



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

█
Docket No. 3398-22
Ref: Signature Date



Dear █:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, dated 18 May 2022, and the Order of the United States Court of Federal Claims (COFC), dated 5 April 2022, remanding your case to the Board for Correction of Naval Records, hereinafter referred to as the "Board." Specifically, you requested that the Board set aside your 29 February 2020 administrative separation; upgrade your characterization of service and change your narrative reason for separation; correct your fitness report (FITREP) for the reporting period 8 June 2018 to 25 November 2018, and all other military records;¹ and to correct all other records accordingly. Upon careful review and consideration of all of the evidence of record, the Board found insufficient evidence of any material error or injustice warranting relief. Accordingly, your application has been denied.

A three-member panel, sitting in executive session, considered your application in accordance with the COFC Order, on 7 July 2022. The names and votes of the panel members will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with the administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board included your application dated 18 May 2022, with all supplemental material submitted in support thereof; your complaint to the COFC, dated 3 December 2021, along with the COFC Order remanding your case to the Board, dated 5 April 2022; the case file for Docket No. 7521-19; relevant portions of your naval record; and applicable statutes, regulations, and policies. The Board also reviewed and considered the video footage that you provided.

The Board determined your personal appearance, with or without counsel, would not materially add to its understanding of the issues involved. Accordingly, the Board determined that your personal appearance was not necessary and considered your case based upon the evidence of record.

¹ This aspect of your petition constitutes a request for reconsideration of the Board's previous decision in Docket No. 7521-19.

The Board, having reviewed all the evidence of record pertaining to your allegations of error or injustice, found as follows:

On 2 September 2018, you were among two officers and six enlisted personnel deployed to the [REDACTED] as part of the [REDACTED] advanced party for [REDACTED]. You were briefed prior to your deployment that the [REDACTED] General Order No. 1 for [REDACTED] prohibited the consumption of alcohol. Upon arrival at the hotel in [REDACTED], you had a dinner meeting with other members of the advanced party in a conference room adjacent to the hotel's club to prepare for the next day's activities. After this dinner, a senior noncommissioned officer (NCO) reported his suspicion to the site officer-in-charge (OIC) that members of your party had been drinking during this dinner, in violation of General Order No. 1. This NCO had observed what appeared to empty glasses of alcohol on the table after your group departed,² and reported that one member of the group had volunteered to him that at least one of the members had consumed alcohol. He also reported that the other officer in your group exhibited signs of intoxication upon departing the conference room.

By memorandum dated 6 September 2018, the [REDACTED] Commanding General (CG) appointed a preliminary investigation (PI) into the allegation that members of your group consumed alcohol in violation of General Order No. 1. Despite the fact that every member of the group denied any consumption of alcohol, the officer appointed to conduct the PI found that alcoholic beverages were delivered to the conference room and consumed by certain members of the advanced party;³ that everyone in the room knew alcoholic beverages were being consumed even if they did not personally consume any; that your team was able to collaborate to present a consistent narrative on leadership efforts to ensure that no alcoholic beverages were consumed due to the delay between the allegations and the initiation of the PI; and that every member of your group lied about either their personal consumption of alcohol or having witnessed other members of the party consuming alcohol. Along with the testimony offered by the above referenced senior NCO who engaged with several members of the group after the meeting, these findings were based in large part upon review of video footage which, while not conclusive with regard to contents of the drinks served, strongly suggested that alcoholic beverages were being delivered to the conference room, and the testimony of several club employees regarding the club practices for serving alcohol. Among the recommendations made by the PI officer was that you be held accountable for failing to ensure that your subordinates followed General Order No. 1 and for making false statements during the PI.

On 5 November 2018, the [REDACTED] issued you a formal "Page 11" counseling statement to document substandard performance of duty and misconduct as found by the PI. Specifically, you were counseled for violations of Article 92, Uniform Code of Military Justice (UCMJ), for being derelict in your duties by willfully failing to enforce

² The NCO took a photograph of the table with the glasses in question.

³ The PI identified the three specific individuals and the type of alcoholic beverages consumed based upon the seating arrangement and remaining glassware. One of these individuals was the other officer in your group.

the prohibition against the consumption of alcohol by members of the advanced party during [REDACTED]; Article 107, UCMJ, for making false statement to the PI officer to the effect that you did not drink nor were you aware of anyone else drinking during the dinner meeting discussed above, that your party drank a “mixture of juices, iced teas, etc.” and no alcoholic beverages to your knowledge, and that you did not recall what beverages were in specific glasses when presented with a photograph of the table setting; and Article 133, UCMJ, for conduct unbecoming an officer and gentleman based upon the same conduct. You subsequently exercised your right to rebut this counseling statement, denying the allegations.

On 2 December 2018, you acknowledged receipt of an adverse FITREP for the reporting period from 8 June 2018 to 25 November 2018. Although the FITREP was adverse due to the derogatory counseling statement issued to you by the [REDACTED], the comments of your Reporting Senior (RS) were generally favorable and he recommended you for promotion. On 1 January 2019, your Reviewing Officer (RO) did not concur with the assessment of your RS with regard to block F.3. (Setting the Example) or his promotion recommendation. Your RO also described your potential as “Unsatisfactory” in his Comparative Assessment of your potential relative to your peers. You acknowledged this non-concurrence, and on 2 January 2019 you submitted a statement in rebuttal to the RO comments in which you again denied the allegations and noted that there had been no adversarial process to substantiate these allegations. On 2 January 2019, the Third Officer Sighter (TOS) resolved the factual differences between your RS and RO.⁴ He stated that he substantiated your violations of Articles 92, 107, and 133, UCMJ, based upon his review of the PI report and the evidence contained within, and that he was recommending that you show cause for retention.

By memorandum dated 7 January 2019, the [REDACTED] commander submitted a report of misconduct (ROM) regarding the misconduct substantiated by the PI and recorded in your counseling statement in accordance with MCO P5800.16. This ROM opined that your “marked lack of judgment and questionable integrity falls well below the standards expected of a commissioned officer,” and recommended that you be required to show cause for retention in the Marine Corps at a Board of Inquiry (BOI). It further stated that you would face court-martial but for the government’s inability to subpoena foreign nationals as witnesses. Although you initially indicated your intent to submit a statement in response, you subsequently indicated that you did not intend to submit a statement.

Contrary to the recommendation made by the [REDACTED] commander that you be required to show cause for retention at a BOI, on 25 February 2019 the [REDACTED] [REDACTED] initiated administrative separation proceedings via notification procedures. The specific reasons cited for this recommendation were substandard performance of duty, in that you failed to demonstrate acceptable qualities of leadership required of an officer in your grade and to properly discharge the duties expected of an officer of your grade and experience, and misconduct, or moral or professional dereliction, based upon

⁴ The TOS was the [REDACTED], who issued Petitioner the counseling statement.

commission of a military or civilian offense which could be punished by confinement of six months or more or misconduct which requires specific intent for conviction and intention misrepresentation or omission of material fact in official written documents or official oral statements. You were notified of your rights pertaining to this recommended administrative separation, to include your right to submit a statement to the Secretary of the Navy (SECNAV).

On 15 March 2019, you submitted a statement for consideration by the SECNAV in response to your proposed administrative separation. In this rebuttal, you alleged that the attempt to administratively separate you was based upon a false premise and that the adverse FITREP was tainted by unlawful command influence. You noted that every member of the advanced party confirmed that no one consumed alcohol, and that you saw and heard nothing to suggest otherwise. You also noted that the site OIC had met with both you and your fellow officer in the group and did not believe either of you to be intoxicated. You attacked the probative value of the video footage relied upon and the photograph taken by the senior NCO, and you alleged that “the entire basis and foundation for continuing this investigation was focused around the word of a foreign national,” elevating the testimony of this individual over that of the other members of the advance party, the site OIC, and his senior NCO. You also accused the [REDACTED] of attempting to unduly influence and bully a Marine to change his official statement. You supplemented this statement on 27 March 2019, reiterating your previous arguments and requesting the opportunity to address the allegations of misconduct at a BOI or court-martial. By memorandum dated 29 March 2019, the [REDACTED] forwarded these matters along with the ROM through the chain of command, to the SECNAV, with the recommendation that you be separated from the Marine Corps under honorable conditions with a general characterization of service.

By memorandum dated 25 November 2019, the Commandant of the Marine Corps (CMC) forwarded all of the aforementioned matters to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)), with the recommendation that you be separated from the Marine Corps under honorable conditions with a general characterization of service. In making this recommendation, the CMC stated that your misconduct “demonstrates no potential for future service and outweighs any positive aspects of [your] career.” The ASN (M&RA) approved this recommendation by signature dated 16 December 2019. On 29 February 2020, you were discharged from the Marine Corps for misconduct under honorable conditions with a general characterization of service.

On 3 April 2020, you applied for relief from the Naval Discharge Review Board (NDRB). Specifically, you alleged that your separation was “not justice or morally acceptable” because you were denied a court-martial and/or a BOI. You also alleged that you were deprived of the ability to defend yourself or to secure legal counsel unless you paid for it yourself. On 25 January 2021, the NDRB unanimously voted to deny relief, finding that you were, in fact, afforded all of the process that you were due as a probationary officer subject to an administrative separation under honorable conditions

for misconduct. The NDRB also found that your general discharge under honorable conditions was consistent with the standards of discipline of the naval service.

On 13 October 2020, this Board voted unanimously to deny your request to remove the FITREP for the reporting period 8 June 2018 to 25 November 2018 in Docket No. 7521-19.

This Board is not an investigative body. In the absence of evidence to the contrary, it relies upon the presumption of regularity to establish that naval officials properly discharged their duties. In this case, the Board found no evidence to overcome the presumption that the field-grade officer who conducted the PI performed his duties in a fair, impartial, and competent manner, or that any of the several senior officers and officials, up to and including the CMC and the ASN (M&RA), failed to fairly and impartially consider the evidence gathered by the PI as well as the matters that you submitted in response to that evidence and the recommendation that you be discharged from the Marine Corps.

The Board agrees that the evidence gathered by the PI likely would not have been sufficient to establish your guilt to the offenses alleged against you beyond a reasonable doubt in order to sustain your conviction by court-martial. That, however, is not the standard of proof required to sustain the issuance of a “Page 11” counseling statement, an adverse FITREP, or an administrative separation. Rather, the standard of proof required to sustain these actions is the preponderance of the evidence, and the evidence gathered by the PI clearly met this threshold. When faced with conflicting testimony, investigating officers are required to assess the respective credibility of the witnesses. The PI officer did so in your case, finding the credibility of the senior NCO who personally spoke to and/or observed three members of your group in the immediate aftermath of the dinner and the club employees he interviewed, none of whom had any apparent motivation to fabricate their testimony, to be more credible than your testimony and that of the other members of the advance party. The Board found this determination to be reasonable, given that every member of your team had a significant motivation to lie, the statements made by the members of the advanced party appeared to be coordinated and several made rather unbelievable assertions to establish the group’s innocence, and there were inconsistencies in your testimony relative to that of other witnesses that you failed to resolve.⁵ Certainly the election of your right to remain silent cannot be, and was not, used to establish your guilt, but in the absence of an explanation for this inconsistency the PI officer understandably drew the obvious conclusions. Ultimately, the PI officer was the only person who personally interviewed all of the witnesses and who was able to assess their respective demeanor, body-language, and credibility during questioning. This Board is not inclined to question the judgment of a field-grade officer with no apparent motivation to make invalid findings regarding the credibility of witnesses in this regard, especially since the evidence clearly supported his findings.

The Board also agrees that neither the video evidence nor the photograph of the table taken by the senior NCO conclusively established that anyone in your group consumed alcohol during the

⁵ The site OIC testified that he met with you personally after receiving the report of suspected alcohol use, but your statement said nothing about this meeting. Rather, you reported receiving a telephone call from the site OIC. When asked to clarify this point, you invoked your right to remain silent.

dinner in question or that the alcoholic beverages prepared at the bar were actually delivered to your party. The video footage, however, was persuasive toward this fact, and did not confirm your truthfulness, as you suggest. When taken in conjunction with the testimony of a senior NCO with no apparent motivation to lie that one of the members of your group admitted that members of the group were consuming alcohol and that your fellow officer demonstrated obvious signs of intoxication, and that of the club employees, who also had no apparent motivation to lie and whose testimony suggested that alcohol was, in fact, served to your group, the preponderance of the evidence clearly established that members of your group were consuming alcohol and that everyone in the room, particularly you as one of only two officers in the group, knew or should have known it was happening.

The Board did not find persuasive your argument that the site OIC and his senior NCO confirmed your apparent sobriety and that of your fellow officer. Whether either of you were intoxicated would be irrelevant to the question of whether anyone in the party violated General Order No. 1. Further, these individuals had every motivation to fabricate their testimony as well, as their failure to take appropriate action in the event of a discovered violation of General Order No.1 could have subjected them to adverse consequences. The testimony of the senior NCO who reported his suspicion regarding the actions of your group, whose testimony the Board still has no reason to question, suggests that the site OIC did in fact suspect the use of alcohol but elected to take no action. Finally, the site OIC himself was later found to have violated General Order No. 1 during [REDACTED], so he was hardly a credible witness in this regard. The Board also did not find persuasive your argument that the club served non-alcohol beverages in the types of glasses found at your table, as evidenced by the fact that members of the advanced party received non-alcohol drinks in such glasses while awaiting their interview. This evidence was unpersuasive because it contradicted the testimony of the club employees, whose testimony the Board also has no reason to doubt, and because the circumstances of the service of such drinks was not the same as during the “happy hour” when the drinks in question were being served. Finally, the Board did not find persuasive your contention that there was no evidence that the three hotel employees interviewed by the PI officer were waitresses or worked in the bar area – the Board assumes that the PI officer did not select random hotel employees to confirm the serving practices at the club.

In addition to finding insufficient evidence to overcome the presumption that the PI officer conducted his duties in a fair, impartial, and competent manner, the Board also found insufficient evidence to establish that any of the several senior officers who reviewed all of the evidence, to include your several statements in rebuttal, failed to also consider that evidence in a fair and objective manner. The fact that these senior officers had carefully reviewed the evidence, to include your statements, is established by their thorough summaries of the evidence and your objections in their respective recommendations. It was apparent that your objections to the findings and evidence were considered at every level of command, but were ultimately rejected by these senior officers and officials. They did not necessarily rely upon the PI officer’s interpretation of the evidence, but rather upon their own respective reviews of the evidence. The Board finds no error or injustice in this determination, as the evidence was clearly sufficient for reasonable persons to conclude that you failed to enforce the prohibition against consuming alcohol by members of the advance party, that you lied about your knowledge of such

consumption during the PI, and that such conduct was unbecoming of an officer and a gentlemen.

Having found no error or injustice in the findings of the PI, and that the evidence established your guilt of the alleged offenses by at least the preponderance of the evidence, the Board also found no error or injustice in your administrative discharge from the Marine Corps for misconduct. Such conduct is more than sufficient to warrant the administrative separation of an officer from the Marine Corps under the circumstances. Further, there were no apparent errors in the process by which you were administratively separated from the Marine Corps, as you were properly notified of the action and afforded all rights due to you in this process in accordance with SECNAVINST 1920.6C. Contrary to your contention, there was nothing unconstitutional or immoral about the process by which you were separated from the Marine Corps.

The Board found no merit in your contention that you were denied due process in the administrative separation process. As no punitive action was pursued against you, you had no right to demand trial by court-martial. Further, as a probationary officer who was recommended for discharge under honorable conditions, you were not entitled to a BOI in accordance with SECNAVINST 1920.6C. Your right to respond to and contest the allegations against you, and/or to convince the separation authority of your worthiness for retention, consisted of the right to submit a statement and matters for consideration by the separation authority. In your case, the separation authority was the ASN (M&RA). You availed yourself of this right, and your matters were clearly considered at every level of command. Ultimately, however, they failed to persuade any of the several senior officers who recommended your administrative separation, to include the CMC, or the ASN (M&RA). You did, however, receive and avail yourself of all process that was due to you.

The Board did not find credible your claim that you were denied the right to consult with counsel during the separation process. You were expressly notified of your right to consult with a judge advocate in the memorandum notifying you of the recommendation for your administrative separation, and by memorandum dated 25 February 2019 you acknowledged that right and stated that you had conferred with a judge advocate on that very date. Accordingly, the Board did not find your current claim that you were deprived of the right to a consult with a judge advocate because you were not afforded a court-martial to be credible. The Board also noted the inconsistencies in your explanations for your inability to access counsel. In your response to the recommendation of your administrative separation submitted on 15 March 2019, you stated that it was your mandated attendance at a transition readiness seminar which prevented you from talking to legal services in order to timely submit matters (even though you acknowledged consulting with a judge advocate on 25 February 2019), but in your application to this Board and to the NDRB you stated that you could not utilize military counsel because you were not afforded a court-martial. The inconsistency of these statements raises doubts regarding your credibility in this regard, and your current claim that you were denied access to counsel is simply not believable. In addition to your claim of having been denied counsel during the separation process, you also contended that you requested but were denied counsel while in the Philippines. The record reflects, however, that you were advised of your Article 31, UCMJ, rights, to include the right to consult with a lawyer before being questioned during the PI, and that you expressly waived that right. The record also reflects that you exercised your right to remain silent when

confronted with the inconsistency between your testimony and that of the site OIC. You clearly were not deprived of your rights in this regard.

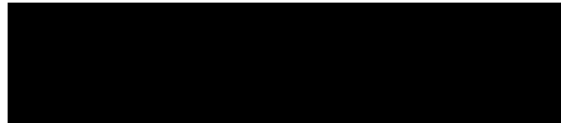
Having found no error or injustice in your administrative separation for misconduct, the Board also found no error in your receipt of the "Page 11" counseling statement for that misconduct or in the adverse FITREP for the reporting period 8 June 2018 to 25 November 2018. Accordingly, the Board affirms its previous decision in Docket No. 7521-19 to make no corrections to your record with regard to the subject FITREP.

Having found no merit in any of your contentions, the Board found insufficient evidence of any error or injustice in your case warranting relief. Accordingly, your application has been denied.

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 correction of an official naval record, the burden is on you, the applicant, to demonstrate the existence of probable material error or injustice.

Sincerely, _____

8/15/2022

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Executive Director

Signed by: _____