



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: 1045-22

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 application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 11 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).

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 enlisted in the Navy and commenced active duty on 24 May 2001. Your pre-enlistment physical on 28 February 2001 and self-reported medical history noted no psychiatric or neurologic conditions or symptoms. Upon the completion of initial recruit training, on 8 September 2001, you reported for duty on board the █ in █
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On 1 July 2003, you extended your enlistment for nineteen months. On 12 September 2003, your extension was cancelled due to non-judicial punishment (NJP).

On 27 April 2004, you commenced a period of unauthorized absence (UA). Your UA terminated after approximately 177 days with your return to military authorities on or about 21 April 2004.

Following your return to military control, you voluntarily submitted a written request for an administrative discharge in lieu of trial by court-martial for your lengthy UA. Prior to submitting this voluntary discharge request, you would have conferred with a qualified military lawyer, at which time you were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. You would have also expressly acknowledged and understood that with an other than honorable conditions (OTH) discharge you would be deprived of virtually all rights as a veteran under both federal and state legislation, and you may encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the armed forces or the character of the discharge therein may have a bearing. As a result of this course of action, you were spared the stigma of a court-martial conviction for your long-term UA, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge. Ultimately, on 5 May 2004, you were separated from the Navy with an OTH discharge and assigned an RE-4 reentry code.

Unfortunately, some of the administrative separation in lieu of trial by court-martial documents are not in your record. However, the Board relied on a presumption of regularity to support the official actions of public officers, and given the narrative reason for separation and corresponding separation and reentry codes as stated on your Certificate of Release or Discharge from Active Duty (DD Form 214), the Board presumed that you were properly processed and discharged from the Navy for your long-term UA. In block 29 your DD Form 214, it states "Time Lost" was "2003OCT27 – 2004APR21," a period lasting almost six months. Time Lost describes periods on active duty spent either in a UA status or while serving in military confinement. In blocks 25 through 28 of your DD Form 214 it states "MILPERSMAN 1910-106," "KFS," "RE-4," and "In Lieu of Trial by Court Martial," respectively. Such DD Form 214 notations collectively refer to a discharge involving a written request for an administrative separation in lieu of trial by court-martial.

On 1 March 2007, the Naval Discharge Review Board (NDRB) denied your initial application for relief. On 17 June 2013, the NDRB again denied you any relief. On 14 April 2021, this Board denied your discharge upgrade petition.

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) you joined the Navy to serve and protect with a goal to be a law enforcement officer, (b) you became the top sailor in your division and were approved to attend MAA School, (c) one day you received permission to attend a civilian court hearing but were told the next morning you instead were UA on such date and going to receive NJP which would cancel your orders to MAA School, (d) you believe you were set up by your command because they couldn't afford to let you go due to staffing issues, (e) you were told that you were

going to receive a general (under honorable conditions) discharge, (f) you requested a court-martial to adjudicate your UA but it was declined, (g) you are seeking an honorable discharge so you can get into the law enforcement field, and (h) you received “honorary citizen” recognition from the Mayor of ██████████. However, based upon this review, the Board still concluded that given the totality of the circumstances your request does not merit relief.

The Board unequivocally did not believe that your record was otherwise so meritorious to deserve a discharge upgrade or change in your reentry code. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board also determined that your misconduct constituted a significant departure from the conduct expected of a Sailor and that the record clearly reflected your misconduct was intentional and willful and indicated you were unfit for further service. Moreover, the Board 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.

The Board also noted under the Uniform Code of Military Justice that Sailors attached to a ship/vessel do not have the right to refuse NJP and demand trial by court-martial. The Board further noted that you did not provide any evidence to corroborate you were set up by your command to receive NJP and cancel your orders, and the Board observed that your service records also did not contain any records to substantiate this contention, and/or any of your other contentions. 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. Moreover, absent a material error or injustice, the Board declined to summarily upgrade a discharge or change a reentry code solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. The simple fact remains is that you left the Navy while you were still contractually obligated to serve and you went into a UA status for just under six months without any legal justification or excuse. Accordingly, the Board concluded that you received the correct discharge characterization and reentry code based on your overall circumstances and that such characterization and reentry code were in accordance with all Department of the Navy directives and policy at the time of your discharge. The Board carefully considered any matters submitted regarding your 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 your discharge, and the Board concluded that your serious misconduct clearly merited your receipt of an OTH.

Finally, despite the fact that your discharge request in lieu of trial by court-martial records were not in your service record, the Board relied on a presumption of regularity to support the official actions of public officers. In the absence of substantial evidence to rebut the presumption, to include evidence submitted by the Petitioner, the Board presumed that you were properly processed for separation and discharged from the Navy. In the end, the Board concluded that you received the correct discharge characterization based on your circumstances, and that such

OTH characterization was in accordance with all Department of the Navy directives and policy at the time of your discharge.

You have now attempted on four separate occasions to upgrade your discharge without success. 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,

3/21/2022

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Executive Director

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