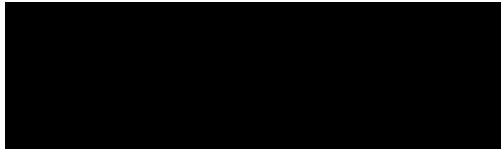




DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

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Docket No: 5190-22
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 your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 30 September 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 the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo). The Board also considered an advisory opinion (AO) furnished by Headquarters United States Marine Corps, Manpower and Reserve Affairs Department (Head, Enlisted Promotions) ("HQMC").

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

You enlisted in the Marine Corps and entered active duty on 8 September 1997. Your pre-enlistment physical examination, on 11 February 1997, and self-reported medical history both noted no neurologic or psychiatric history, treatment, conditions, or symptoms. On your enlistment application you did not disclose or endorse: (a) anything which would preclude you

from performing military duties or participating in military activities whenever necessary, or (b) any personal restrictions or religious practices which would restrict your availability from performing military duties or participating in military activities whenever necessary.

On 23 June 1999, contrary to your plea, you were convicted at a Special Court-Martial (SPCM) of failing to obey a lawful order to submit to an anthrax vaccination on or about 29 January 1999. You were tried by military judge alone and sentenced to confinement for thirty days, and to be discharged from the Marine Corps with a Bad Conduct Discharge (BCD). Automatic forfeitures applied to your pay while in confinement, and a reduction in rank to the lowest enlisted paygrade (E-1) took effect upon the Convening Authority's (CA) action in your case.

On 16 August 1999, you were placed on voluntary appellate leave awaiting the CA's action. On 30 October 2000, the CA approved the SPCM sentence as adjudged. Prior to taking action on your SPCM sentence, the CA considered the Staff Judge Advocate's Recommendation, the clemency matters submitted by you, and the entire record of trial. On 5 January 2001, you were placed on involuntary appellate leave awaiting your punitive discharge.

On 21 July 2005, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence as approved by the CA. You had argued, in part, that the order to receive the anthrax vaccine was unlawful, and the order violated your Constitutional right to refuse unwanted medical treatment. The NMCCA concluded that the SPCM guilty findings and sentence were correct in law and fact and that no error materially prejudicial to your substantial rights was committed.

On 17 August 2005, you filed a petition for a grant of review with the U.S. Court of Appeals for the Armed Forces (CAAF). On 28 September 2006, CAAF concluded the order for you to receive the anthrax vaccination was lawful and affirmed the NMCCA decision. Upon the completion of SPCM appellate review in your case, on 26 January 2007, you were discharged from the Marine Corps with a BCD and assigned an RE-4 reentry code.

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: (a) you were unjustly and administratively improperly removed from consideration for selection to the rank of Corporal, (b) you were unjustly and excessively punished for refusal to accept the anthrax vaccine, and (c) federal court litigation regarding the military's anthrax vaccine program and NDRB precedent in similar cases suggest relief is warranted. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board review process, HQMC reviewed your contentions regarding your non-promotion to Corporal (E-4) and issued an AO dated 7 September 2022. HQMC noted you contended that, but for the disciplinary matters related to your anthrax refusal, you would have promoted to Corporal (E-4) due to time in grade *prior to* being reduced in rank to E-1. HQMC initially observed you promoted to Lance Corporal (E-3) on 1 May 1998, and HQMC noted that

promotions to E-4 would be authorized on the basis of vacancies existing throughout the Marine Corps and will be effected by authorized commanders. HQMC also noted that E-4 promotions would be based on automatic composite scores computed quarterly for each eligible Lance Corporal and would be effected monthly by primary occupational field. HQMC observed that you first became eligible for promotion to corporal on 1 January 1999. However, HQMC discovered and determined that you did not meet or exceed the established cutting score for your primary occupational field of 0352 prior to being reduced to E-1. HQMC further noted that following your SPCM you would have been in a promotion restriction status following your reduction to E-1 until you were discharged. HQMC also discovered, contrary to your contention, that no evidence existed that other members of your unit were meritoriously promoted, and therefore there were no grounds warranting any meritorious promotion.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. The Board concurred with the AO that you were not eligible for promotion to E-4 at any time prior to your reduction in rank to E-1. Additionally, the Board unequivocally also did not believe that your record was otherwise so meritorious to deserve an upgrade or any other requested relief. The Board determined that your SPCM punishment was appropriate given your offense and not excessive, and the Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board noted that the anthrax vaccination mandate served a valid military purpose was based on military readiness and safety concerns, and the Board concluded that the anthrax vaccination policy in no way represented a broad military/government overreach and infringement of personal liberties and privacy rights. The Board determined that the order to receive that anthrax vaccination was a lawful military order only to be disobeyed at one's peril. The Board determined that your misconduct constituted a significant departure from the conduct expected of a Marine, and that the record clearly reflected your misconduct was intentional and willful and demonstrated you were unfit for further service. Moreover, the Board noted that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not otherwise be held accountable for your actions.

The Board observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average calculated from your available performance evaluations during your enlistment was approximately 3.8 in conduct. Marine Corps regulations in place at the time of your discharge required a minimum trait average of 4.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your serious misconduct.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and concluded that your misconduct and disregard for good order and



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discipline clearly merited your BCD. Even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an error or injustice exists to warrant upgrading your characterization of service, promoting you to E-4, or granting clemency in your case. 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,

11/1/2022

