



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. 8282-22
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 case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 27 April 2023. 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 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). In addition, the Board considered the 18 January 2023 advisory opinion (AO) provided by the Navy Personnel Command (PERS-32), and your response to the AO.

The Board carefully considered your request to remove the 27 October 2016 non-judicial punishment (NJP), 28 October 2016 Punitive Letter of Reprimand (PLOR), and fitness report for the reporting period 26 February 2016 to 28 February 2017 from your record. In addition, you request a discharge upgrade to Honorable along with changes to your record to reflect a "Secretarial Authority" separation. The Board considered your statement and contentions that the NJP violated your due process rights and that the allegations are substantively untrue. You also contend that, as written, the charge for violating Article 92, Uniform Code of Military Justice (UCMJ) is legally deficient and fails to allege the mens rea with which you allegedly acted in dereliction of duty. According to the Manual for Courts-Martial (MCM) (2016 ed.), and the third element of Article 92, UCMJ the government must specify whether you acted willfully, negligently, or with culpable inefficiency. You further contend that there is no evidence to support the conclusion that you asked the Midshipman on a date or made sexually explicit comments to her. You claim that you were unlawfully pressured and intimidated into pleading guilty to the allegations, you were told to plead

guilty or you would face court-martial and severe punishment. In addition, the command denied your request to consult with counsel prior to making a decision on how to respond to the NJP. You also claim that statements gathered in the course of the investigation reveal that you directed the Division to record and log the heat stress temperatures on the hour. The Medical Readiness Review indicates that there were zero discrepancies with the heat stress log audit. This evidence demonstrates that you did comply with directives, therefore, you were not derelict in the performance of your duties. In response to the AO, you argued that the AO contained no analysis or factual discussion, and nothing in the AO added to the understanding of this case.

The Board noted that you received NJP on 27 October 2016 for violating Article 92, UCMJ by being derelict in the performance of duties for failing to properly supervise the heat stress survey logs between May 2016 and September 2016, and for violating Article 133, UCMJ by behaving in a manner indecorum towards a Midshipman Third Class. The Board also noted that you were properly notified of your commanding officer's (CO's) intent to impose NJP, you acknowledged your Article 31, UCMJ Rights, pleaded guilty to both charges, your CO found you guilty, and your appeal was denied. The Board noted, too, that your contested fitness report was marked 2.0 for performance traits 33, 35, 36, 37, and 38. In block 41, the reporting senior (RS) documented your NJP and other administrative actions pending as a result of the NJP.

The Board carefully reviewed your case, but found no evidence that you were pressured or intimidated into pleading guilty to violating Articles 92 and 133 at NJP, and you provided none. In addition, the Board found no evidence that you were denied the ability to consult with counsel. The Board noted that you were embarked aboard the █ when NJP was imposed and determined that you were properly notified, advised of your legal rights, and afforded all due process rights according to the MCM (2016 ed.) vessel exception. The Board also determined that you were placed on notice by the charges and specifications of the offenses you were accused of committing and pleaded guilty to the misconduct. Regarding your dereliction of duty, the Board considered that you were issued a Non-punitive Letter of Caution, on 20 May 2016, counseling you regarding specific instructions on the Heat Stress Program requirements. The Board considered the Medical Readiness Review, however, the document is undated and insufficient to outweigh the negligence documented by the XO in the 10 October 2016 Memorandum for the Record.

Concerning the charge for violating Article 133, UCMJ, the Board noted the command investigation into allegations of conduct unbecoming of an officer and the finding that you indirectly used a perceived position of power to influence the Midshipman's behavior. The Board also noted the you were counseled, on 14 August 2016, that the use of first names when addressing anyone, "less your peers—in this case the Midshipmen—is unprofessional and erodes the Chain of Command and Good Order and Discipline." The Board thus determined that the NJP was conducted according to the MCM (2016 ed.) and your CO found you guilty based on the preponderance of evidence, which included the command investigation, XO Memorandum for the Record, and your plea of guilty. The Board also determined that your CO acted within his discretionary authority when determining that NJP was warranted.

The Board acknowledged the findings by the Navy Discharge Review Board (NDRB), however, this Board is not bound by the NDRB findings. Additionally, the Board noted that the NDRB decision of 15 January 2021 was set aside by the Secretarial Review Authority.

Regarding your request to remove the fitness report, the Board substantially concurred with the AO that your fitness report is valid. In this regard, the Navy Performance Evaluation System Manual (EVALMAN) required the RS to submit a fitness report for the periodic reporting period. The Board noted that RSs have a duty to report significant and persistent weaknesses. The Board determined that the NJP and documented counselings constituted a sufficient basis to document persistent weaknesses. The Board also noted that the RS provided sufficient justification to substantiate the 1.0 and 2.0 performance traits.

Additionally, the Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Ultimately, the Board found your evidence insufficient to overcome this presumption. Therefore, based on the foregoing rationale, the Board concluded that there is no probable material error, substantive inaccuracy, or injustice with your NJP, PLOR, and fitness report in question.

Finally, the Board considered your request to upgrade your characterization of service and change your record to reflect a "Secretarial Authority" separation. 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. After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJP, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the likely negative effect it had on the good order and discipline of your command. As previously discussed, the Board found the imposition of NJP appropriate in your case and, based on your guilty plea, supported by the preponderance of the evidence. As a result, the Board concluded significant negative aspects of your service outweighs the positive aspects and continues to warrant a General (Under Honorable Conditions) characterization. While the Board carefully considered the evidence you submitted in mitigation, 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 with respect to a discharge upgrade, a Secretarial Authority discharge, or a matter of clemency or equity. 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,

5/17/2023

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Deputy Director

Signed by: █