



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. 8842-22
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.

A three-member panel of the Board, sitting in executive session, considered your application on 11 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 as well as the 17 January 2023 advisory opinion (AO) provided by the Navy Personnel Command Office of Legal Counsel (PERS-00J) and your response to the AO.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will 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.

The Board carefully considered your request to remove the evaluation report for the reporting period 16 November 2020 to 28 July 2021, reinstate your pay grade to E-6, retirement under the Temporary Early Retirement Authority (TERA) or; reinstatement on active duty under shore duty orders. You also request to modify your DD 214 by changing the reentry code to RE-1E or RE-2, changing the separation code accordingly, and changing the paygrade to E-6. The Board considered your statement that you filed a complaint because an intimate video of you was being shared amongst the crew without your knowledge in violation of Article 117a, Uniform Code of Military Justice (UCMJ). You contend that you received non-judicial punishment (NJP), were reduced in rate, and forced out of service due to High Year Tenure (HYT) with an RE-4 reentry code because you filed a complaint. You also contend that you did not receive or endorse the NJP package as required by MILPERSMAN 1616-040, and you were coerced into signing the evaluation report in question. You further contend that the concluding date noted in the evaluation report is not the correct filing date because you submitted an appeal, and your written statement was not submitted into the record as

required by Navy Performance Evaluation System Manual (EVALMAN). You claim that you were intimidated and harassed throughout the investigation and proceedings by the Chief's Mess, your request for mitigation was never forwarded to the commanding officer (CO), and you did not receive the protection or outcome of the complaint as required by several policies. You also claim that the reentry code prevents you from ever rejoining the Navy, your shore duty orders were canceled, you were denied retirement, and full Involuntary Separation Pay. Further, this ordeal has caused financial and mental stress as a single mother of four, you should not have experienced any of this for reporting a crime, and you should have been protected from reprisal. In response to the AO, you provided additional evidence that was not included in your original application.

The Board, however, substantially concurred with the AO. In this regard, the Board noted the Naval Criminal Investigative Service (NCIS) and Criminal Investigative Division (CID) investigations into allegations that intimate photos and videos were stolen from your phone and that four sailors were held accountable. However, during the course of the investigation it was discovered that you committed misconduct. As a result, you received NJP for violating Article 92, UCMJ (3 specifications). The Board also noted that you pleaded guilty, the CO found you guilty, and as punishment, you were reduced in grade to E-5, and awarded extra duties.

The Board determined that your NJP was conducted according to the *Manual for Courts-Martial* (MCM) (2019 ed.). Specifically, your CO relied upon a preponderance of the evidence, that included investigations by NCIS and CID, and your admission of misconduct when determining that NJP was warranted. The Board also determined that the awarded punishment was authorized according to the MCM and proportionate to the charges. Moreover, the fact that your misconduct was discovered during the course of the investigations is not an error or injustice. The Board noted that MILPERSMAN 1616-040, requires commanders to submit a Report of NJP when NJP is complete. The Board found that the absence of the Report of NJP was an error, but not a material error that would invalidate the NJP. In this regard, your NJP was properly documented in your evaluation report and you pleaded guilty at NJP. Based on these factors, the Board found no basis to grant your request to be reinstated to E-6.

Concerning your contested evaluation report, the Board noted that you were issued an evaluation report, for the reporting period 16 November 2020 to 28 July 2021, documenting the CO's finding of guilt at NJP. According to the EVALMAN, the reporting senior (RS) can document a civil conviction or NJP if he or she feels it is necessary to place facts on the record in a timely manner. The Board noted that you did submit an appeal, however, your appeal did not dispute the underlying basis for the NJP. In addition, the evaluation report was not signed by the RS until after your appeal was denied, and you did not acknowledge the evaluation report until after your appeal was denied by the appropriate authority. Further, the Board found no evidence that you were coerced into signing the evaluation report. According to the EVALMAN, your signature is required for adverse reports and your signature does not imply agreement with the report, but acknowledges that you saw the report and were aware of the right to submit a statement. Concerning your statement to the record, the Board noted that you did indicate your intent to submit a statement and the statement is not in your record. Therefore, the Board determined that you have not exhausted your administrative remedies. The EVALMAN authorizes you to submit your statement to the Navy Personnel Command (PERS-32) within two years after the report ending date.

Concerning your separation due to HYT, correction of your DD 214, and request for TERA. The Board determined that your separation due to HYT was in accordance with MILPERSMAN 1160-120, and your reduction in rate warranted the assigned separation and reentry code. The Board noted

that the Navy is not currently participating in TERA, thus there is no entitlement to TERA. Moreover, the Board is not an investigative body, and 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. The Board found your evidence insufficient to overcome this presumption. Accordingly, given the totality of the circumstances, the Board concluded that there is no probable material error, substantive inaccuracy, or injustice concerning those contentions. Based on the finding that you were properly separated due to HYT, the Board also determined your request to be return to active duty is not supported by the preponderance of the evidence.

You also indicate in your application that you were the victim of reprisal. The Board, however, determined that there was insufficient evidence to conclude that you were the victim of reprisal by the Chief's Mess or your chain of command in violation of 10 U.S.C Section 1034. In making this determination, the Board noted that you provided no evidence, other than your statement and a printout of complaint status. 10 USC Section 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 Section 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,

4/26/2023

