



**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. 5240-23  
Ref: Signature Date

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Dear █

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 25 April 2024. 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 29 August 2023 Advisory Opinion (AO) provided by Headquarters Marine Corp (JPL), your 14 November 2023 rebuttal, and JPL's supplemental AO dated 29 February 2024. The supplemental AO was provided to you on 1 March 2024, and you were given 30 days in which to submit a response. Although you were afforded an opportunity to submit an additional rebuttal, you chose not to do so.

The Board determined your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on the evidence of record.

The Board carefully considered your request to remove or set aside the nonjudicial punishment (NJP) of January 2020 and the NJP of June 2020. Additionally, you requested restoration of the rights, privileges, and property affected by the NJPs. Specifically, you requested restoration of grade to Corporal, return of the forfeited pay, and return of the pay differential caused by the reduction in grade. You also requested constructive credit from your separation to the end of your enlistment contract on 12 September 2021 and corresponding changes to your Certificate of Release or Discharge from Active Duty (DD Form 214). Lastly, you requested removal of all

associated derogatory entries, to include the administrative separation paperwork, and correction of the entries within the Marine Corps Total Force System (MCTFS).

The Board, having reviewed all the facts of record pertaining to your allegations of error and injustice, found as follows:

Before applying to this Board, you exhausted all administrative remedies available under existing law and regulation within the Department of the Navy.

On 22 January 2020, you accepted NJP for a violation of Article 92 (Failure to Obey Order or Regulation) of the Uniform Code of Military Justice (UCMJ). Specifically, you were charged with failing to obey a lawful order, on or about 4 January 2020, when you entered into [REDACTED], [REDACTED] “which is a restricted area per [REDACTED].” You were awarded reduction in rank to E-3, forfeiture of pay, and 45 days restriction and extra duty (suspended for six months). You declined to appeal the NJP.

On the same date, you received an Administrative Remarks (Page 11) counseling entry due to the NJP. You acknowledged the entry and declined to make a rebuttal statement. You also received a Page 11 entry wherein you acknowledged you were eligible but not recommended for promotion to Corporal for a period of six months due to your NJP. You chose not to submit a rebuttal statement.

While deployed to Kuwait, on 12 June 2020, you accepted NJP for two violations of Article 92 of the UCMJ. Specifically, you were charged with taking photos of sensitive information “while on an [REDACTED]” and making comments regarding flight location and the specific mission which was “considered secret after being briefed that such action and information [was] prohibited.” Secondly, you were charged with posting “mission-sensitive information on-line violating the contents of MARADMIN 008/17 and exposing the aircrew to danger in hostile area while forward deployed.” You were awarded reduction in rank to E-2, forfeiture of pay, and 60 days restriction (suspended). You declined to appeal the NJP.

On the same date, you received a Page 11 counseling entry regarding your violations of Article 92 by taking photographs on 29 May 2020 from the back of an [REDACTED] during a mission that was deemed secret and posting those photos on your social media “exposing the air crew, passengers, and the mission to danger while in the Area of Operation qualifying for Imminent Danger Pay.” You acknowledged the entry and declined to make a statement. You also received a Page 11 entry wherein you acknowledged you were eligible but not recommended for promotion to Lance Corporal for a period of six months due to your NJP. You chose not to submit a rebuttal statement.

Although the documents pertaining to your subsequent administrative separation are not available in your record, the DD Form 214 issued, on 2 April 2021, indicates you were discharged on 5 April 2021 with a General (Under Honorable

Conditions) characterization of service by reason of misconduct due to a pattern of misconduct and assigned an RE-4 reentry code.

On 27 July 2022, the Naval Discharge Review Board (NDRB), after a “thorough review of the circumstances that led to the discharge and the discharge process,” changed your characterization to Honorable, your narrative reason for separation to “secretarial authority” with a corresponding separation code of “JFF1,” and your reentry code to RE-1. In its review, the NDRB commented that the “charges of endangering the lives of [your] fellow Marines was unduly harsh and likely inaccurate.” Further, the NDRB noted you had nearly completed your five-year obligation with proficiency and conduct marks of 4.1/4.0 during your career. The NDRB also commented that your misconduct was “minor in nature” and “numerous senior officers support[ed your] retention or separation with an Honorable characterization.” Based on your record of service, the NDRB determined your service was “not flawless but overall was honest and faithful.”

Based on your contention the “NDRB decision was the first correction to the inequitable actions against [you],” you submitted the present request for correction to your record.

The Board carefully considered your statement, supporting attachments -- which included 16 character statements collected during the administrative separation process, the applicable references, pictures, Official Military Personnel File (OMPF) documents, and a timeline of events – and your 14 November 2023 rebuttal to the JPL AO. Specifically, the Board considered the following summarized comments and contentions:

(1) Your January 2020 NJP should be set aside/removed from your OMPF due to improprieties and erroneous actions. Specifically, you contend the following:

(a) The charge is in error because [REDACTED] is not a restricted area as defined by [REDACTED] which uses the terms “prohibited” and “non-prohibited.” “By the unambiguous language in the order and the unambiguous language of the specification written in the Unit Punishment Book, [you] could not have committed the misconduct alleged because [REDACTED] is not a restricted (prohibited) state in [REDACTED].” Further, the AO ignores the lack of specificity in the January 2020 NJP charge. You were not charged with violating the [REDACTED], in general, but you were specifically charged with violating the order by entering a restricted area of [REDACTED], and the restricted area was identified as [REDACTED]. JPL doesn’t get to “double-down on the mistake and advocate that [you are] guilty of something.”

(b) There is no language in [REDACTED] or its enclosures indicating that it “would be punitive if violated because what the enclosures required is just filling out the form.” Absent the direct language, to determine whether the order falls within the category of a “punitive” order or regulation, it must first be examined as a whole, including the purpose statement. The mission of the [REDACTED] is to publish policy and guidance for leave and liberty for all Major Subordinate Commands and Major Subordinate Elements that comprise [REDACTED] Expeditionary Force. Regulations which only supply general guidelines or advice for conducting military

functions may not be enforceable under Article 92. You contend IMEFO 1050.1J only provides general guidelines or advice. In fact, you contend most of the regulation is directed toward subordinate commanders and, to be enforceable under Article 91, the order or regulation cannot rely on subordinate commanders for implementation to give it effect as a code of conduct. In summary, you contend the Board should find [REDACTED] nonpunitive in nature because it “does not unequivocally seek to regulate individual conduct, lacks clear language mandating punitive sanctions, and ‘the general theme prevalent throughout’ is inconsistent with a finding to the contrary.” For the same reason, enclosure (3) of [REDACTED] is also not an order; it’s an enclosure and is nonpunitive for the same reasons.

(2) Your June 2020 NJP should be set aside/removed from your OMPF due to improprieties and erroneous actions. Specifically, you contend the following:

(a) The first specification is “devoid of what order [you are] alleged to have violated; therefore, it fails to state an offense and violates [your] due process rights because the “specification is constitutionally void for vagueness.” Further, you contend the “specification lacks specificity to the point of being fatally ambiguous” and that ambiguity should resolve in your favor.

(b) In response to the AO, you added that the first specification is “so confusing it would be an injustice to allow it to stand.” The charge is too vague, and the CO does not even enumerate the order you are alleged to have violated. Further, you contend there is no evidence you knew either of the pictures was sensitive or classified and clearly neither picture was classified or sensitive.

(c) The second specification does not state an offense because the order – MARADMIN 008/17 – does not exist, and, even if one assumes the Commanding Officer (CO) meant ALMAR vice MARADMIN, ALMAR 008/17 is not an order, let alone a punitive order. Even assuming ALMAR 008/17 was the correct order, that ALMAR is only a directive that provides guidance on typical social media usage and there is “nothing in the cited ALMAR that could give rise to it being considered an order one could violate and be subject to the UCMJ.” As support, you pointed the Board to its previous findings and decision in a separate case where the Petitioner sought the removal of an Administrative Remarks (Page 11) 6105 counseling entry where the entry alleged a violation of Article 92, UCMJ, for violating ALMAR 008/17.

(3) You contend the two NJPs and the mention of the NJPs should be removed from your OMPF due to injustice based upon the totality of the circumstances. Specifically, you contend that “[b]ased on the matters contained in this petition, [your] NDRB petition and board results, [your] OMPF, and any other matter discovered by BCNR in reviewing the petition,” the Board should grant relief in the form of setting aside/removing the two NJPs due to the resulting injustice. You note the Board should look to the “accurate analysis by the NDRB” that “the charges of endangering the lives of [your] fellow Marines was unduly harsh and likely inaccurate.”

Upon review and consideration of all the evidence of record, the Board determined there is insufficient evidence of an error or injustice warranting your requested relief. Without adopting

the supplemental AO's full discussion of your decision not to appeal either NJP, the Board viewed your decisions not to appeal as evidence the charges and specifications were not so ambiguous, confusing, or vague that they violated your due process rights. Further, the Board substantially concurred with the AO's comment that the written specifications were "inartful" but, noting MCO 5800.16 does not require the NJP entry to use "model charges and specifications as in courts-martial," determined the specifications were not materially erroneous or unjust. Lastly, as further evidence of your understanding of the charges and specifications at both NJPs, the Board noted you were issued Page 11 counseling entries following each NJP and rather than exercise the opportunity to explain your lack of understanding of the charges/specifications, you declined to avail yourself of the opportunity to submit a rebuttal statement. The Board concluded your argument and evidence are insufficient in establishing any violation of your due process rights.

The Board, substantially concurring with the AO, determined you have provided insufficient evidence to establish that the NJP for traveling to [REDACTED] without appropriate permission was erroneous or unjust. Noting your own "background" explanation, the Board determined your decision to self-report the interaction with the Customs Border Patrol officer indicated an understanding that your excursion into [REDACTED] was problematic and, regardless of the lack of specificity or use of the word "restricted," the Board concluded you were aware that your travel to [REDACTED] without prior approval was unauthorized. The Board further agreed with the AO's discussion that [REDACTED] does, in fact, regulate individual conduct with respect to foreign travel.

The Board further concurred with the AO's discussion regarding specification 1 of the June 2020 NJP. As crafted, the Board determined the specification provided you with adequate notice of the underlying acts that formed the basis of the NJP and concluded that any deviation from the model charge that should be used at a court-martial fell short of material error or injustice. Further, as noted in the specification, you had been briefed regarding prohibited actions and, although the specification does not specify by whom, your decision to not appeal indicated to the Board that you did not question the validity of the specification nor did you misunderstand that your actions were unauthorized.

Additionally, the Board, concurring with the AO, determined that citing to a MARADMIN in specification 2, instead of the ALMAR, is more significant than a scrivener's error but concluded it does not rise to the level of material error or injustice. On 31 March 2017, by your signature on the Page 11 entry, you acknowledged your understanding that you "must never contribute to any online effort to...violate operational security." The Board noted your contention regarding another Board panel's decision to grant relief in a separate case regarding violation of ALMAR 008/17 but, substantially relying on the JPL AOs, concluded there was insufficient evidence of an error or injustice in the specification.

Lastly, the Board was not persuaded by, nor did it agree with, the NDRB's apparent reliance on the [REDACTED] pilot's comment that "the taking of pictures while in flight is not an uncommon practice" nor the pilot's questioning of "the legitimacy of the charges levied against [you]." Simply stated, the Board did not agree with the NDRB's decision, made while stateside in non-hostile territory more than two years after the event, that the "charges of endangering the lives of

[your] fellow Marines was unduly harsh and likely inaccurate.” Although the Board does not have the application package submitted to the NDRB, a review of the information provided to this Board was insufficient to warrant such a comment that the charge was “unduly harsh and likely inaccurate.” Unlike the NDRB’s view, this Board determined your actions demonstrated a disregard for the situation, the mission, the location, and national security. The Board disagreed with the NDRB’s apparent decision to stand in the place of the commander who administered the NJP and determine that the misconduct was “minor.” Further, the Board disagreed with the NDRB decision, reached by using the same character statements reviewed by the Separation Authority, that the more appropriate characterization of service was Honorable.

Based on the available evidence, the Board concluded there was insufficient evidence demonstrating a material error or injustice to overcome the presumption of regularity attached to the official actions taken by your chain of command. The Board concluded the January 2020 and June 2020 NJPs should remain in your record and, therefore, no basis exists to grant your related requests for correction to 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,

5/20/2024

