



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

██████████
Docket No. 3108-22
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.

A three-member panel of the Board, sitting in executive session, considered your application on 18 August 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 and applicable statutes, regulations, and policies. The Board also considered the 11 July 2022 advisory opinion (AO) furnished by Headquarters, Marine Corps Military Personnel Law Branch (JPL), and your 29 July 2022 rebuttal response.

The Board carefully considered your request to remove your 12 April 2021 Administrative Remarks (Page 11) 6105 counseling entry from your official military personnel file. The Page 11 counseled you regarding your relief for cause from the Marine Security Guard Program due to misconduct and a lapse in judgment, and specifically addressed several deficiencies that resulted in your Commanding Officer (CO) losing faith and confidence in your ability to serve as a detachment commander. You contend the Page 11's continued presence in your record is arbitrary, capricious, and unsupported by substantial evidence. Specifically, you contend a "mere conclusion or single piece of evidence is insufficient when countervailing evidence is ignored or the conflict remains unresolved." The Board considered your contention, as updated by your rebuttal response to the AO, that all charges were dropped and the allegations contained in the counseling entry are "so unsupported by substantial evidence that the very low standard of probable cause" is not met "as evidenced by this alleged misconduct not being charged." You further contend the Military Judge's ruling that failing to report a prescription drug is not misconduct contradicts the Page 11 and these "contradictory factual conclusions" is the "very height of arbitrariness and caprice." The Board also considered your contention that "even if"

the Board found no legal error, it would be an injustice to retain the adverse material because the counseling entry contains allegations of uncharged misconduct and will continue to affect your career. The Board also considered the explanations and evidence submitted with your 29 July 2022 AO rebuttal response.

The Board, however, substantially concurred with the AO. In this regard, the Board noted the purpose of formal counseling is to put the recipient on official notice of deficiencies in personal conduct or performance of military duties but counseling does not restrain the commander from later pursuing court-martial nor does it require him to do so. The fact your CO, with the advice of trial counsel, did not prefer all of the noted deficiencies does not overcome the presumption of regularity in the formal counseling entry. Further, while the standard of proof at a court-martial requires admissible evidence to prove guilt beyond a reasonable doubt, a commander is not required to cite any evidence in counseling a Marine. Even considering the additional evidence provided in your rebuttal to the AO, to include the memorandum from the defense counsel that was detailed to represent you, the Board determined there was insufficient evidence to contradict the allegations in the formal counseling entry and concluded the evidence available to the CO was appropriately relied upon by the CO in making the determination to counsel you on the deficiencies.

The Board also noted you did not challenge the counseling entry on a procedural basis and chose not to avail yourself of the opportunity to provide a statement in response to the counseling entry. Substantially concurring with the AO, the Board presumed the counseling entry was properly administered and should not be removed based on the CO's subsequent charging decisions or dismissal of criminal charges by a military judge. The Board thus substantially concurred with the AO and concluded there was insufficient evidence of a material error or injustice warranting the removal of the 12 April 2021 counseling entry.

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,

9/13/2022

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Deputy Director

A black rectangular redaction box covering the name of the Deputy Director.