



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: 5010-22
Ref: Signature Date



Dear Petitioner:

This 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 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 Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 5 August 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 the 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 to 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 in the Marine Corps and began a period of active duty on 20 September 1999. You were counseled on 29 August 2000 for a violation of Article 89, disrespect to a commissioned officer, after losing your bearing and throwing a pen on the officer's desk when instructed to sign an official refusal of the Anthrax vaccine, although you contend you had merely requested additional information on the vaccine before receiving it. Subsequently, you were not recommended for promotion due to lack of judgment in relation to your pending nonjudicial punishment (NJP) of 13 November 2000 for violation of Article 86 due to an unauthorized absence (UA) from your appointed place of duty. On 5 January 2001, you received a second NJP for violations of: Article 86, absence from your appointed place of duty without authority; Article 91, insubordinate conduct by assault upon a noncommissioned officer in the execution of his office; and, Article 134, restriction breaking. Thereafter, you were not recommended for promotion in July of 2001 due to your poor attitude.

On 18 October 2001, you were tried by Special Court-Martial (SPCM). Contrary to your pleas, members found you guilty of two charges with four specifications of violations of Article 91 for

subordinate conduct by striking and willfully disobeying the lawful order of a staff noncommissioned officer, using disrespectful language toward a noncommissioned officer, and disobeying his lawful order. Your adjudged sentence included a Bad Conduct Discharge (BCD). Prior to departing for appellate leave, you received two additional NJPs. Although additional information regarding the violations of the fourth NJP is not documented in your official record, your third NJP detailed two additional UA periods. Your request for clemency was denied by the Department of the Navy's Clemency and Parole Board. Likewise, the findings and sentence of your SPCM were upheld upon appellate review and, on 23 November 2004, your punitive discharge was effected.

You previously applied to the Naval Discharge Review Board (NDRB), initially receiving documentary review in 2014 for contentions that your discharge was inequitable. Later, you made a personal appearance before the NDRB contending that your discharge was inequitable because it was unnecessarily harsh for relatively minor infractions and that your in-service performance and conduct together with your post-discharge achievements should be considered for an upgrade based on clemency. You included a personal statement, the statement of a former Marine peer, duty logbook entries, a request mast form, and character references. Your current contentions through counsel are substantially identical with the additional contention, in significant part, that the reversal of the NDRB's vote was arbitrary and capricious in light of the substantial deference owed to the deliberations and judgment of members hearing an in-person appeal from an applicant. On both occasions, the NDRB denied your request for relief after determining your discharge was proper as issued.

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 your contentions that your post-discharge conduct and accomplishments reflect that your in-service misconduct was not due to a character flaw but, rather, evidence that you were unfairly targeted as a result of medical limitations. Additionally, you acknowledged that being targeted and ridiculed does not excuse your misconduct, but present it as evidence why you were treated differently in comparison to other Marines who committed similar infractions but did not receive as harsh of punishments. In support of this contention, you provided a letter from an in-service peer attesting to your mistreatment and describing his witness testimony given in your defense at your SPCM. For purposes of clemency consideration, the Board noted you provided supporting documentation describing post-service accomplishments and 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 SPCM conviction, 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. Further, while the Board acknowledges it is possible that the misconduct of your NJPs was viewed or treated more harshly due to medical limitations, the Board noted that your punitive discharge was adjudged by properly empaneled service members in trial proceedings during which you were represented by competent counsel and were afforded the opportunity to object to any evidence of bias during voir dire of those members. Likewise, the Board observed that those members had the opportunity to hear all evidence given under oath by witnesses both for the government as well as for your defense, to include the individual who provided your character letter. Ultimately,

those members assessed all admissible evidence in determining your guilt as well as in determining that your offenses, together with all mitigating and extenuating matters, merited a punitive discharge. With respect to your contentions of error and injustice regarding the results of your SPCM, the Board strongly weighed the appellate review and clemency proceedings in your case as evidenced of the propriety of your punitive discharge and found no evidence of either error or injustice. In regard to your contentions of post-discharge character, although the Board appreciates that you have made inroads toward your career and education, 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 the 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 is attached 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,

9/29/2022

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Executive Director

Signed by: █