



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: 3004-22

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 you did not file your application in a timely manner, the statute of limitation was waived in the interests of justice. A three-member panel of the Board, sitting in executive session, considered your application on 14 November 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 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, 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 also considered the advisory opinion (AO) furnished by Headquarters, U.S. Marine Corps, an AO provided as part of your previous application to this Board. Although you were again 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 enlisted in the United States Marine Corps and commenced a period of active duty on 13 October 1992. On 17 June 2009, you received an Administrative Counseling (Page 11) concerning deficiencies in your performance and conduct, specifically, for failing to be at your appointed place of duty and for dereliction of duty. On 9 September 2009, you again received an

Administrative Counseling (Page 11) concerning deficiencies in your performance and conduct, specifically, for failing to be at your appointed place of duty and for dereliction of duty. You were notified that failure to take corrective action and any further violations of the UCMJ may result in punitive or adverse administrative action, including but not limited to Non-judicial Punishment, Court Martial, Administrative Separation, or Competency Review Board.

On 5 November 2009, you received non-judicial punishment (NJP) for violations of Uniform Code of Military Justice (UCMJ) Article 86 (unauthorized absence, 2 specifications) and Article 92 (dereliction of duty) for “culpable inefficiency for failing to maintain his section mission capable.” You received an Administrative Counseling (Page 11) concerning deficiencies in your performance and conduct as addressed in the NJP.

On 23 December 2009, you received an adverse fitness report, with Section F (Leadership) marked as: 1A, 2A, and 3A. The justification stated, “[t]he MRO was convicted of violation of Articles 86 and 92 of the UCMJ at RS level NJP. MRO failed to lead his subordinate and develop his subordinate. He failed to train his supply clerk which resulted in a non-mission capable inspection. His actions surrounding his conviction highlight him putting himself and his wellbeing ahead of the mission and his Marine.” The Reviewing Officer commented “his performance during a critical period for the RS was consistently unsatisfactory.... I relieved MRO from his duties as Supply Chief after informal and formal counselings.... I eventually lost confidence in ability to lead and execute his duties. Do not retain. Do not promote.”

On 19 February 2010, you again received an Administrative Counseling (Page 11) concerning deficiencies in your performance and conduct, specifically, for failure to pay spousal support.

On 1 February 2010, you were notified that you were being processed for an administrative discharge by reason of misconduct, pattern of misconduct. You initially waived your right to consult with qualified counsel and elected your right to a hearing at an Administrative Separation Board. However, after speaking with detailed defense counsel, you submitted a Conditional Waiver of Administrative Discharge on 8 April 2010. You elected to waive your administrative discharge board contingent on receiving a General (Under Honorable Conditions) (GEN) characterization of service. You discussed this waiver with counsel and stated “I am satisfied with my counsel’s advice.” You further state, “I am aware of and understand my rights at an Administrative Discharge Board as explained to me by my counsel. I acknowledge without a board I will be separated three years short of retirement, and lose any benefits I would receive upon retirement.” On 21 April 2010, a Staff Judge Advocate reviewed your request and found it to be sufficient in law and fact.

Your conditional waiver was accepted and, on 24 May 2010, you were discharged from the Marine Corps for pattern of misconduct with a GEN characterization of service, the separation code of “HKA-1,” and assigned an “RE-04” reentry code.

On 18 July 2012, the Naval Discharge Review Board (NDRB) reviewed your contention that your discharge was improper based on inaccurate and erroneous information used to incorrectly establish a pattern of misconduct and your contention that your discharge was inequitable based on your superior record of performance over five enlistments and approximately 18 years of

honorable service. After careful consideration and extensive deliberation on the facts and circumstances surrounding your administrative separation from the Marine Corps, the NDRB determined that your discharge was proper for a pattern of misconduct and that no relief was warranted. As such, no change was made to your reenlistment code that would have allowed you to reenlist. However, the NDRB also determined that your discharge, though proper, was not equitable when the totality of the circumstances was considered. As a result, the NDRB upgraded your characterization of service from "General" to "Honorable," and changed your narrative reason for separation from "Pattern of Misconduct" to "Secretarial Authority."

The Board previously reviewed your requests for relief on 23 June 2014 and 5 January 2017, and both times you were denied relief by the Board.

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) your desire to change your reenlistment code and continue to serve, (b) your assertion that your overall career was successful, as supported by your service record, evaluations and awards, (c) your contention that the events leading up to your separation were all minor incidents, (d) your desire to receive constructive credit sufficient for placement on the Retired List with back pay and allowances, or in the alternative, separation pay, and (e) your assessment that the governing regulations authorizes separation pay. For purposes of clemency review, the Board noted that you have provided substantial documentation since your separation for the Board's consideration of your request for relief.

As part of the Board's review process, the AO was reviewed. The AO acknowledges that based on the changes directed by NDRB, you received an Honorable discharge, a Reenlistment Eligibility (RE) Code of RE-4, and a Separations Program Designator (SPD) Code of JFF1, indicating Secretarial Authority. The AO explains that "due to █' nature of separation, he is ineligible to receive involuntary separations pay." The AO directed you to submit a request to Manpower Management Separation and Retirement Branch (MMSRB) requesting a change to your SPD Code in order to be eligible for involuntary separation pay. MMSRB then issued a memo dated 5 February 2014, referencing the AO and further highlighted that "the Office of the Secretary of Defense's Separation Designator (SPD) code tables indicate that involuntary separation directed by Secretarial Authority is not eligible for separation pay. Based on the references we do not recommend separation pay for █ █"

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. In reviewing your record to determine whether a change to your reenlistment code is warranted, the Board concurred with NDRB that your discharge was proper and did not contain an error that would support relief. The Board felt that your misconduct was well documented in your record on Page 11 Administrative Counselings, your evaluation period ending on 23 December 2009, the Unit Punishment Book dated 5 November 2009, and on the Commanding Officer Recommendation for Administrative Separation dated 2 February 2010. In particular, the Board relied on your own statements contained within your conditional waiver, which acknowledged the rights that you were waiving and the fact that you knew you would be separated prior to vesting in retirement. The Board felt that you considered all of your options prior to your separation, after consulting with qualified defense counsel, and elected the path

most advantageous to you at the time. The Board felt that your misconduct continues to render you unfit for continued military service, and therefore did not grant relief in the form of a change to your reenlistment code.

The Board applied the same analysis to your request for constructive credit and placement on the Retired List, with back pay and entitlements. The Board found no error in the separation process, as supported by your service record and acceptance of your conditional waiver. Based upon this review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your counselings, negative evaluation, and NJP, outweighed these mitigating factors. The Board considered the negative impact your conduct had on mission accomplishment and the good order and discipline of your command. The Board noted that in submitting a conditional waiver, you knowingly gave up the opportunity to present your argument in front of an administrative separation board. Further, you specifically acknowledged that you were forfeiting any benefits you would receive upon retirement.

After consideration of your request for separation pay, the Board found that there was insufficient evidence to establish the existence of material error or injustice. In making this finding, the Board substantially concurred with the comments contained in the advisory opinion. Although the Navy Discharge Review Board (NDRB) upgraded your characterization of service from "General" to "Honorable," and changed your narrative reason for separation from "Pattern of Misconduct" to "Secretarial Authority," the Board concluded that you are still not authorized involuntary separation pay.

The narrative reason for separation of "Secretarial Authority" is assigned with the Separation Designator (SPD) code "JFF1." This separation code does not authorize involuntary separation pay. The governing regulation at the time of your separation was Marine Corps Order (MCO) P1900.16F Ch.2 dated 6 June 07. Through counsel, you argue that per paragraph 1307, you are guaranteed separation pay when separated under Secretarial Authority. Counsel highlights paragraph 1307, subsection d., which states "Marines involuntarily discharged under paragraph 6214, Secretarial Authority (also known as "Best Interest of the Service"), with an honorable or general characterization of service will receive full separation pay." However, counsel fails to continue the analysis under subsection e., which states "[o]nly the Secretary of the Navy or his designated representatives may deny separation pay to Marines meeting the criteria in paragraphs 1307 or 1308." In addition to paragraph 1307, further analysis must be conducted under paragraph 6214, which states, "Marines separated under this paragraph with an honorable or general (under honorable conditions) characterization of service normally rate full separation pay. The Secretary of the Navy or the Secretary's delegated representatives will determine approval of half or no separation pay."

Under both paragraph 1307 and paragraph 6214, the Secretary of the Navy or the Secretary's delegated representatives make the final decision regarding eligibility to receive separation pay. The Secretary of the Navy, in line with the Secretary of Defense's direction, has made this determination and *does not authorize* separation pay in *any* case where the narrative reason for separation is "Secretarial Authority" and where the SPD code is "JFF1." As explained in the letter issued by MMSRB, the "Office of the Secretary of Defense's Separation Designator (SPD)

code tables indicate that involuntary separation directed by Secretarial Authority *is not eligible* for separation pay.” Because you were separated under “Secretarial Authority” and received a “JFF1” SPD code, you are not legally authorized to receive separation pay by the direction of the Secretary of the Navy and the Secretary of Defense. Even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants a change to your reenlistment code, constructive credit towards retirement, or separation pay. Accordingly, given the totality of the circumstances, the Board determined 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,

11/30/2022

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Executive Director

Signed by: █