



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. 5634-22
Ref: Signature Date

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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 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 7 November 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 in the United States Marine Corps and began a period of active duty on 20 May 1986. On 6 June 1988, you were absent from your command without authorization for a period of 2 days. On 9 June 1988, you again went absent from your unit, this time for a period of 41 days. Upon your return to military control, on 21 July 1988, you were placed into pre-trial confinement due to your misconduct and the assessment that you were a flight risk.

On 7 September 1988, you were found guilty at Special Court Martial of two specifications of violating Uniform Code of Military Justice (UCMJ) Article 86 (Unauthorized Absence) (UA). You were sentenced to confinement for a period of 3 months (with time in excess of 60 days suspended), forfeitures of pay, and reduction in rank to E-1. You were given credit for time served in pretrial confinement plus good time, and were released with time served on 8 September 1988.

On 12 September 1988, 4 days after your release from confinement, you again went UA and remained absent for 95 days. You were declared a “Deserter” on 12 October 1988. On 16 December 1988, upon your return to military custody, you were placed in pre-trial confinement. On 5 January 1989, you requested a separation in lieu of trial by court martial (SILT). You acknowledged your rights, and after consultation with qualified counsel, you admitted guilt of the preferred charges related to UCMJ Article 86. You acknowledged that if your request was approved, you would receive an Other than Honorable (OTH) discharge, which carried the potential for life-long adverse consequences. The separation authority accepted your SILT request, and on 14 February 1989, you were discharged from the service by reason of “Separation In Lieu of Trial by Court Martial” with an “OTH” characterization of service, a “KFS1” separation code, and an “RE-4” reenlistment 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, your desire to upgrade your discharge character of service and contentions that: (a) you feared for your life and wellbeing after a street fight resulted in persistent harassment, and (b) you went UA out of fear of retaliation by unit members and that you felt going UA was the best option at the time. For purposes of clemency and equity consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

After thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your SPCM and SILT request, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your repeated misconduct and its negative impact on the mission. The Board highlighted that you requested a SILT, thereby avoiding a possible court martial conviction and punitive discharge. The separation authority granted you significant clemency by accepting your separation in lieu of trial by court martial. Further, your SILT request does not mention any fear of retaliation or other safety concerns as a cause of your misconduct. The Board determined the record clearly reflected that your active duty misconduct was intentional and willful and demonstrated you were unfit for further service. The Board also determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should otherwise not be held accountable for your actions.

Finally, 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. As a result, the Board determined your conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH characterization. Even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting an upgraded characterization of service as a matter of clemency or equity. Accordingly, given the totality of the circumstances, the Board determined your request does not merit relief.

Finally, the Board noted that you checked the reprisal/whistleblower box on your application. However, the Board determined there was insufficient evidence to conclude you were the victim of reprisal in violation of 10 USC 1034. 10 USC 1034 provides the right to request Secretary of

Defense review of cases with substantiated reprisal allegations where the Secretary of the Navy's follow-on corrective or disciplinary actions are at issue. Additionally, in accordance with DoD policy you have the right to request review of the Secretary of the Navy's decision regardless of whether your reprisal allegation was substantiated or non-substantiated. Your written request must show by clear and convincing evidence that the Secretary of the Navy acted arbitrarily, capriciously, or contrary to law. This is not a de novo review and under 10 USC 1034(c) the Secretary of Defense cannot review issues that do not involve reprisal. You must file within 90 days of receipt of this letter to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Office of Legal Policy, 4000 Defense Pentagon, Washington, DC 20301-4000. Your written request must contain your full name, grade/rank, duty status, duty title, organization, duty location, mailing address, and telephone number; a copy of your BCNR application and final decisional documents; and, a statement of the specific reasons why you are not satisfied with this decision and the specific remedy or relief requested. Your request must be based on factual allegations or evidence previously presented to the BCNR, therefore, please also include previously presented documentation that supports your statements.

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, _____

11/17/2022

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Deputy Director

Signed by: _____