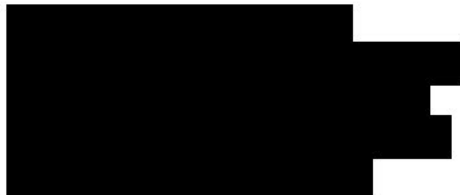




**DEPARTMENT OF THE NAVY**  
BOARD FOR CORRECTION OF NAVAL RECORDS  
701 S. COURTHOUSE ROAD, SUITE 1001  
ARLINGTON, VA 22204-2490

█  
Docket No: 7224-21

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.

A three-member panel of the Board, sitting in executive session, considered your application on 18 February 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).

The Board determined that your personal appearance, with or without counsel, would 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.

You originally enlisted in the Marine Corps on 19 August 2002. Your pre-enlistment physical examination on 8 February 2002 and self-reported medical history noted no neurologic or psychiatric conditions or symptoms, and you endorsed no significant pre-service medical issues or concerns. Your last reenlistment occurred on 4 April 2014 for four years. Such reenlistment was extended for twenty-one months in October 2016 into January 2020, and you extended it one last time in December 2019 to last into February 2020 while awaiting a reenlistment decision.

On or about 12 June 2015, █, USMC (1LT or spouse) checked into █

Battalion, ██████████ Marines, Marine Corps Base ██████████ as the Battalion Adjutant/Legal Officer. On or about 2 December 2016 you checked into ██████████ Battalion, ██████████ Marines, Marine Corps Base ██████████. You were assigned to be the Battery Gunnery Sergeant for ██████████ Battery, and then appointed as the Battery First Sergeant shortly thereafter.

On 7 June 2018 you married 1LT in ██████████. On 8 June 2018 you filed a Dependency Application (NAVMC 10922) naming 1LT as your spouse. At all relevant times while you were stationed in ██████████, both you and 1LT were attached to the same command prior to and during your marriage.

Following command inquiries into your marriage to a commissioned Marine Corps Officer, you initially declined non-judicial punishment (NJP) for a fraternization charge and demanded to be tried by court-martial. On or about 7 November 2018 fraternization and conduct unbecoming an officer charges were preferred against 1LT after she also initially refused to accept NJP for her alleged offenses.

On 30 November 2018 your spouse agreed to accept NJP, plead guilty to her offenses, and submit a qualified resignation request in lieu of administrative separation processing at a Board of Inquiry. On 20 December 2018 your spouse received NJP for fraternization and conduct unbecoming. She did not appeal her NJP and/or the punitive letter of reprimand (PLR) she was awarded. On 14 January 2019 your spouse submitted her qualified resignation request.

On 7 August 2019, pursuant to the terms of a pre-trial agreement (PTA) negotiated by your counsel with the CA, you agreed to accept and plead guilty at NJP to a fraternization charge. In exchange for your guilty plea at NJP, the Convening Authority (CA) agreed to withdraw and dismiss without prejudice the pending court-martial charge. The CA further agreed not to use such misconduct as a basis for administrative separation proceedings.

On 14 August 2019 pursuant to your plea, you were found guilty at NJP of failing to obey the lawful general regulation prohibiting fraternization (Navy Regulations Article 1165). You received as punishment a PLR and suspended forfeitures of pay. You did not appeal your NJP or PLR.

In October 2019 you submitted a reenlistment package with your end of active service (EAS) date approaching in early January 2020. On or about 17 October 2019 you were issued a "Page 11" counseling sheet documenting your NJP for fraternization. On 17 October 2019 you filed through counsel a Page 11 rebuttal statement objecting, in part, to the timing of the Page 11 and its potential adverse implications with your reenlistment package. On 1 November 2019, the CA put a negative endorsement on your reenlistment request to HQMC.

On 6 November 2019 a ██████████ Circuit Court granted a divorce decree to you and your spouse to effectively end your marriage. The divorce decree addressed the usual and customary support and property division issues.

On 7 January 2020 you received a Page 11 informing you that you were not recommended for

reenlistment and would be assigned an RE-4 reentry code per CMC, HQMC, MMEA-1. The Page 11 also notified you that you were found unqualified for service in the Marine Corps Reserve but eligible for one-half separation pay. On 17 January 2020 you filed a request for early retirement authority under the Temporary Early Retirement Authority (TERA) program with a proposed retirement date of August 19, 2020.

Ultimately, on 3 February 2020 at the expiration of your enlistment (as previously extended), you were discharged from the Marine Corps with an honorable characterization of service and assigned an RE-04 reentry code. Your DD Form 214 indicated that you received half separation pay in the amount of \$49,426.09 upon your discharge. At your EAS you had served approximately seventeen years, four months, and nine days of total *active* service in the Marine Corps.

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 that: (a) you were assigned an RE-04 reenlistment code, which was explicitly considered a form of administrative separation in clear violation of the PTA you signed with the CA; (b) the language in the PTA and larger Marine Corps regulations clearly do not support the CA's argument that the PTA was only meant to permit your charges to be adjudicated at the appropriate level; (c) your due process rights were violated twice in this process --- first, when the Marine Corps argued that the PTA was meant to keep your NJP at 'an appropriate level,' because it deprived you of the right to appeal under false pretenses, and second, when the Marines altered your separation codes with three days left before your retirement, depriving you of a reasonable time to challenge the administrative decision; (d) even if the Marine Corps was correct about the interpretation of the PTA, because of some unforeseen technicality, interpreting it in such a manner would be a clear breach of the duty of good faith and fair dealing, given that the clear intent of an agreement barring separation was to secure your 20-year retirement; (e) not only is the denial of your reenlistment improper for all the reasons stated above, the CA's only stated reason to deny your reenlistment is clearly legally insufficient according to military case law; (f) your Page 11 was improperly filled out in a clear attempt to circumvent the PTA, tacitly acknowledging that the RE-04 assignment's only rational basis (the NJP) would violate the PTA; and (g) the charges filed against you were per se unconstitutional because they created an irrebuttable presumption of a breach of good order and discipline. However, given the totality of the circumstances, the Board determined that your request does not merit relief.

First and foremost, the Board unequivocally disagreed with any argument or suggestion that: (a) the terms of the PTA precluded the Marine Corps from preventing your reenlistment, (b) that your RE-04 reentry code was a de facto administrative separation prohibited by the PTA, and/or (c) that there was any breach of duty of good faith and fair dealing in the PTA negotiation. The Board determined your contentions fundamentally flawed and without merit.

The relevant terms at issue from the PTA are as follows:

I agree to accept and plead GUILTY to the charge and specification listed below at NON- JUDICIAL PUNISHMENT. Once I begin service of my punishment, the Convening Authority agrees to withdraw and dismiss without prejudice the pending charge and specification from special court-martial, such dismissal to ripen into dismissal with prejudice upon termination of the non-judicial punishment and imposition of sentence.

Additionally, for the sole charge and specification to which I will plead guilty at NON- JUDICIAL PUNISHMENT, **the Convening Authority agrees to not use such misconduct**, or any other misconduct known or suspected at the time of the agreement, **as a basis for administrative separation proceedings** or additional criminal action. The parties agree and understand in the event the accused engages in future or further misconduct that the NJP which is the subject of this agreement may be used in support of administrative separation proceedings.

**I am entering into this agreement freely and voluntarily.** Nobody has made any attempt to force or coerce me into making this agreement or into pleading guilty at NON JUDICIAL PUNISHMENT.

**This agreement constitutes ALL the conditions and understandings of both the Government and myself regarding the pleas and sentence limitation in this case. There are NO other agreements, oral or written, expressed or implied, between myself and the Convening Authority, or any other representative of the Government.** (emphasis added).

The plain language in the PTA makes it clear that you knowingly and voluntarily signed the PTA with full and complete understanding of the terms and ramifications of the agreement. The terms of the PTA are unambiguous and leave nothing to interpretation. The PTA terms are clear on their face and do not otherwise require the Board to look beyond the four corners of the document in order to determine the parties' meaning, intent, state of mind, or capacity to enter into the PTA at the time of the agreement. Interpreting the PTA otherwise as your attorney suggests would likely lead to a speculative decision incongruent with the facts and evidence that are actually in the record.

Your attorney argues that it was their clear intent that this agreement protect you until you were retirement eligible; however, if that was the case, such terms should have been negotiated into the PTA. Your attorney's well-intended strategy never made it into the PTA, and no exceptions to parole evidence rule concepts exist to permit any purported intentions or understandings outside of the PTA to modify the agreement after the fact. The PTA makes is clear that there were "no other agreements, oral or written, expressed or implied," existing between you, your attorney, and the CA.

The PTA indeed protected you from an administrative separation for the misconduct adjudicated at NJP. However, you were never subject to an administrative separation prior to your EAS.

That is a separate and distinct process initiated by a command as governed by the MARCORSEPMAN. Your functional equivalent arguments are simply not persuasive. An administrative separation requires notice, and an election of certain rights including the right to counsel and the right to elect a hearing before an administrative board. Your command never contemplated or initiated an administrative separation post-NJP in accordance with the terms of the PTA.

The Board noted that the NJP/PTA process and your reenlistment request were always two mutually exclusive undertakings. The fact that the CA provided a negative endorsement to your reenlistment package is of no consequence in the instant matter before the Board, as the CA was not empowered to make reenlistment decisions. Such reenlistment authority rests with Headquarters, Marine Corps (MMEA-1).

As outlined in the January 2020 email conversation between your counsel and the CA, the CA's intent in agreeing to a PTA was to adjudicate your misconduct at the appropriate forum. The CA made it clear to your counsel that he considered reenlistment a separate matter given he was not the decision authority for reenlistments. Accordingly, the Board determined that there was no evidence in the record that your due process rights were violated, the PTA was misinterpreted, that any breach of good faith and fair dealing occurred, that any Page 11 entries were entered into your record to circumvent the PTA, or that the PTA otherwise violated military case law or public policy concerns.

Additionally, the Board determined that the TERA program was inapplicable in your case and you were not eligible for early retirement under current policy directives. The TERA policy applicable at the time of your discharge was promulgated on 4 March 2019 as outlined in MARADMIN 135/19. The purpose of TERA was to serve as an additional force management tool to meet the needs of the Marine Corps. Although you met the initial TERA guidelines based on tenure, you did not meet the baseline criteria for consideration, namely being denied reenlistment *due to force shaping needs*. Your reenlistment denial and discharge clearly had nothing to do with usual and customary force shaping needs. Thus, the Board concluded that you were ineligible for early retirement consideration through TERA, and that your TERA request was based on an exception to the TERA policy that did not exist.

The Board also determined your misconduct presented no Constitutional concerns. You were found guilty of violating the Department of the Navy's regulation prohibiting personal relationships between officer and enlisted members that are unduly familiar and do not respect differences in rank and grade. The Board determined that unduly familiar personal relationships between officer and enlisted members in the same command violate long-standing customs and traditions of the Marine Corps. The Board concluded that conduct constituting fraternization is not excused or mitigated by a subsequent marriage. Moreover, you admitted and pleaded guilty to fraternization at your NJP. A plea of guilty is the strongest form of proof known to the law. Based upon your plea of guilty alone and without receiving any evidence in the case, the NJP authority could find you guilty of the offense to which you pleaded guilty. Thus, any baseless



Constitutional due process arguments featuring the creation of irrebutable presumptions meeting certain elements of the fraternization offense were rendered moot when you pleaded guilty.

The Board did not believe that your record was otherwise so meritorious during your last enlistment as to deserve relief. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board noted that, although one's service is generally evaluated at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the basis to deny reenlistment. The Board determined that your misconduct constituted a significant departure from the conduct expected of a senior enlisted Marine and demonstrated a total lack of personal and professional judgment. The Board also noted that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not otherwise be held accountable for your actions.

Additionally, absent a material error or injustice, the Board declined to summarily change a military record solely for the purpose of facilitating VA benefits, retirement eligibility, or enhancing educational or employment opportunities, including military enlistments. 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 given the totality of the circumstances your request does not merit relief. Accordingly, the Board determined that there was no impropriety or inequity in the denial of your reenlistment package, your subsequent discharge, and your assigned reentry code and narrative reason for separation.

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,

2/28/2022

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Executive Director

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