



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. 5925-22
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 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 24 February 2023. 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).

You enlisted in the Marine Corps and entered active duty on 27 April 1998 at age eighteen (18). Your pre-enlistment physical examination, on 17 April 1998, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms.

On 18 December 1998, you received non-judicial punishment (NJP) for failing to obey a lawful order by underage drinking. You did not appeal your NJP. On 2 March 1999, your command issued you a "Page 11" counseling sheet (Page 11) documenting your alcohol-related incident underlying your NJP. The Page 11 noted that you were recommended for and completed the one-week alcohol-abuse intervention/rehabilitation "IMPACT" course on 26 February 1999. The Page 11 expressly warned you that a failure to take corrective action may result in disciplinary action. You did not submit a Page 11 rebuttal statement.

On or about 16 March 1999, you underwent surgery at U.S. Naval Hospital, ██████████ for a right-sided microdiskectomy at L5-S1. Your pre and post-operative diagnoses were L5-S1 herniated nucleus pulposus; right S1 radiculopathy. The operative report noted there were no intraoperative complications during the surgery.

On 13 May 1999, you received NJP again for failing to obey a lawful order by underage drinking. You did not appeal your NJP. On 1 June 1999, the suspended portion of your NJP was vacated and enforced. On 15 June 1999, your command issued you a Page 11 documenting your underage drinking. The Page 11 expressly warned you that a failure to take corrective action and/or further incidents of misconduct may result in punitive action and/or limitation on further service. You did not submit a Page 11 rebuttal statement.

On 19 July 1999, you received NJP for writing a check to the Army and Air Force Exchange Service (AAFES) without sufficient funds. You did not appeal your NJP. On 9 August 1999, your command issued you a Page 11 documenting your lack of professionalism stemming from conduct contrary to good order and discipline due to your financial irresponsibility. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation or limitation on further service. You did not submit a Page 11 rebuttal statement.

On 24 September 1999, the Physical Evaluation Board (PEB) found you unfit for duty due to your "Mild Epidural Fibrosis S-1 Region." The PEB recommended your separation from active duty with severance pay. The PEB determined that your disability did not result from a combat-related injury and rated your unfitting medical condition at 10%. On 1 October 1999, you accepted the PEB findings and waived your right to a formal board. Following the PEB, you had an approved EAS date of 15 December 1999.

However, on 6 December 1999, you were convicted at a Summary Court-Martial (SCM) of two separate specifications of insubordinate conduct, and for failing to obey a lawful order for underage drinking a third time. You were sentenced to confinement for twenty-one days. The Convening Authority approved the SCM sentence.

On 10 January 2000, you underwent a substance abuse screening at the Naval Hospital Alcohol Rehabilitation Department (ARD) at the request of your command. The ARD recommended that you be returned to full duty.

On 11 January 2000, you were notified of administrative separation proceedings by reason of misconduct due to a pattern of misconduct. You consulted with counsel and initially elected your right to a hearing before an administrative separation board. However, you later withdrew such request. On 31 January 2000, the Staff Judge Advocate (SJA) to the Separation Authority reviewed your discharge and determined your separation was legally and factually sufficient. Ultimately, on 29 February 2000, you were separated from the Marine Corps for misconduct with an under Other Than Honorable (OTH) conditions discharge characterization and assigned an RE-4 reentry code.

You previously applied to this Board for a disability discharge and upgrade to your characterization of service. You were denied relief on 11 May 2017.

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 for a discharge upgrade and changes to your separation reason, separation code, and separation authority. You contend that: (a) your discharge constituted error because the SCM charges reflected prejudicial errors in fact, law, procedure, and discretion, (b) your discharge was unjust because your discharge was overly harsh and inconsistent with Marine Corps standards of discipline, (c) your discharge was unjust because taking into account your quality of service and capability to serve, your discharge was not consistent with principles of equity and fundamental fairness, (d) with the benefit of certain new evidence proving the extent of the impropriety and injustice in this matter, together with evidence of your personal accountability and good character, your petition for correction merits an upgrade, (e) an upgrade in the interests of justice is appropriate based on the equitable factors set forth in regulation as well as the Wilkie Memo, (f) your misconduct was minor and you were targeted with a punitive discharge by a Navy Captain who was later dishonored and incarcerated for lying, and (g) you have proven your good character through two decades of recovery and good citizenship, and your application merits careful and generous consideration. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board determined that characterization under OTH conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Marine. The Board determined that the record clearly reflected your misconduct was intentional and willful and indicated 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 noted the SJA determined your separation was legally and factually sufficient. Had the SJA concluded there were any evidentiary, procedural, substantive, and/or due process deficiencies prior to your separation, the SJA would have ordered the appropriate relief. Accordingly, the Board was not willing to re-litigate the well-settled misconduct and disciplinary findings underlying your discharge. The Board determined that your cumulative misconduct justified your separation and discharge, and that such discharge processing was well within your commanding officer's discretion to initiate. The Board concluded, contrary to your contention, that your separation processing and characterization were entirely consistent with Marine Corps standards of discipline, and did not represent an overreach or were disproportionate to your cumulative misconduct. The Board noted that processing for disciplinary reasons took absolute

precedence over medical concerns, and concluded it was appropriate for your discharge processing for misconduct, that resulted in an OTH, to suspend your disability processing.

Additionally, the Board noted that while technically the assault charge required an “in the execution of their office” element of the offense, that element was not required for the other UCMJ Article 91 disobedience offense. The Board also noted that the ultimate decision to or not to charge anyone with an offense lies exclusively with the command. Lastly, the Board noted that you had both the right to refuse a trial by SCM, and a right to have your case heard at an administrative separation board. If you firmly believed that your command was acting inappropriately towards you or the charges were not legally/factually sufficient, you had the absolute right to refuse trial by SCM at such time and force the command to make an alternate disposition decision. Moreover, when you were facing administrative separation processing, you could have elected to have your case heard at an administrative separation board where you would have been represented by counsel, but you waived such right.

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. Additionally, 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 that there was no impropriety or inequity in your discharge, and the Board concluded that your pattern of serious misconduct clearly merited your receipt of an OTH, and that such discharge was in accordance with all Department of the Navy directives and policy at the time of your discharge. The Board carefully considered any matters submitted regarding your character, post-service conduct, and personal/professional accomplishments, however, 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 granting you the relief you requested or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. 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,

2/28/2023

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Executive Director

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