



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: 3453-22
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 limitations was waived in the interests of justice. A three-member panel of the Board, sitting in executive session, considered your application on 29 June 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).

You enlisted and entered a period of active duty in the Marine Corps on 17 January 1977. On 5 December 1977, you received nonjudicial punishment (NJP) for disrespect towards a Sergeant and treating the Sergeant with contempt by saying "stop f-----g around with me" and "Sergeant, you're going to get knocked on your a--." This offense was in violation of Article 91, Uniform Code of Military Justice (UCMJ). Your second NJP occurred, on 13 April 1978, for failure to obey a lawful order by having a female in your room in violation of Article 92, UCMJ. You entered into a period of unauthorized absence (UA), terminated by apprehension, from 22 April 1978 to 27 April 1978. During this period, you were in the hands of civilian authorities. On 12 May 1978, you appeared in civilian court for arraignment on burglary charges and pled guilty. On 24 August 1978, you were convicted by general court martial (GCM) of unlawfully entering the Public Works Center and stealing 12 radios valued at \$9,966.25, the property of the U.S. government. These offenses were in violation of articles 130 and 121, UCMJ. You were sentenced to confinement at hard labor for three

months, forfeiture of \$300 pay per month for three months, and reduction to the pay grade E-1. On 21 March 1979, a charge of disrespect was referred against you at a special court martial (SPCM). During the proceedings, the military judge dismissed the charge due to lack of personal jurisdiction based on misconduct by your recruiter during your enlistment process. The military judge found that you did not disclose preservice marijuana use at the direction of your recruiter and the SPCM proceedings were terminated. On 4 April 1979, the Staff Judge Advocate reviewed the GCM proceedings and found them to be correct in law and fact. On 21 May 1979, you were notified of administrative separation processing by reason of fraudulent enlistment (due to your nondisclosure of preservice marijuana use) and frequent involvement with military authorities. You consulted with counsel and waived an administrative discharge board (ADB). Your Commanding Officer (CO) recommended you be discharged with an Other Than Honorable (OTH) characterization of service. On 6 July 1979, Headquarters Marine Corps (HQMC) reviewed your administrative separation proceeding and found the discharge as recommended OTH was appropriate. Judge Advocate Division (JAD) also reviewed the proceeding and concurred. JAD further commented that "...a military court's determination that it has no criminal jurisdiction over an accused Marine is not binding on administrative authorities concerning nonjudicial matters (unless statutorily void)...the character of a fraudulently enlisted Marine's discharge is determined by the nature and quality of his or her record of service, a defect in the contract of enlistment notwithstanding." You were discharged, on 3 August 1979, with an OTH characterization of service.

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 to upgrade your discharge and contentions that that under current Marine Corps regulations, the basis for your discharge in 1979 no longer authorizes an OTH characterization of service and is therefore inequitable. You argue that since 2001, "[c]haracterization of service under other than honorable conditions may only be issued when the fraud involves concealment of a prior separation in which service was not characterized as honorable...." You further contend that the military judge's ruling that the court lacked personal jurisdiction over you voided your enlistment contract. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments, or advocacy letters.

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 NJPs and GCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. In its deliberations, the Board also determined that during the administrative separation process you were notified of dual processing on the bases of fraudulent enlistment and frequent involvement with military authorities. The separation on the basis of fraudulent enlistment was reviewed by HQMC and JAD, and found to be appropriate. Furthermore, although your CO chose to administratively separate you for fraudulent enlistment and frequent involvement with military authorities, you could also have been processed for commission of a serious offense based on your GCM conviction. In particular, the Board concurred with JAD's analysis, and determined that the severity of your GCM misconduct warranted your discharge with an OTH characterization of service. As a result, the Board concluded your conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH

characterization. After applying liberal consideration, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. 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,

7/21/2022

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Executive Director

Signed by: █