



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: 4684-21

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.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 1 February 2022. 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, as well as the 22 November 2021 advisory opinion (AO) furnished by the Navy Office of Legal Counsel (PERS-00J) and your response to the AO.

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

The Board carefully considered your request to remove your 25 May 2016 Report and Disposition of Offense/non-judicial punishments (NJP), 31 May 2016 Punitive Letter of Reprimand (PLOR), and all associated documents. The Board considered your contentions that: (1) when the offense occurred you were recalled to the vessel, as opposed to letting you remain at the temporary assignment, depriving you of your right to consult with counsel and to demand trial by court-martial. You argue that the Judge Advocate General Manual (JAGMAN) states, "No one may be ordered to a vessel solely for the purpose of limiting the ability to demand trial by court-martial; (2) there were Constitutional issues with the probable cause for your traffic

stop, you believed you were driving without any reason for suspicion and the Airman did not provide a reason for the stop; (3) there were significant issues with the form of the charge in the NJP as it states incorrect elements and language for an Article 111, Uniform Code of Military Justice (UCMJ) violation. You claim that the specification failed to state an offense and is legally insufficient for the offense alleged; and (4) the Wilke Memo provides guidance and standards for granting relief on the basis of equity, an injustice, or clemency grounds including: an applicant's candor, positive post-conviction conduct since the incident, severity of misconduct, acceptance of responsibility, remorse, or atonement for misconduct, character and reputation, meritorious service in government, evidence of rehabilitation, character references, and letters of recommendation. You claim that you completed the deployment with honor, the incident occurred during a significant combat operation, and your character and reputation were and still are beyond reproach.

The Board, however, substantially concurred with the AO that the application of the vessel exception and your NJP are valid. In this regard, the Board noted that you received NJP for violating Article 111, UCMJ for operating a motor vehicle while under the influence on 26 April 2016, the commanding officer (CO) found you guilty, and you were awarded a PLOR. The Board also noted that you acknowledged your Article 31, UCMJ Rights, you acknowledged your right to appeal your CO's finding of guilt, and you elected not to appeal the NJP.

The Board also noted that you were assigned, via written orders, to █, to █, which was attached to the █. As such, you were subject to instant recall, you received sea duty pay throughout this period, and your assignment on the █ was considered a sea tour. Therefore, based on the totality of the circumstances of the record, the Board determined that you were attached to a "vessel" and that the "vessel exception" for your NJP was appropriately applied in your case.

Concerning your contention that recalling you to the vessel deprived you of your right to consult with counsel and to demand trial by court-martial, the Board also determined that your assignment to the █ was in a temporary duty status that did not terminate your relationship with the █, or abdicate the legal responsibility for the misconduct of their service members to the temporary command. Moreover, the Board agreed with the AO that parent commands routinely take jurisdiction for the misconduct of service members in a temporary status, as they are authorized to do, and as a member assigned to a vessel, you were subject to being recalled to the ship. Based on these findings, the Board determined the preponderance of the evidence does not support your argument that you were recalled for the sole purpose of limiting your ability to refuse NJP.

Concerning your contention that there were Constitutional issues with the probable cause for your traffic stop, the Board found no evidence to support your contention. However, the Board determined that the evidence supported findings that you were stopped for excessive speed, you failed a field sobriety test, and your Blood Alcohol Concentration (BAC) was 0.15%. Based on this evidence and your statement accepting responsibility for your actions, that you were appropriately punished for your misconduct.

Similarly, the Board was not persuaded by your contentions that there were significant issues with the form of the charge on the Report and Disposition of Offenses. As explained above, the Board found sufficient evidence to support the command's determination that you committed the misconduct for which you were found guilty. While the Board considered that the command borrowed the model language from Article 92 (Failure to obey an order or regulation) in imposing NJP, the Board determined that this error is harmless since it was not unduly prejudicial or substantive in that it would have reversed your CO's finding of guilt at NJP.

The Board considered your reference to the Wilke Memo and your desire to continue to serve as a pilot in the Navy reserve component, however, the Board determined that your NJP was conducted pursuant to the *Manual for Courts-Martial* (2016 ed.) and found no basis to justify the removal of your NJP or PLOR. Further, after weighing the evidence in your case, the Board concluded the mitigation evidence you provided was insufficient to overcome your misconduct. In making these findings, the Board also considered your response to the AO in which you asked the Board to disregard the case presented by your legal representatives and accepted responsibility for your actions that led to your NJP. Accordingly, the Board concluded that there is no probable material error, substantive inaccuracy, or injustice warranting corrective action.

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,

2/14/2022

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Executive Director
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