



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. 5924-21
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.

A three-member panel of the Board, sitting in executive session, considered your application on 21 April 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. The Board also considered the 22 November 2021 advisory opinion (AO) furnished by Navy Personnel Command, Office of Legal Counsel (PERS-00J) and your rebuttal response.

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 for reinstatement to active duty, removal of all files and documents associated with the administrative separation from your Official Military Personnel File (OMPF), and convening of a special selection board to consider you for advancement to chief petty officer.

The Board, having reviewed all the facts of record pertaining to your allegations of error and injustice, found as follows:

Before applying to this Board, you exhausted all administrative remedies available under existing law and regulation within the Department of the Navy.

On 27 May 2017, you were arrested and charged with assault and domestic violence. Per the Preliminary Inquiry (PI) directed by Commanding Officer, Navy Recruiting District, [REDACTED] and as specifically noted in the PI Interview memo of 20 June 2017, you and your spouse were drinking alcohol at home on 27 May 2017 when your spouse disclosed she had cheated on you years ago. Your interview explains that you tried to avoid confrontation with your spouse by moving to a different room and even taking a drive, but ultimately, after returning to the house, you went to the bedroom and retrieved your handgun. Although there are differing versions, each version, as told by you and/or your spouse, describes you holding the handgun with a chambered round while in the presence of your spouse. The PI also noted you admitted to operating your vehicle after drinking two mixed drinks and two shots of vodka and chambering a round into your handgun to “scare” your spouse.

Although your OMPF is incomplete in that it does not contain all the documents pertaining to your administrative separation processing, the record does reflect that in June of 2017, you were notified of pending administrative separation proceedings by reason of misconduct due to commission of a serious offense and elected an Administrative Discharge Board (ADB).

On 26 July 2017, the Family Advocacy Program Incident Determination Committee (IDC) determined your case met the criteria for spouse physical abuse.

On 6 September 2017, you appeared before the ADB. The members determined the preponderance of the evidence supported separation by reason of misconduct due to commission of a serious offense and, by a vote of 2 to 1, recommended separation, with all members recommending an Honorable characterization of service.

You submitted a Letter of Deficiency (LOD) on 14 September 2017 stating the ADB violated Article 31b of the Uniform Code of Military Justice (UCMJ) and Military Personnel Manual (MPN) 1910-155 by indicating a desire for you to provide a sworn statement and expressing a desire to question you after your unsworn statement. Specifically, you contend the ADB shifted the burden onto you to provide your case through answering their questions. Further, you contend the practice is explicitly prohibited. Additionally, in the LOD you argued the government’s refusal to approve appropriate travel accommodations for you was a deficiency requiring correction. Lastly, you stated in the LOD that the ADB’s findings and retention decisions were not supported by substantial evidence. Of note, the recorder’s response to the LOD is not available in your OMPF.

On 24 October 2017, you were honorably discharged by reason of misconduct due to commission of a serious offense and assigned a RE-4 (not recommended for reenlistment) reentry code.

On 22 December 2020, the Naval Discharge Review Board (NDRB) changed your narrative reason for separation to “Secretarial Authority” with a corresponding separation code of “JFF” and your reentry code to “RE-1” (recommended for reenlistment). The NDRB concluded the misconduct narrative reason was improper and not equitable because it was not “congruent” with the assigned Honorable characterization of service.

The Board considered each of the following contentions from your counsel's brief: 1) The substance of the evidence did not meet the Government's burden of proving the alleged misconduct by a preponderance of the evidence; 2) The ADB members held your decision to provide an unsworn statement – without answering their questions or those of the Recorder – against you in violation of your rights; 3) The ADB violated your right not to be required to testify under oath; 4) The ADB members did not understand, or did not heed, the instructions concerning the burden of proof; 5) The ADB findings worksheet reflected a procedural flaw that misrepresented the duty assigned to the members of the ADB and violated your right to have a hearing conducted in accordance with the MPN; 6) NDRB reviewed the matter and agreed your discharge was not equitable; and 7) You were forced to pick up a chief petty officer for “support” and he did not even attend the ADB.

The Board, however, substantially concurred with the AO. In this regard, the Board noted the NDRB decision ruled that commission of a serious offense can never give a service member an Honorable characterization of service but the Board concurred with the AO that this ruling clearly contradicts Department of Defense Instruction (DoDI) 1332.14.

Additionally, the Board concurred with the AO that there is insufficient evidence the government acted unreasonably with respect to your travel to and from the ADB. Specifically, the Board noted you did not provide evidence to support your contention that having the chief travel with you was “punishment.” Further, the Board noted you previously raised this contention regarding “appropriate travel accommodations” but still provide insufficient evidence of the impact the travel had on your ADB. The Board also considered the explanation in your rebuttal to the AO that the issue was raised to demonstrate the inflexibility and unreasonable nature of your command's actions relevant to the conduct of the ADB but concluded your contention lacks merit.

The Board also substantially concurred with the AO's discussion concerning your unsworn statement. The Board noted your counsel did not call the legal advisor, which was the perfect remedy, and concurred that your counsel, therefore, waived the issue. Further, the Board concurred that the facts, as discussed in your LOD, support the finding that the complaint regarding your rights is without merit. The Board, noting you did not provide evidence the ADB members held your decision to not make a sworn statement or answer questions against you, concluded there is insufficient evidence the ADB shifted the burden onto you to prove the case.

Further, the Board concurred with the AO that the evidence does not support your contention the members were confused by the findings worksheet which clearly has a block specifically labeled “Recommendations (separation or retention)” which comes after the “Findings” and “Specific evidence considered...” boxes. The Board concluded there is insufficient evidence of a procedural error in the findings worksheet.

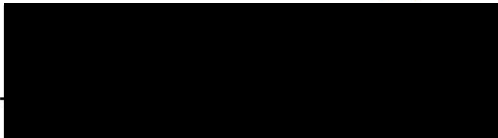
Lastly, the Board substantially concurred with the AO and concluded the basis for separation was supported by a preponderance of the evidence. The Board considered each of your contentions, the credibility of the witnesses, and the evidence of your character for peacefulness but noted your repeated acknowledgement that you retrieved your handgun and chambered a round of ammunition. The Board further noted you have never claimed you had legal

justification. The Board, concurring with the AO that all elements of Article 128 were met, concluded the preponderance of the evidence supported the basis for the Article 128 violation. Accordingly, based on the available evidence, the Board concluded there was insufficient evidence of an error or injustice to warrant granting your requested 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,

5/19/2022

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Executive Director

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