



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: 3998-21
10186-16
8406-16
Ref: Signature Date



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 17 March 2022. The names and votes of the panel members 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, to include the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo).

You enlisted and entered a period of active duty in the Navy on 25 June 1977. You served honorably for two enlistments from 25 June 1977 to 18 December 1984. During your second enlistment you received nonjudicial punishment (NJP) on two occasions. On 5 October 1981, you received NJP for a ten hour unauthorized absence (UA) and for missing ship's movement in violation of Articles 86 and 87, Uniform Code of Military Justice (UCMJ). On 14 April 1982, you attended the military Rights/Responsibilities workshop. Your second NJP occurred on 3 May 1982 for a 45-minute UA and failure to obey a lawful order in violation of Articles 86 and 92, UCMJ. During your second enlistment, you also completed a 36-hour alcohol education course on 11 August 1983. You began your third enlistment on 19 December 1984. On 7 March 1986, you completed the Navy Alcohol and Drug Safety Action Program. On 12 March 1986, you received NJP for drunkenness and incapacitation for performance of duties in violation of Article 134, UCMJ. Your service record indicates that you were in a UA status for 3.5 hours on 22 July 1987 and for 30 minutes on 7 October 1987. On both occasions you were in a UA status over liberty. On 30

December 1987, you received a counseling entry and retention warning regarding incidents of alcohol abuse. Recommendations for corrective action included the following: avoid misconduct, take Antabuse daily until completion of aftercare, attend Alcohol Anonymous meetings three times a week until completion of aftercare, and actively pursue a program of self-improvement. The entry stated “[a]ny further deficiencies in performance and/or conduct will terminate the reasonable period of time for rehabilitation that this counseling/warning entry infers and may result in disciplinary action and in processing for administrative separation.” On 1 June 1988, you received another NJP for failure to obey a lawful order issued by the medical department not to drink alcohol while on the Antabuse program in violation of Article 92, UCMJ. You were notified of administrative separation processing, on 2 June 1988, by reason of alcohol abuse rehabilitation failure as evidenced by your NJP of 1 June 1988. You waived your procedural rights, did not object to the separation, and were discharged with a general (under honorable conditions) characterization of service on 10 June 1988.

You contend that at the time of discharge you were not given your discharge papers and all pay to which you were entitled. You contend that by statute, three events must occur in order to be lawfully discharged: 1) delivery of a valid discharge certificate, 2) final accounting of pay, and 3) undergoing the clearing process required under appropriate service regulations to separate from military service (all monies paid before release). You contend events 2 and 3 did not occur, your discharge was in violation of federal law, and you should be paid through the end of your original contract based on the constructive service doctrine. You further contend the Board did not attempt to obtain your records in accordance with federal law governing the correction of military records.

In addition to your contentions regarding receipt of final pay, you also raise due process issues. You contend you were not properly advised of your rights prior to being questioned by your division officer nor offered counsel prior to your 1 June 1988 NJP in violation of your 5th and 14th amendment rights. You contend you were not offered counsel prior to the NJP at all. You further contend the Board did not indicate where in your service record you waived your right to counsel prior to your 1 June 1988 NJP. You state your ship, at the time, was not underway, so you should have been offered counsel and the choice to accept NJP, or to refuse it and demand trial by court martial. You state that your division officer questioned you and never cautioned you of the ramifications that your statement, “that I had one beer,” would be held against you. You further contend there was no evidence in the record that you refused to take your medication, Antabuse.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo. These included, but were not limited to, your contentions noted above, desire to upgrade your discharge, and to receive all pay for your third enlistment through the end of your original contract.

The Board reviewed the documents provided to you by the Defense Finance and Accounting Service (DFAS) regarding your contention that your discharge was unlawful because you did not receive your final accounting and pay. The Board found the documents to be inconclusive, and you did not provide sufficient evidence to establish that you were entitled to or denied active duty pay.

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Furthermore, although you state the Board did not attempt to obtain your pay records, the Board contacted DFAS on 24 August 2021 and requested assistance.

The Board also considered your contentions regarding your 5th and 14th amendment rights. You requested the Board to indicate where, in your record, you were offered counsel prior to the 1 June 1988 NJP. Your service record is incomplete; however the Board relies on a presumption of regularity to support the official actions of public officers, and in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Although your record does not include the documentation indicating you were informed of your right against self-incrimination and the right to counsel, in the absence of evidence to the contrary, the presumption of regularity applies to establish that these actions were proper and that you were afforded all due process rights. In addition to applying the presumption of regularity, the Board noted that you had been subject to NJP three times prior to the 1 June 1988 NJP. The Board did not hold these proceedings against you in its deliberations because your contentions regarding your due process rights pertain only to the 1 June 1988 NJP. However, the Board did consider the other NJPs for the purpose of establishing that you had experience with the NJP process to include the understanding that you had the right to counsel. Furthermore, in the typical course of conducting NJP, you would have been provided a script that would have addressed your due process rights, to include confirming whether you were going to accept NJP, or refuse it demand trial by court martial.

In addition, the Board noted that your record contains your administrative separation processing documents to include your statement of awareness and request for, or waiver of privileges. The document is dated 2 June 1988, one day after the NJP in question, and informs you of your “right to consult with counsel qualified under Article 27(b) of the UCMJ or, when circumstances warrant, nonlawyer counsel.” Although your record does not contain your NJP election of rights as to counsel, the Board determined that your unit incorporated due process rights in other legal notifications which strongly indicates the appropriate procedural rights were incorporated in the NJP processes as well. The Board further determined you were notified of your right to request an administrative discharge board (ADB) and, had you done so, you would have been represented by counsel and could have contested the basis of your administrative separation processing at that time, to include all contentions pertaining to the 1 June 1988 NJP. However, the Board noted you did not exercise your right to consult with counsel, you did not request an ADB, and you did not object to the separation. Ultimately, applying the presumption of regularity, considering your eleven years of service experience to include your attendance at a military Rights/Responsibilities workshop, and experience with the NJP process, the Board determined that the information contained within your service record did not correlate with your contentions as to your due process rights.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant an upgrade to your characterization of service. Specifically, the Board determined that your alcohol abuse rehabilitation failure, as evidenced by your service record and NJP of 1 June 1988, outweighed these mitigating factors. In determining that an upgrade to your characterization of service was not warranted, the Board also took into consideration your NJP from 12 March 1986,

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two UA periods in 1987, and counseling received during your last enlistment. In the Board's opinion, your record of misconduct documents that significant negative aspects of your conduct outweighed the positive aspects of your military record during your last enlistment period. As such, the Board concluded your assigned characterization of service remains appropriate. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

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,

4/6/2022

[REDACTED]

Executive Director

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