



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

[REDACTED]
Docket No: 03451-16
APR 18 2017

[REDACTED]
Dear [REDACTED]

This is in reference to your reconsideration request received on 5 April 2016. You previously petitioned the Board and were advised in our letter of 14 August 2012, that your application had been denied. You submitted a second request, and your case was reviewed again and closed on 22 August 2013, for lack of new and material evidence. Your current request was reconsidered in accordance with Board of Correction of Naval Records procedures that conform to *Lipsman v. Secretary of the Army*, 335 F.Supp.2d 48 (D.D.C. 2004).

Although your application was not filed in a timely manner, your application was submitted with a new basis for relief not previously considered and the Board found it in the interest of justice to consider this new assertion. Your current application asserts that at the NJP proceedings held at the end of March 2010, you were charged under an incorrect article of the Uniform Code of Military Justice (UCMJ), that the NJP procedure violated Article 15 of the UCMJ, that the NJP proceedings were unlawful in that they violated double jeopardy, that you were not given the right to appeal the NJP, and that your Fifth Amendment rights were violated. The Board found it in the interest of justice to review your most recent application based on the new assertions. In this regard, your current request has been carefully examined by a three-member panel of the Board for Correction of Naval Records on 13 January 2017.

Your current request seeks the removal of a nonjudicial punishment (NJP) that you received in March 2010. Your previous request also sought the removal of the March 2010 NJP. Documentary material considered by the Board consisted of (1) your application; (2) any material submitted in support of your application; (3) the Advisory Opinion (AO) from Headquarters Marine Corps (HQMC) dated 24 February 2012, which considered the removal of all adverse material from your Official Military Record regarding your 31 March 2010 NJP; and (4) the Memorandum from HQMC dated 19 June 2012, which detailed the Performance Evaluation Review Board's conclusions pertaining to the fitness report for the period of 28 August 2009 to 31 March 2010. Copies of both the February 2012 Advisory Opinion and the June 2012 memorandum were previously provided to you prior to their consideration by the Board in August 2012.

After careful and conscientious consideration of the entire record, the Board determined that the assertions you provided, even though not previously considered by the Board, did not present any new or material evidence, and upon consideration on the merits of your request, were

insufficient to establish the existence of probable material error or injustice. A review of your recent application reveals that again your request must be denied. In this regard, the Board considered that you were charged at NJP proceedings on 31 March 2010, under Article 111 (drunken or reckless operation of vehicle, aircraft or vessel). The Board noted you were apprehended on 17 March 2010, for driving while intoxicated, with a blood alcohol content (BAC) of 0.146. The Board concluded that your arrest following the operation of a vehicle with a BAC of 0.146 supported the charge under Article 111. Article 15 of the UCMJ authorizes commanders to administratively discipline troops without court martial. The Board considered your assertion of a general violation of Article 15, as well as your claim of a double jeopardy violation given that you were taken to NJP while your civilian judicial proceedings were pending. You also imply that the lack of a civilian conviction should negate the guilty finding at NJP. The Board noted that a commander's ability to exercise administrative discipline is not hampered by civilian judicial proceedings and that the outcome of civilian judicial proceedings are not binding or retroactively restrictive on a previously imposed NJPs. The Board relied on the recommendation and discussion within the February 2012 HQMC Advisory Opinion. The Board noted that the Advisory Opinion stated you were given the opportunity to appeal your NJP and declined to do so. Absent contrary evidence provided by you or exhibited in your record, the Board determined that your NJP was conducted in accordance with the authority and guidance of Article 15, that the proceedings did not violate double jeopardy, and that your right to appeal was not abridged. With regard to Fifth Amendment allegations, the Board determined you did not provide evidence that a violation of your rights occurred, or evidence that you were wrongfully compelled to provide information against yourself.

The Board concluded that your new assertions are not supported by evidence in your record or by evidence provided by you, and therefore you have not established that your record contains an error or injustice that warrants removal of the adverse information (NJP and/or fitness report) from your record. Accordingly, your application has been denied.

It is regretted that the circumstances of your reconsideration petition are such that favorable action cannot be taken again. You are entitled to have the Board reconsider its decision upon the submission of new and material evidence. New evidence is evidence not previously considered by the Board. In the absence of sufficient new and material evidence for reconsideration, the decision of the Board is final, and your only recourse would be to seek relief, at no cost to the Board, from a court of appropriate jurisdiction.

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,

[REDACTED]

Executive Director