his deemed failure of selection by the FY 2006 Colonel Selection Board should be denied. This advisory stated he was withheld from the FY 2006 promotion list because of the adverse fitness report (which had not yet been removed), and that without the report, his record is "obviously competitive." Petitioner was not considered by the FY 2007 Colonel Selection Board. This advisory was written before he had failed of selection by the FY 2008 and 2009 Colonel Selection Boards. He was presented to the FY 2010 Colonel Selection Board, convened on 9 September 2008. The results of that promotion board are not yet available.

f. By enclosure (5), Petitioner's counsel rebutted the unfavorable advisory opinions that had been submitted to that point. When this rebuttal was drafted, counsel was unaware that the PERB would ultimately remove the contested adverse fitness

report. Counsel stated that when Petitioner was removed from command, Major General S---, the 3d Marine Air Wing (MAW) commanding general (CG) and RO on the adverse fitness report, did not consider Petitioner's relief to be a relief for cause and never contacted HQMC to have him withheld from the promotion list. Counsel argued that JAM had no authority to recommend Petitioner be withheld from the promotion list. He also alleged that JAM initiated action to withhold Petitioner from the promotion list without having sufficient information, since the contested adverse fitness report was not available until after the removal process was started. Counsel alleged that other than media reports and the now removed adverse fitness report, there was no basis to withhold Petitioner from the promotion list. Counsel concluded that since there were only minor mishaps, and no personnel or aircraft were lost from Petitioner's squadron, there was no basis to withhold him from the promotion list. Counsel contended that when Petitioner was withheld from the promotion list, SECNAV had incomplete information, and was erroneously told that his squadron had lost aircraft and personnel from mishaps on his watch as CO of HMLA 367. Counsel enclosed a supporting letter from Colonel C---, Petitioner's CO who was the RS on the now removed adverse fitness report, stating that Petitioner was not relieved for cause, but for a loss of confidence by the CG. The RS stressed that he recommended Petitioner for promotion. Counsel also enclosed a letter from Major General S---, Petitioner's CG who was the RO on the now removed fitness report, who states that Petitioner did a number of beneficial things for the squadron. The CG goes on to state that if the Board recommends that Petitioner be reinstated to the promotion list, he would support it. Finally, counsel enclosed a supporting letter from Major General B---, stating that although he had no firsthand knowledge of Petitioner's relief or the now removed adverse fitness report, it is his opinion that the appropriate standards were not met in withholding him from the promotion list. He states that although the CG lost confidence in his abilities to turn around the squadron's safety record, this does not make him unqualified for promotion. He concludes by recommending that Petitioner be reinstated to the promotion list.

g. In enclosure (6), the HQMC JAM7 provided another advisory opinion. This opinion commented to the effect that even though there appears to be no evidence of any error or injustice in Petitioner's withholding from the promotion list, there may be equitable grounds to reinstate him. This advisory includes the following:

2...b. [Petitioner's] relief, and that of the entire squadron leadership, was apparently undertaken to send a signal during a period of high accident rates. That this action had such a deleterious effect on one individual seemingly for the benefit of a larger Marine Corps organization, could be considered inequitable, particularly if other squadron commanders were experiencing similar or more aggravated difficulties as petitioner [sic] suggests. Such inequity, if sufficiently established, could rise to the level of injustice - depending on its extent...

3...Any relief should be granted solely on equitable grounds...

h. Enclosure (7) is a letter from Brigadier General M---, who recommends Petitioner for promotion by the FY 2009 Colonel Selection Board.

i. Counsel submitted another letter, enclosure (8), in which he complains of what he considers mistreatment of Petitioner by the chairman of the HQMC PERB. (Note: the chairman counsel mentions has since resigned from the PERB.)

j. Enclosure (9) is another letter from Petitioner's former CG and RO, Major General S---, supporting removal of the now removed adverse fitness report. This letter reads in pertinent part as follows:

...3...[Petitioner] made an enormous effort to get his squadron ready for combat. The time between deployments for HMLA-367 was compressed from the usual 18 months to 12 months. He took command nine months prior to the squadron's deployment, having no night instructors and a large number of pilots just out of the training command. His squadron was young and inexperienced to the harshness of combat; it was the last HMLA in the Marine Corps to enter theater. Although I originally viewed the minor mishaps as over confidence [sic] by the pilots, I now view it as inexperience...These minor mishaps were not the result of poor leadership or dereliction of duty on the part of [Petitioner].

4. Removal of the fitness report is a just and proper outcome. My perspective and perceptions of the situation which culminated in the fitness report has [sic] changed a great deal over time. This request is based on a more precise understanding, and reflects the reality of the

challenges that [Petitioner] and the squadron faced. I would handle it differently in light of what I now know...

k. In enclosure (10), the HQMC Promotion Branch (MMPR) has commented to the effect that if this Board reinstates Petitioner to the FY 2006 Colonel Promotion List, he will receive the same date of rank and effective date as if he had never been withheld.

l. In enclosure (11), the HQMC Civil Law Branch, Judge Advocate Division (JAR) has commented to the effect that Petitioner's request to be reinstated to the promotion list has no merit. This advisory states that once an officer is removed from a promotion list, the decision is final. The advisory opines that reinstatement after removal would encroach upon the President's appointment authority.

m. Enclosure (12) is Petitioner's counsel's rebuttal to the advisory opinion from the HQMC JAR. He stated that this Board does have authority to reinstate officers on promotion lists and gave a number of cases where the Board used reinstatement as a remedy.

n. Enclosure (13) documents the HQMC PERB chairperson advised that the reason Petitioner's adverse fitness report had been removed was the strong support from the RS and RO that he had not been removed from the promotion list for cause and that he should be promoted.

o. In enclosure (14), the HQMC MMPR stated it had no comment regarding the competitiveness of Petitioner's record or whether he should be reinstated to the promotion list.

p. Enclosure (15) shows HQMC MMPR-1 advised that Petitioner failed of selection by the FY 2008 and 2009 Colonel Selection Boards; that his promotion date from the FY 2006 Colonel Selection Board would have been 1 June 2006; that since he was withheld from the FY 2006 promotion list, he was not submitted to the Senate for confirmation; and that if he were to be reinstated to the FY 2006 promotion list, "he would have to be nominated to the Senate (CMC to SECNAV to SECDEF [Secretary of Defense] to POTUS [President of the United States] to Senate)."

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of enclosures (6) and (9), the Board finds an injustice warranting the requested relief.

The Board finds that although Petitioner was, in fact, relieved for cause, specifically loss of confidence, his culpability for the aircraft mishaps on his watch was insufficient to warrant his relief or a recommendation against his promotion. In this connection, the Board particularly notes Major General S---'s statement, in enclosure (9), that the "minor mishaps were not the result of poor leadership or dereliction of duty on the part of [Petitioner]" and that he "would handle it differently in light of what [he] now know[s]." The Board also particularly notes the strong support for Petitioner's promotion not only from the RS on the adverse fitness report, but also from Major General S---, the RO on the report who relieved Petitioner of his command because of a lack of confidence and recommended against his promotion. As a matter of equity, the Board concludes that Petitioner should be reinstated to the FY 2006 Colonel Promotion List, an action that would not encroach on the President's appointment authority.

In view of the above, the Board recommends the following corrective action:

RECOMMENDATION:

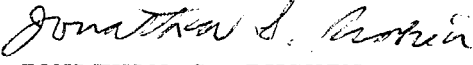
- a. That Petitioner's naval record be corrected by removing the HQMC Routing Sheet dated 6 December 2004 with enclosures.
- b. That he be reinstated to the FY 2006 Colonel Promotion List.
- c. That he be nominated to the Senate for confirmation (CMC to SECNAV to SECDEF to POTUS to the Senate).
- d. If his promotion is approved, that his record be corrected further to show that he was promoted to colonel with a date of rank and effective date of 1 June 2006; and that he did not fail of selection by the FY 2008 and 2009 Colonel Selection Boards.
- e. That any material or entries relating to the Board's recommendation be corrected, removed or completely expunged from

Petitioner's record and that no such entries be added to the record in the future.

f. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.


ROBERT D. ZSALMAN  
Recorder

  
JONATHAN S. RUSKIN  
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.

  
W. DEAN PFEIFFER

Reviewed and approved:

  
11-17-08

**Robert T. Cali**  
Assistant General Counsel  
Manpower and Reserve Affairs)