



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. 8448-23
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.

A three-member panel of the Board, sitting in executive session, considered your application on 30 November 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 naval record, and applicable statutes, regulations, and policies.

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.

A review of your record revealed that you enlisted in the Navy and commenced active duty on 22 July 2003. On 22 March 2004, you received a page 13 warning regarding violation of article 134, underage drinking. On 17 April 2006, your commanding officer recommended that you be granted a waiver of administrative separation processing due to alcohol rehabilitation failure, which was granted. Your performance evaluation ending 15 September 2019 marked you as Must Promote and your cumulative average was above your commanding officer's summary group average. Your performance evaluation ending 21 January 2020 marked you as Early Promote and you were recommended for advancement to Senior Chief. Your first performance evaluation ending 15 September 2020 at your new command, █ marked you as promotable. On 17 December 2020, you were involved in an incident that resulted in a

civilian conviction. Along with your petition, you provided a report of an abbreviated medical evaluation dated 14 July 2021, which recommended that you be reviewed by the Physical Evaluation Board (PEB) for a hip condition. You received another performance evaluation, ending 15 September 2021, which marked you as promotable. Notably, your record does not contain any non-medical assessments or other indication that you were unable to perform the duties of your rate during this period. In fact, your performance evaluation ending 15 September 2021 marked you as promotable.

As a result of your civilian conviction, you were processed for administrative separation. You elected your right to an administrative board, for which you were appointed a lawyer. You also elected your right to be represented by an additional, civilian, lawyer. Your administrative board found that you committed misconduct as reflected by your civil conviction, and that you should be retained in service. In an undated letter, your commanding officer transmitted the results of the administrative board to Commander, Navy Personnel Command, in which he set forth his disagreement with the result of the administrative board, and he recommended that you be discharged. On 13 June 2022, Navy Personnel Command transmitted your administrative separation package to Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) for final decision. On 25 August 2022, the Acting ASN (M&RA) approved your discharge. Your final performance evaluation, through your date of discharge, 15 September 2022, was submitted upon the occasion of your separation from service, and, despite your administrative discharge due to civilian conviction, it marked you as promotable and you were issued 3.0 (average) marks. You submitted a letter with your petition from the Department of Veterans' Affairs (VA), dated 8 June 2023, reflecting that the VA awarded you a combined 90% disability rating for a variety of service connected conditions.

In your petition, you request that your record be changed to reflect that you received an active-duty retirement with an Honorable characterization of service via constructive credit for the balance of time required to accrue 20 years towards said active-duty retirement, that you receive permanent medical retirement with at least 30% disability, and that you receive any and all back pay dating back to the appropriate effective date of your medical retirement. In the alternative, you request that your case inserted into the Disability Evaluation System for evaluation as to whether you should be medically retired. You also seek "any other relief that is equitable and just." In support of your requests, you contend that your discharge was unjust and that you should have been processed through the DES and reviewed by the PEB. You assert that you were on limited duty status from July 2021, and that you were reviewed by an abbreviated medical evaluation board that recommended you be reviewed by the PEB.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, and the Board disagreed with your rationale for relief. In reaching its decision, the Board observed that, in order to qualify for military disability benefits through the Disability Evaluation System with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or the member or to the welfare or safety of other members, the member's disability imposes unreasonable requirements on the military to maintain or protect the

member, or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting.

In reviewing your record, the Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the disability evaluation system at the time of your discharge. In its review, the Board observed no evidence that you were diagnosed with any unfitting condition while you were on active duty. Despite that you were placed on limited duty during a period of service, there is no indication that anyone in your command recommended that you should be reviewed by the PEB for finding concerning a potentially unfitting condition. Further, the Board observed that limited duty status alone does not result in a finding of an unfitting condition within the meaning of the Disability Evaluation System. Indeed, the Board observed that you met or exceeded the demands of your office, grade, rank, or rating at all times during your service, and that you received, for the most part, above average fitness reports, including your final performance evaluation, which marked you as promotable with 3.0 performance marks. The Board also noted that it did not observe any recommendations by anyone in your chain of command that you be reviewed by a medical evaluation board during any of your periods of service by way of a non-medical assessment or otherwise. To the extent you rely upon findings by the VA to support your request for a disability retirement, the Board observed that the VA is a separate organization, and it does not make determinations as to fitness for service as contemplated within the service disability evaluation system. Rather, eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based without a requirement that unfitness for military duty be demonstrated.

With respect to your request that you receive constructive service credit to allow you to receive a 20-year retirement, the Board determined that there was insufficient evidence supporting your argument that your discharge was unjust and inequitable. In fact, you were afforded all rights provided by existing regulations with respect to your discharge processing, and you elected the right to an administrative board, the right to a military lawyer free of charge, and the right to be represented by a civilian lawyer at your expense. Your administrative board found that you should be retained despite their finding of commission of civilian misconduct, and neither of your lawyers submitted a letter of deficiency concerning the conduct of the Board. Thereafter, and prior to your discharge, your case was reviewed by the highest levels in the Navy Department, including the Commander of Navy Personnel Command as well as the Assistant Secretary of the Navy for Manpower and Reserve Affairs. Thus, in its review of the entirety of your petition and all supporting materials, the Board was unable to find an error or injustice in your record. 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,

12/19/2023

