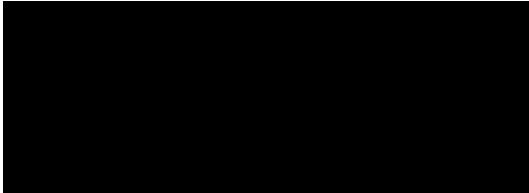




DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

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Docket No: 1394-22
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 19 August 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 the Deputy Assistant Judge Advocate General (Administrative Law) ("OJAG"), which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

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 Navy and entered active duty on 11 February 1997. On 26 May 1999, you received non-judicial punishment (NJP) for failing to obey a lawful order. You did not appeal your NJP. On 28 October 2000, you reenlisted for five years.

On 19 May 2005, you entered into a pretrial agreement (PTA) in connection with your upcoming Special Court-Martial (SPCM). In the PTA, you agreed to plead guilty at a SPCM to multiple offenses and agreed to enter into a stipulation of fact describing the facts and circumstances surrounding the offenses to which you were pleading guilty. Most importantly, as part of the SPCM PTA you also agreed to waive any administrative discharge board that was based on any act or omission reflected in the charges and specifications subject to the PTA. You expressly understood in the PTA that any administrative discharge will be characterized in accordance with service regulations and could be under Other Than Honorable (OTH) conditions. You acknowledged the nature and purpose of an administrative discharge board and the rights you would have had at such a board.

On 25 July 2005, pursuant to your pleas, you were convicted at a SPCM of dereliction of duty, the wrongful disposition of government property, larceny, obstruction of justice, and wire fraud. You were sentenced to confinement for thirty days and a reduction in rank to petty officer third class (E-4). The PTA had no effect on the adjudged sentence.

On 29 July 2005, your command notified you that were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. In accordance with the PTA terms, you waived your right to request an administrative separation board. In the interim, on 18 August 2005, your defense counsel's clemency request was denied. Ultimately, on 9 September 2005, you were discharged from the Navy for misconduct with an OTH discharge and assigned an RE-4 reentry code.

On 29 November 2012, the Naval Discharge Review Board (NDRB) denied relief. The NDRB determined that your discharge was proper as issued and that no change was warranted. On 15 October 2021, this Board denied your initial petition for relief.

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 desire for a discharge upgrade and change to your narrative reason for separation and contentions that: (a) the BCNR's application of the presumption of regularity was inappropriate due to the plain language of DODI 1332.14, (b) the BCNR committed legal error in its application of the presumption of regularity based on the records you submitted for reconsideration, (c) the Secretary of the Navy was the appropriate separation authority in your case and did not approve your separation, and (d) the BCNR's partial denial in October 2021 perpetuated the underlying legal error in this case. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board review process, OJAG reviewed your contentions and the available records and issued an AO dated 27 June 2022. OJAG initially noted that on 1 July 2003 the Assistant Secretary of the Navy (Manpower and Reserve Affairs) ("ASNMR") delegated authority to the Deputy Chief of Naval Personnel ("DCNP") to approve an enlisted administrative separation

involving the facts and circumstances such as yours. OJAG noted that DCNP was “dual-hatted” as Commander, Naval Personnel Command (“CNPC”), and that Navy Personnel Command, Enlisted Performance and Separations Section (“PERS-4832”) served as the designated separation authority on behalf of DCNP/CNPC. OJAG opined that PERS-4832 was the appropriate separation authority in your case. OJAG noted that you were ultimately separated by your local command without proper authority and that the local commander should have forwarded your separation package with a separation recommendation to PERS-4832 for review and final action. However, OJAG opined that such error was harmless based on their determination that it was highly likely that PERS-4832 would have approved an OTH given the serious nature of your SPCM, consistent with the express guidance contained in Department of Defense policy. Additionally, OJAG noted that PERS-4832 did receive the local commander’s correspondence regarding your separation and had an opportunity to correct the error, but did not do so.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your SPCM, outweighed these mitigating factors. Contrary to your contentions, the Board concurred with the AO that PERS-4832 was appropriately delegated separation authority in enlisted administrative separation cases involving the specific factual circumstances in your case. The Board also determined that while your command erroneously separated you locally, such error was harmless. The Board unequivocally concluded that had your command timely forwarded your administrative separation waiver and separation package to PERS-4832 for review and discharge determination, that it was a virtual certainty, given the seriousness of your SPCM offenses, that PERS-4832 would have given you an OTH characterization. The Board also noted that your command sent the functional equivalent of an administrative separation package to PERS-4832 post-discharge, on 15 September 2005, but PERS-4832 did not order any remedial relief.

Further, the Board unequivocally did not believe that your record was otherwise so meritorious to deserve an upgrade. 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 serious 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 demonstrated 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 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. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans’ benefits, or enhancing educational or employment opportunities. As a result, the Board determined that there was no impropriety or inequity in your discharge, and concluded that your misconduct and disregard for good order and discipline clearly merited your OTH. In the end, the Board concluded that you received the

correct discharge characterization 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. Even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an error or injustice exists to warrant upgrading your characterization of service, changing your narrative reason for separation, or granting clemency in your case. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit 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,

8/24/2022

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