



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

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Docket No. 7753-20
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board, sitting in executive session, considered your application on 13 October 2021. The names and votes of the members of the panel will be furnished upon request. 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, relevant portions of your naval record and applicable statutes, regulations, and policies.

The Board determined your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on the evidence of record.

The Board carefully considered your request to correct your official military personnel file as follows:

- 1) removal of all nonjudicial punishment (NJP) administered in 2004 and 2005;
- 2) promote to E-8;
- 3) change discharge date to reflect the completion of the balance of your third enlistment;
- 4) award credit of 1,246 active duty days towards an active duty retirement;

5) award back pay for the balance of your enlistment contract that was prematurely terminated;

6) award compensation for lost basic allowance for subsistence (BAS) and basic allowance for housing (BAH) for the balance of your enlistment contract;

7) recommend to the Secretary that the leadership who targeted you and violated your rights be investigated and receive disciplinary action deemed suitable; and

8) repayment of recoupled reenlistment bonus.

The Board noted an earlier request, Docket No: NR20160006406, granted relief. Specifically, the Board granted your requested relief by upgrading your characterization of service to Honorable and by changing your reentry code to "RE-1J." The Board also changed your narrative reason for separation to "secretarial authority," the separation authority to "MILPERSMAN 1910-164," and the separation code to "JFF."

The Board noted another previous request, Docket No: NR20180006284, was denied. In the referenced submission, you requested removal of all derogatory material received while attached to [REDACTED] and restoration of your pay grade to petty officer second class because the case NR20160006406 decision letter from the Board "seemed to indicate that I may receive other repairs having befallen such injustices." The Board, however, determined there was no probable material error or injustice warranting your requested relief.

In your current request for correction, the Board noted you submitted new contentions and new evidence, to include a witness statement describing the racism the witness experienced onboard [REDACTED] and your recent enlistment contract reflecting your enlistment into the U.S. Navy Reserve on 7 August 2019. The Board further noted your current submission appears to extrapolate from the NR20180006284 decision letter, and based on your interpretation of that decision letter, you now contend that Board concluded the unfavorable personnel actions taken following the Command Assessment Team (CAT) Survey were in reprisal for your comments on the survey.

Due to your new statement and contentions, the Board requested an advisory opinion (AO) from Navy Personnel Command, Office of Legal Counsel (PERS 00J). By memorandum dated 27 May 2021, you provided a rebuttal to the PERS-00J AO which stated the AO was a " cursory evaluation of the case and fails to account for the evidence." In its review and reconsideration of your request for relief, the Board reviewed but did not rely upon the AO. The Board did, however, consider your rebuttal as it reviewed your current request for relief.

Based on your interpretation of the NR20180006294 decision letter, the Board first carefully considered whether the previous Board panel found a Military Whistleblower Protection Act (MWPA) violation had occurred. The Board noted the previous Board panel did hone in on the toxic command climate and determined an injustice had occurred that warranted correction, but concluded that Board panel did not determine reprisal had occurred nor did it direct additional relief reflecting a conclusion other than injustice which warranted clemency. This current Board panel noted the specific use of the word "retaliate" and considered your reprisal contentions but

determined it was error to assume the Board found a MWPA violation based solely on words or phrases in the NR20180006294 decision letter. The Board further noted that had the previous panel concluded there had been a MWPA violation, that Board would have directly stated such and not specifically avoided the word “reprisal” in its decision document. After reviewing the entire record, the Board determined your contention that the previous Board panel found the command violated the MWPA is not supported by the evidence.

Having determined the previous Board panel did not base its relief on a finding that a MWPA violation had occurred, this Board panel continued its reconsideration of your request for correction of your record by considering the newly submitted evidence and contentions. The Board considered your contention you were targeted for reprisal even though the Board noted you have not exhausted the appropriate avenue for resolution by submitting a MWPA reprisal complaint to the Department of Defense Inspector General. Specifically, the Board considered your contention that the purpose of the Administrative Discharge Board (ADB) was to retaliate against you due to your participation in the CAT survey. The Board also considered your contention the previous Board panel made findings that 1) your ADB testimony was “credible,” 2) you were “nickel and dimed,” 3) you were the target of reprisal, and 4) the command climate was toxic. Based on these findings, you contend this Board is required to make a “specific finding stating that the leadership used the ADB to retaliate against [you].”

The Board first reviewed the command’s actions leading up to the ADB convened on 28 April 2005, which determined that a preponderance of the evidence supported the misconduct bases and recommended separation with a General (Under Honorable Conditions) character of service.

The Board considered your contention that your performance evaluations prior to the CAT survey were “strong” but only two months after the survey, you received a Letter of Instruction (LOI). You contend that “both evaluations cannot be true.” However, the Board did not agree with your conclusion that your prior performance evaluations were “strong” and specifically noted in your submitted statement “I received the lowest promotion recommendation rating among my peers.” The Board further noted you received a 3.14 on the evaluation for the reporting period of 22 March 2003 to 15 March 2004, received a promotion recommendation of “promotable,” were ranked below 21 other sailors in your summary group, and the evaluation contained language such as “has the ability to become a true professional with unlimited potential.” The Board concluded the evaluation does not reflect what you contend is “strong performance.” The Board also noted you received NJP on 15 May 2004 for dereliction of duty after admitting to playing video games while on watch. Noting the NJP and the evaluation received on 15 March 2004, the Board further determined there is insufficient evidence the LOI was in error, unjust, or unwarranted.

Additionally, you contend the evaluation or the LOI “must be false.” You further contend the previous Board’s “concession that [you] were targeted” coupled with the witness statements “lead to the conclusion that the evaluation drafted after the CAT survey is nothing less than a lie.” Your train of logic further contends that because the leadership “lied about [your] performance,” the “leadership’s credibility is impeached,” and taking it one step further, you contend that, based on the previous Board’s comment that your “accounts of the ADB process were credible,” this Board must find you to be credible in your presentation of facts, and the

command leadership not credible. However, this Board noted the statement that your accounts were “credible” does not mean the previous Board agreed with your account or accepted it as fact.

The Board also considered your contention that the LOI “began a campaign of harassment and reprisal intended to build a record of ‘nickel and dime’ infractions to support, post hoc, the false performance evaluation.” The Board considered the specific contentions that many counseling sessions did not occur; those that did occur were “patently negative” and never contained a “glimmer of encouragement or positive feedback;” multiple were unsigned; and two undoubtedly were created after the fact to “create false evidence to introduce into an adverse personnel action to bolster the leadership’s LOI.” You contend the counseling sheets further impeach the command’s credibility and establish that the entire counseling program the LOI directed was a pretext used to convene the ADB and a sham because the leadership did not implement it. The Board reviewed the counseling records and noted the records are not “patently negative” but contain both positive and negative assessments of your ongoing performance. The Board further noted the majority of the records of counseling reflected leadership review by the Command Master Chief and Commanding Officer and that you rarely ever commented or attempted to explain the perceived negative performance. Even if the records that allegedly contained errors were removed, the Board noted the remainder of the records of counseling reflected your performance as observed by your immediate supervisory leadership and concluded there was insufficient evidence to support your contention the LOI was a “pretext” to convene an ADB or that it was a “sham.”

The Board also carefully considered the NJP you received prior to the ADB. On 15 May 2004, you received NJP for dereliction of duty. On 12 January 2005, you received a second NJP for dereliction of duty while standing Sounding and Security watch. On 17 March 2005, you received a third NJP for dereliction of duty and failing to go to your appointed General Quarters station. The Board considered your contention the NJPs were “by definition” arbitrary and capricious because they were in retaliation for your survey comments and were “nickel and dime” punishments for behavior “knowingly rampant throughout the ship.” The Board concurred with the previous Board that reviewed case NR20180006284. The Board further noted the NJPs were supported by evidence that you committed offenses that were in violation of the Uniform Code of Military Justice and for which you admitted guilt. Further, the Board noted you did not appeal the NJPs. The Board also noted the case NR20160006406 decision letter, even with its “nickel and dined” quote, still specifically concluded the NJPs addressed your misconduct. Lastly, the Board considered that the NJPs occurred subsequent to your CAT survey comments but determined the NJPs were not reprisal for the protected communication. Specifically, the Board concluded there was an independent basis for each NJP, namely the underlying misconduct, which was supported by evidence. The Board also considered the contention the NJPs began approximately two months after the CAT survey but concluded the mere timing of the NJPs did not establish a causal relationship between the survey comments and the personnel actions when evaluated in concert with the evidence supporting the NJPs. Further, the Board determined there was no evidence to indicate any potential motive the commanding officer may have had to reprise against you. The Board further noted there is insufficient evidence that others were not punished for the same misconduct and specifically noted that the Executive Officer, whose letter the previous Board relied heavily upon, transferred after the CAT

survey and prior to your NJPs. After full consideration, the Board concluded the NJPs of 15 May 2004, 12 January 2005, and 17 March 2005 did not constitute violations of the MWPA.

In summary, the Board concluded your contentions the leadership “failed” you by manufacturing counseling statements and a misleading LOI in order to “escort [you] into an unfair ADB proceeding specifically to retaliate” were not supported by the evidence. The Board also found the NJPs were not reprisal and were not arbitrary and capricious. As discussed in detail above, the Board determined there was insufficient evidence to support your contentions the LOI was a pretext for reprisal or that the NJPs constituted an arbitrary, capricious, and inequitable pattern of misconduct basis for administrative separation.

Next, the Board considered your contention that the “falsified” Certificate of Release or Discharge from Active Duty (DD Form 214) reissued in 2008 with an other than honorable (OTH) character of service rather than the general, under honorable conditions, character of service you received when discharged on 24 June 2005, is further evidence the leadership used the ADB to retaliate against you. The Board rejected your contention that the “most likely explanation” for the issuance of a revised DD Form 214 in 2008 was that your leadership “tampered with [your] ADB file so that it would reflect an OTH characterization” because “such manipulation of records is consistent with the leadership’s pattern of misconduct.” The Board also considered your contention the absence of a summarized record of the ADB proceedings violates MILPERSMAN 1910-516 and bolsters the conclusion your leadership tampered with the ADB record. Although there is nothing in the record to explain or support the downgraded characterization of service, the Board concluded that [REDACTED] leadership’s involvement, approximately three years after your discharge, was not possible because the change to the characterization was not an administrative change that could be made by Navy Personnel Command without Board authorization. The Board concluded the contentions lacked merit and did not further your argument the ADB was used as a “weapon” against you in violation of the MWPA.

As discussed above, the Board determined your contention the ABD was inequitable because it relied upon a pattern of conduct that arose from reprisal and a toxic command climate and was arbitrary and capricious, was not supported by the evidence. The Board further concluded your contention the ADB was unlawful and inequitable because the ADB’s legal procedures were “fatally flawed” and denied you of substantial rights was also without merit. The Board also specifically determined your contention that the relief granted by the previous Board “expunged the ADB’s finding of misconduct because the Board, in effect, conceded the ADB’s inequity,” was unsupported by the evidence and lacked merit.

The Board also considered your contention the Law of the Case Doctrine mandates reversal of the ADB. Specifically you contend the previous Board panel for docket NR20160006406 “established that the [REDACTED] violated [your] right to protection from reprisal as a whistleblower” and this Board, under the law of the case, may not “readjudicate the determination that the leadership targeted [you] and used the NJP system for reprisal.” You further contend the previous Board found the NJPs addressed misconduct but were also, by definition, arbitrary and capricious because other sailors who committed the same offenses went unpunished. You again contend the “only relevant factor leadership had to punish [you] while leaving the others

unpunished was reprisal.” Further, the Board considered your contention that by changing the narrative reason for separation from pattern of misconduct to secretarial authority, the Board “has already invalidated discharging [you] based on a ‘pattern of misconduct.’” You specifically contend that, according to the law of the case, this Board is bound to a finding that your misconduct was an invalid reason to convene the ADB given the reprisal you suffered.

This Board reiterated its finding the previous Board did not make a determination a MWPA violation had occurred. This Board emphasized that the previous panel concluded it was an injustice for your characterization to be less than honorable and granted clemency in the form of an upgraded characterization of service and, in the interest of justice, changed the narrative reason, separation authority, and separation code. In view of this Board’s determination regarding the case NR20160006406 decision, the Board concluded your contention the Law of the Case Doctrine mandates reversal of the ADB is without merit.

After careful consideration of your contentions as discussed above, the Board concluded there was insufficient evidence of an error or injustice warranting relief. Specifically, the Board determined the NJPs of 15 May 2004, 12 January 2005, and 17 March 2005 were valid, noting you did not appeal the NJPs and even admitted you committed the misconduct. The Board further determined the LOI was properly issued and was not a “sham” or “pretext” for reprisal. The Board concluded the ADB was not used as a “weapon” to reprise against you but was properly convened. Noting the contentions you raise regarding procedural errors in the ADB, the Board further noted you did not submit a letter of deficiency after the ADB recommended separation with a General (Under Honorable Conditions) character of service and, as previously concluded by previous Board panels, determined there was insufficient evidence of an error or injustice in the administrative separation process to warrant relief. Additionally, the Board noted the absence of ADB documentation but also noted your comment in the AO rebuttal that you were provided a copy of all the ADB documentation by your lawyer upon discharge. After considering the contentions as stated above and determining that any alleged procedural errors were not material or unjust, the Board concluded there was insufficient evidence of an error or injustice in the ADB’s determination you should be administratively separated from the Navy or that your third enlistment was inequitably or prematurely terminated. Based on these findings, the Board determined there was no basis to remove the derogatory documentation pertaining to your NJPs or ADB from your official military personnel file, or to promote you to E-8, change your discharge date, repay your recouped bonus, or award days of credit, back pay or compensation for BAS and BAH benefits. The Board further determined there was no basis to recommend the Secretary of the Navy investigate the [REDACTED] leadership.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or 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,

12/4/2021

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Executive Director

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