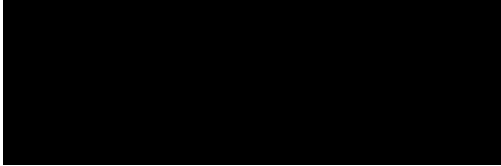




DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

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Docket No: 2976-22
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.

A three-member panel of the Board, sitting in executive session, considered your application on 6 September 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, applicable statutes, regulations, and policies, as well as the 20 July 2022 advisory opinion (AO) furnished by the Marine Corps Military Personnel Law Branch (JPL) and your response to the AO.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will 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.

The Board carefully considered your request to remove your 14 May 2021 unit punishment book (UPB)/non-judicial punishment (NJP), restore your promotion to sergeant (Sgt/E-5), payment of all pay and allowances, and an Enlisted Remedial Selection Board (ERSB) for promotion to Staff Sergeant (SSgt/E-6). You also request to remove unspecified fitness reports, all negative documentation due to fitness test scores, and anything negative resulting from your weight gain and failed weigh-in documented in the 5 April 2021 Administrative Remarks (page 11). The Board considered your contentions that you were found innocent of all charges, you did nothing wrong and should not be punished, the documents were written incorrectly, and because you were wrongfully punished you received multiple negative fitness reports, counselings, and 6105s. You also contend that the administrative separation (ADSEP) board found no basis and

determined you were innocent. You claim that an ongoing thyroid issue caused severe weight gain, fatigue and other health concerns. After two years of fighting weight gain, you finally obtained a definitive diagnosis, and had surgery during January 2022 to remove nodules from your thyroid. You also claim that documentation will show a battle for two years and a wrong diagnosis of hypothyroid disease which was another reason that you were removed from the Marine Corps Enlisted Commissioning Education Program (MECEP). You assert that you were supposed to be promoted with to SSgt with your peers during June 2021, you have one year left of school and would have commissioned this fall if not for the NJP.

On 5 April 2021, you were issued a page 11 entry pursuant to paragraph 6105 of the Marine Corps Separation and Retirement Manual (MARCORSEPMAN), counseling you for failing to pass the physical fitness test (PFT) on 23 March 2021. The Board noted that you acknowledged the entry and elected not to submit a statement. The Board determined that the contested entry was written and issued according to the MARCORSEPMAN. Specifically, the entry provided written notification concerning your deficiencies, specific recommendations for corrective action, where to seek assistance, the consequences for failure to take corrective action, and it afforded you the opportunity to submit a rebuttal. Moreover, your commanding officer (CO) signed the entry, and he/she determined that your substandard performance was a matter essential to record, as it was his/her right to do.

On 14 May 2021, you received NJP for violating Articles 92 and 112a, Uniform Code of Military Justice (UCMJ) for failing to obey a lawful order and for the wrongful use of a controlled substance, specifically, fentanyl, a schedule II controlled substance. The Board noted that you acknowledged your Article 31, UCMJ Rights, certified that you were afforded the opportunity to consult with a military lawyer, and you acknowledged your right to appeal the NJP. You appealed your CO's finding of guilt and your request was denied. The Board also noted your assertion that you innocently ingested fentanyl, the Board, however, substantially concurred with the AO that your NJP is valid. Specifically, your CO's finding of guilt was based on the results of two separate positive urinalyses test, you were allowed the opportunity to present evidence at NJP and, as the factfinder at NJP, the CO is free to weigh the evidence and resolve any inconsistencies as he or she sees fit. The Board determined that your NJP was conducted appropriately pursuant to the *Manual for Courts-Martial* (2019 ed.).

Concerning the findings by your ADSEP board, the Board concurred with the AO and determined that an ADSEP board does not determine guilt or innocence, the purpose of an ADSEP board is to determine your suitability to continue to serve in the Marine Corps. The Board also determined that NJP and an ADSEP board are separate processes with specific functions. Thus, it is not a material error or injustice for two separate fact-finding bodies to arrive at different conclusions, and your ADSEP board findings do not invalidate your CO's finding of guilt at NJP.

Concerning your request to remove unspecified fitness reports, all negative documentation due to fitness test scores, and anything negative resulting from your weight gain and failed weigh-in. The Board found no evidence of negative documentation associated with your diagnosis or weight gain and you provided none. The Board did, however, note your 5 April 2020 page 11 entry for failing a PFT and determined that it was valid. Regarding the removal of fitness

reports, the Board determined that you have not exhausted your administrative remedies. The Performance Evaluation Review Board (PERB) is the initial action agency for fitness report appeals, therefore, you must submit your request to the PERB according to the Marine Corps Performance Evaluation Appeals Manual. Based upon the available evidence and foregoing determinations, the Board found no bases for an ERSB. As a result, the Board concluded that there is no probable material error, substantive inaccuracy, or injustice warranting removal of the NJP or the granting of the associated requested relief. 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,

9/23/2022

