

DEPARTMENT OF THE NAVY

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

> Docket No. 3616-22 Ref: Signature Date



Dear Petitioner:

This letter is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. After careful and conscientious consideration of the entire record, the Board for Correction of Naval Records (Board) found the evidence submitted was 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 15 November 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, as well as the 22 September 2022 Advisory Opinion (AO) by the Headquarters Marine Corps Military Personnel Law Branch (JPL). The AO was provided to you on 29 September 2022. Although you were afforded an opportunity to submit a rebuttal, you did not do so.

The Board carefully considered your request to remove your 1 May 2020 Unit Punishment Book, reimbursement of forfeiture of pay, removal of your 1 May 2020 Administrative Remarks (Page 11) 6105 counseling entry, and removal of your 1 July 2019 to 1 May 2020 adverse fitness report. The Board considered your contention that the punishment issued falls under double jeopardy in accordance with JAGINST 5800.7F. The Board also considered your claim that your former commanding officer (CO) believed the nonjudicial punishment (NJP) is unjust and should be removed.

The Board noted that, on 1 May 2020, you received NJP for violation of the Uniform Code of Military Justice (UCMJ), Article 92 (Failure to obey an order or regulation). Specifically, on or about 14 November of 2017 you were found guilty of operating a motor vehicle while intoxicated in the City of Tempe, Arizona. From this date to present you failed to self-report this incident to anyone in your chain of command or the security manager requisite for the continuous evaluation program and reporting requirements to Department of Defense Consolidated Adjudications Facility (DODCAF). You were advised of your rights under Article

31 of the UCMJ, given the opportunity to consult with a military lawyer, and advised of your right to demand trial by court-martial in lieu of NJP. You agreed to plead guilty and accept NJP, and you were advised of your right to appeal the NJP. As punishment, you were awarded forfeiture of \$2310.00 pay per month for two months, which was suspended for 1 month unless sooner vacated. On 1 May 2020, you were issued a 6105 entry counseling you for violating Article 92, of the UCMJ. You were also issued a non-recommendation for promotion counseling entry. You acknowledged (signed) both entries and chose not to submit a rebuttal. The Board noted that the CO issued the counseling entry as a result of the NJP. The Board further noted that the issuing officer, using a preponderance of the evidence standard, was well within his discretionary authority to issue the counseling entry.

With regard to your contention that the NJP was double jeopardy because you were convicted by a civilian court, the Board substantially concurred with the AO and determined that you were NJP'd for failure to report the driving under the influence conviction to your chain of command or to the DODCAF. Further, the Board noted that in accordance with the Manual for Court Martial, your CO has the authority to set aside the NJP and chose not to exercise this authority. Accordingly, the Board concluded that there is no probable material error or injustice warranting removal of your NJP or associated counseling entries from your record.

The Board did not consider your request to remove your fitness report for the reporting period 1 July 2019 to 1 May 2020, because you have not exhausted available administrative remedies by petitioning the Marine Corps Performance Evaluation Review Board (PERB) prior to petitioning this Board.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. 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.

