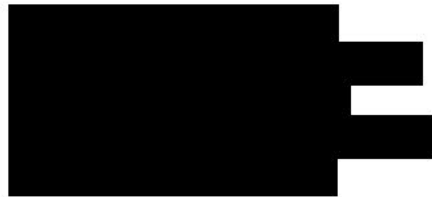




DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

█
Docket No: 5162-21

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.

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 application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 4 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 the 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). Additionally, the Board also considered the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. You were afforded an opportunity to submit an AO rebuttal and you did so.

You attended Purdue University in █ on the NROTC Navy-Marine Corps Scholarship Program (NROTC Scholarship) beginning in August 2001 and took your oath of office as a Midshipman, USNR on 20 August 2001. On such date, you also signed a Navy Reserve enlistment contract and an "NROTC Scholarship Service Agreement" (NROTC Agreement). The NROTC Agreement outlined, *inter alia*, your service obligations for receiving an NROTC Scholarship as well as reimbursement requirements for not satisfactorily completing

either your educational requirements or required active service.

Upon graduation from Purdue University, on 13 May 2005, you commissioned as an Ensign (O-1) in the U.S. Navy. On 31 May 2005, you reported for duty on board the ██████████ in ██████████

Shortly after commissioning, NCIS interviewed you in connection with a civilian investigation into certain suspected felony offenses. During your NCIS interview, you confessed to multiple separate crimes you committed between August 2002 and July 2004 while you were participating in the NROTC Scholarship program. The misconduct consisted of throwing eggs at the victim's car, throwing firecrackers on the victim and his family's lawn, throwing a jar of mayonnaise at the house, placing acid bombs on various occasions in the victim's car and on the victim's yard, and placing a Molotov cocktail in the victim's car. You admitted to experimenting with pyrotechnics as part of your crimes. You also admitted to making bombs out of gasoline and other materials and using such bombs in victim's yard and car.

After less than eight weeks of active Navy service, in early July 2005, you were arrested by ██████████ civilian authorities on multiple felony charges. The charges consisted of, in part, felony aggravated stalking, which included two counts of second degree arson, and two counts of manufacturing and throwing an incendiary device. Following your arrest, you were placed in pre-trial home confinement awaiting trial. The home confinement immediately resulted in your unauthorized absence (UA) status with the Navy because you were unable to report to duty, and you remained in such unpaid, UA status until your ultimate discharge in October 2007.

The Show Cause Authority reviewed your pending civilian felony charges and determined that there was sufficient information requiring you to show cause for retention in the naval service. On 10 March 2006, the Navy initially initiated administrative action requiring you to show cause for retention based on your misconduct and substandard performance of duty. You initially waived your right to a Board of Inquiry (BOI) and, on 15 April 2006, you submitted an unsigned resignation request to the commanding officer of the ██████████ while stating your desire to contest the validity of the debt.

Civil court delays pushed your case into 2007. On 27 June 2007, you were notified of a BOI for a second time, due to the fact that the Navy learned you were preparing to enter into a guilty plea or a plea that would have been tantamount to guilt. You never responded to the second notification, which constituted a waiver of your rights.

On 28 September 2007, Commander, Navy Personnel Command (CNPC) recommended to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) that you be separated with an under other than honorable conditions (OTH) characterization of service for misconduct due to the commission of a serious offense. CNPC also authorized recoupment of the pro-rata cost of your NROTC Scholarship funding (\$64,029.45), calculated based on the date

of your initial UA status. On 28 September 2007, ASN (M&RA) approved CNPC's recommendation. Ultimately, on 18 October 2007 you were discharged from the Navy for the commission of a serious offense with an OTH characterization of service.

As part of the review process, Bureau of Naval Personnel Legal Counsel (LC) reviewed your contentions and the available records and issued an AO dated 19 January 2022. The LC recommended denial of your request. The LC noted that your entire case rested on your objection to receiving an OTH discharge on the grounds your misconduct was prior to commissioning. However, the LC noted that you were only able to commission by omitting important material facts during the commissioning process. The LC observed that your misconduct continued at regular intervals during your time a █ while receiving the NROTC Scholarship. The LC determined that your offenses were of a nature that you would have been well aware that your actions disqualified you from being an officer in the U.S. Navy. The LC noted that you chose to not disclose the information, receive payment for college as part of the NROTC Scholarship, and hoped that you would never get caught. The LC determined that your choice to deliberately omit such material facts made holding you accountable for such criminal behavior and giving you an OTH under the relevant officer separation guidance (SECNAVINST 1920.6C series) reasonable.

Additionally, the LC unequivocally concluded that you failed to meet your burden of proof that your characterization of service of OTH was unjust. The LC noted that SECNAVINST 1920.6C series specifically authorized characterization of service to be based on intentional misrepresentation or omission of facts or based on conduct in the civilian community directly affecting the performance of the members' military duties. The LC noted that you plead nolo contendere (a pleading tantamount to guilty under then-SECNAVINST 1920.6C) to multiple felony charges. The LC determined that your intentional omission and misrepresentation of your conduct while receiving the NROTC Scholarship allowed for a characterization of OTH. The LC also noted that you were in an unpaid, UA status for over two years and thus unable to complete any military duties, which independently warranted an OTH. Lastly, the LC concluded by opining that you failed to meet your burden of proof in your request of forgiveness of your NROTC Scholarship debt. The LC determined that it was your misconduct which prevented you from finishing your service obligation, and the Navy was under no obligation to keep you on active duty after the disqualifying condition arose. The LC noted that by failing to complete the majority of your active duty obligation you were subject to the usual and customary repayment/recoupment provisions on a pro-rata basis.

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: (a) all of your misconduct and reasons for discharge pre-dated your commissioning, and thus it was an error and an injustice to characterize your service as anything other than honorable under the relevant SECNAV instruction, (b) you were not subject to the UCMJ at the time of your civilian offenses, (c) you did not intentionally misrepresent or omit facts when you commissioned, (d) your short time on active duty was honorable, (e) post-

conviction you have not been able to find meaningful employment, and your income is seasonal and not significant enough to pay any amount of your educational debt demanded by DFAS for the ROTC Scholarship debt, (f) your monthly income barely affords you to pay your personal expenses, (g) your status as a felon will limit your future employment opportunities, and (h) you have paid your debt to society and require the Board's assistance with a fresh start at life. However, based upon this "Wilkie" review, the Board still concluded that given the totality of the circumstances your request does not merit relief.

First and foremost, the Board unequivocally determined that an OTH characterization based on your pre-service misconduct was expressly permitted under relevant Department of the Navy guidance and regulations. The Board concluded your argument you were only eligible to receive an honorable characterization of service was not persuasive and entirely without merit.

The relevant SECNAVINST 1920.6 series BOI guidance at the time stated that:

Service will be characterized as Honorable when the grounds for separation are based solely on preservice activities, *other than intentional misrepresentation, or omission of facts, in obtaining an appointment* or in official statements or records. (emphasis added).

Prior to commissioning on 13 May 2005, you had engaged in certain disqualifying felonious conduct over three different summer breaks from █. At all such times, you were a NROTC Scholarship participant with a view towards serving as a commissioned officer in the U.S. Navy upon graduation from Purdue. You knew or should have known that if the Navy had been aware of your nefarious criminal activity you would have not been allowed to obtain a commission under any/all circumstances. The Board determined that your intentional pre-commissioning silence and omission of such relevant information to either NROTC or Department of the Navy authorities was not a defense under the governing SECNAVINST to subsequently shield you from an adverse characterization of service. The Board concurred with the AO and determined, to the contrary, you fit squarely within the exception to the general rule when you intentionally omitted certain disqualifying facts in obtaining your commission. The Board unequivocally concluded that to interpret the SECNAVINST otherwise as your attorney suggested would lead to absolutely absurd results.

Regarding your discharge upgrade request, the Board unequivocally determined that your discharge from the Navy with an OTH characterization was warranted under the totality of the circumstances. The Board determined that the substantiated misconduct clearly demonstrated you had minimal potential to contribute positively to the Navy as an officer responsible for the care and well-being of enlisted Sailors. Thus, the Board found that your OTH separation to be appropriate under the totality of the circumstances.

Additionally, the Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade and/or to make any conforming changes to your DD Form 214. The

Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record in the short eight weeks you served on active duty. The Board determined that characterization under OTH conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a commissioned officer. The Board also determined that the record clearly reflected your pattern of misconduct was deliberate and willful and indicated you were unfit for further service. Moreover, the Board noted that the evidence of record did not demonstrate you were not mentally responsible for your conduct or that you should not otherwise be held accountable for your actions.

The Board also noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. The Board carefully considered any matters submitted regarding your character, post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that your request does not merit relief. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your serious misconduct and your failure to disclose such misconduct prior to commissioning clearly merited your receipt of an OTH characterization of service and no higher. In the end, the Board concluded that you received the correct discharge characterization and narrative reason for separation based on the totality of your circumstances, and that such action was in accordance with all Department of the Navy directives and policy at the time of your discharge.

The Board determined that your request for a recoupment waiver and/or debt forgiveness is denied. The simple fact remains is that you did not complete your service obligation as outlined in your NROTC Service Agreement due to your own misconduct. You were placed in a UA status only a few weeks after commissioning based following your civilian arrest, and you remained in a UA status until your October 2007 discharge. The Board concurred with the 2020 DFAS letter, and concluded that financial hardship is not a factor when determining a waiver decision. The Board determined that any payment or financial benefit you received when participating in the NROTC Scholarship program was legal and proper, and thus not subject to any waiver considerations. The Board also denied your debt relief request based on equitable, indigence, and clemency grounds. Your debt was due to not fulfilling the contractual obligations prescribed in your NROTC Agreement. You served less than eight weeks out of a four-year contractual obligation due to circumstances entirely within your control. Accordingly, the Board concluded that, despite your contentions, this was not a case warranting any debt relief clemency.

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



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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,

3/14/2022



Executive Director

Signed by: 