



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

█
Docket No. 2218-23
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 case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 17 April 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 this Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, relevant portions of your service 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 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 previously submitted your case for review by the Navy Discharge Review Board (NDRB) and were granted partial relief on 17 July 2015. Specifically, NDRB noted that you served an initial period of Honorable service in the Navy from 3 May 2005 to 1 May 2010 that was not annotated on your DD 214, so the NDRB provided an administrative correction by documenting this service on a DD 215. During your first enlistment, you were arrested for driving under the influence (DUI) by civilian authorities on 6 February 2010.

You reenlisted in the United States Navy and commenced a second period of service on 2 May 2010. On 1 July 2011, you were arrested by █ Police Department and charged with “domestic violence - simple assault.” As part of that request, your spouse provided a signed affidavit complaint for domestic violence that detailed the specific conduct alleged. As a result, your command initiated administrative separation (ADSEP) proceedings by reason of “Misconduct – Commission of a Serious Offense as evidenced by █ Uniform Offense Report of 01 July 2011.” You were notified that the least favorable characterization of service that the command would pursue was a General (Under Honorable Conditions) (GEN). After consulting with qualified counsel, you elected to waive your right to an administrative separation board. On 1 September 2011, you were discharged from the Navy with a GEN characterization of service due to “Misconduct (Serious Offense)” and assigned 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 for a discharge upgrade and contentions that: (1) the Navy improperly applied MILPERSMAN 1910-142 by using a simple assault allegation as the basis for separation; (2) the military failed to substantiate the commission of a serious offense as required by MILPERSMAN 1910-142, and (3) equity and fairness requires an upgrade. For purposes of clemency and equity consideration, the Board noted that you did not provide documentation related to your post-service accomplishments or character letters.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First, the Board found that it was not improper to use the evidence in the Ocean Springs Police Department arrest report, and victim affidavit dated 1 July 2011, as the basis of separation under MILPERSMAN 1910-142, Commission of a Serious Offense. Per the MILPERSMAN, “[s]ervice members may be separated based on commission of a serious military or civilian offense when the offense would warrant a punitive discharge, per reference (a), appendix 12, *for the same or closely related offense.*” [emphasis added]. The Board highlighted that the command is not bound by the offense listed on a civilian police report, in the same way that a civilian court can change, add, or remove charges based on the underlying evidence when prosecuting a case. The affidavit provided by your spouse states “[h]e then put his hand on my neck and pushed me to the wall... he hit my head and tried to pull my hair... [I] dialed my neighbor’s number and started screaming into the phone. He followed me back into the kitchen where he put his hands on me to try to stop me... This is not the first time this happened...” Based on this evidence, the Board felt that it would be not only reasonable, but likely that you would have been charged with assault consummated by a battery had your case been referred to court martial; an offense that carries a punitive discharge per Appendix 12 of the Manual for Courts-Martial. As such, the Board concluded that it was proper to categorize your misconduct as the commission of a serious offense and the basis for separation was proper in your case. The Board highlighted that if you had an issue with the sufficiency of the basis for separation, the proper time to raise such issues would have been during the ADSEP process, however you chose to waive your opportunity to provide an argument in your defense.

Second, the Board also disagreed with your assessment that the military failed to substantiate the commission of a serious offense. Per MILPERSMAN 1910-142, “[c]ommission of a serious offense does not require adjudication by non-judicial or judicial proceedings; however, offense must be substantiated by a preponderance of evidence (e.g., *copy of police record*, Naval

Criminal Investigative Service investigation, etc.)” [emphasis added]. The MILPERSMAN specifically identifies a police record as a proper source by which to substantiate the crime. As described above, the Board found that the arrest report contained sufficient detail to substantiate the basis by a preponderance of the evidence. Again, the Board highlighted that if you were concerned about the burden of proof being insufficient, you should have raised this issue at an ADSEP Board.

Finally, the Board determined that your misconduct, as evidenced by your civil arrest for assault, supports your assigned characterization of service. You assert that, as a matter of equity and fairness, your case requires a characterization upgrade. You explain that you were never treated fairly by your command after you were charged with DUI. After the assault affidavit was filed, you contend that the command pressured you to accept punishment for the assault, including separation, despite taking no action to investigate the allegation to determine if the allegation had merit. You contend that had the military treated you fairly and allowed the matter to proceed, the case would have been dismissed by the civilian court.

Ultimately, the Board was not persuaded by your arguments and determined your assigned characterization of service remains appropriate. In making this finding, the Board considered the seriousness of your misconduct and the discrediting effect your arrest had on the Navy. The Board also felt that your command already granted you significant clemency by separating you with a GEN characterization instead of referring your case to court martial, thereby allowing you to avoid a possible criminal conviction and/or punitive discharge. As a result, the Board concluded significant negative aspects of service during your second enlistment outweighed the positive aspects and continues to warrant a GEN 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 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 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,

4/27/2023

█

Deputy Director

Signed by: █