



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

█  
Docket No. 3508-24  
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 1 August 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 3 June 2024 Headquarters Marine Corps (JPL) Advisory Opinion (AO) and your 10 July 2024 rebuttal response.

The Board carefully considered your requested relief as noted in your counsel's brief and your statement to the Board. Specifically, you requested removal of the following adverse material:

- (1) Administrative Remarks (Page 11) counseling entry [of 29 July 2022];
- (2) Report of Misconduct (ROM) [of 4 August 2022];
- (3) Nonjudicial Punishment (NJP) [of 16 December 2022];
- (4) Report of NJP [of 23 January 2023];
- (5) Fitness Report (FITREP) for the reporting period 02 November 2022 to 16 December 2022;
- (6) FITREP for the reporting period 30 April 2022 to 05 August 2022; and

(7) any other associated adverse material.

In your personal statement, you also requested reinstatement of your “rightful” promotion to Captain<sup>1</sup>, reclassification of your discharge<sup>2</sup> as “Honorable,” and removal of the “JKM-1 reenlistment code.”

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 30 June 2022, an [REDACTED], police officer conducted a traffic stop of your vehicle, and a subsequent breathalyzer revealed an alcohol content of 0.20. You were charged with driving while impaired (DWI), having an open container of alcohol in your vehicle, and reckless driving.

On 13 July 2022, a clinical counselor conducted a screening/assessment, noted his diagnostic impression was Alcohol Use Disorder, Mild, and recommended services to include early intervention sessions, individual sessions, outpatient group counseling, and aftercare services at the Substance Abuse Program for a minimum of six months following completion of the noted sessions and counseling. In his written assessment of 19 July 2022, the Clinical Supervisor stated you should maintain sobriety, in accordance with MCO 5300.17A, until the completion of services.

On 29 July 2022, Commanding General (CG), [REDACTED] counseled you concerning your alcohol-related incident on/about 30 June 2022 in which you were issued a citation for DWI, having an open container of alcohol, and reckless driving. Although provided an opportunity to submit a rebuttal, you chose not to submit a statement for inclusion in your Official Military Personnel File.

On 4 August 2022, [REDACTED], submitted a ROM as required by MCO P5800.16 (LSAM) Vol 15. He noted the circumstances giving rise to the ROM and your 29 July 2022 counseling. The CG did not recommend your separation via notification procedures as a probationary officer because “[d]espite [your] misconduct [you had] the potential for further service.”

On 5 August 2022, you were issued a change of reporting senior FITREP for the reporting period 30 April 2022 to 5 August 2022. The report was adverse and noted you were the subject of derogatory material, specifically an administrative counseling for an alcohol-related incident.

---

<sup>1</sup> The Board lacks authority to reinstate selection/promotion to Captain.

<sup>2</sup> The Board declined to consider your request to upgrade your characterization of service or change the “JKM-1” code because you have not exhausted your administrative remedies at the Naval Discharge Review Board.

On 14 October 2022, you successfully completed the required treatment plan and transitioned to aftercare services which included attending aftercare group and/or individual sessions, maintaining abstinence from alcohol and other substances, and continuing to establish sober support network/sober leisure activities.

On 20 October 2022, you failed to arrive at your appointed place of duty and, when your chain of command contacted you, you “indicated [you were] not at [your] place of duty because [you] had been heavily drinking the night prior.” Additionally, a subsequent blood test showed a blood alcohol content of 0.065.

On 28 October 2022, the ██████████, Prosecutor entered a voluntary dismissal because, “[b]ased on a review of the evidence and video, there was no basis for the stop.” The explanation also noted your alcohol concentration was 0.20. The undersigned prosecutor stated “[t]he state believes the stop should be suppressed based upon a review of the evidence.”

On 31 October 2022, the District Court granted your petition to expunge the dismissed charges.

On 1 December 2022, ██████████, notified you of his intent to impose NJP based on your violations of Article 82 (absence without leave), Article 112 (drunk on duty), and Article 133 (conduct unbecoming an officer) stemming from the 20 October 2022 incident where you were absent from your appointed place of duty “because [you] had been heavily drinking the night prior.”

On 16 December 2022, ██████████, imposed NJP after finding you absented yourself without authority from your place of duty and were incapacitated from the proper performance of your duties as a result of previous overindulgence in intoxicating liquor. The CG found your conduct, which was unbecoming an officer and a gentleman, constituted a significant departure from the standards of conduct and behavior expected of an officer of Marines. ██████████, awarded you a Punitive Letter of Reprimand (PLOR), forfeiture of pay, and restriction for a period of 60 days (which was suspended). You did not appeal the NJP or the PLOR.

On 16 December 2022, you were issued an adverse FITREP for the reporting period 2 November 2022 to 16 December 2022 which reported your NJP and noted you were “unable to serve as a role model for others due to being absent from [your] place of duty on 20 October 2022 while incapacitated due to a previous overindulgence of intoxicating liquor.”

As required by MCO 5800.16 (LSAM) Vol 15, ██████████, submitted a Report of NJP, on 23 January 2023, noting you voluntarily accepted NJP, were afforded all your rights, and submitted matters for consideration. Noting the 4 August 2022 ROM and the subsequent dismissal of the charges related to the 30 June 2022 alcohol-related incident, ██████████ stated that your second alcohol-related incident, which occurred after

completion of a substance abuse treatment program, warranted processing for administrative separation in accordance with the LSAM.

On 23 January 2023, ██████████, notified you of his recommendation for administrative separation by reason of misconduct or moral or professional dereliction as evidenced by your commission of a military/civilian offense which could be punished by confinement of six months and any other misconduct which would require specific intent for conviction. Specifically, ██████████ noted violations of Articles 86, 112, 113 (drunken of reckless operation of a vehicle), and 133 which included both the 20 October 2022 and 30 June 2022 alcohol-related incidents. You acknowledged receipt of the administrative separation notification.

On 14 February 2023, you submitted a “rebuttal to separation proceedings” requesting retention in the U.S. Marine Corps or separation with an Honorable discharge. In support of your request, you submitted character statements and a personal statement which detailed your educational and service backgrounds and accepted “responsibility for the actions which [led you] to this point today.”

On 10 March 2023, ██████████, submitted his recommendation for administrative separation.

On 13 June 2023, the Commandant of the Marine Corps (CMC) recommended the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) administratively separate you with a general (under honorable conditions) characterization of service for violating Article 113 and its corresponding Article 133. The CMC noted the violations of Articles 86, 112, and 133 may not form the basis for separation because the Articles, as applied, only impose a maximum punishment of three months of confinement and are not specific intent crimes. Further, the CMC noted that “[w]hile [your] additional misconduct does not provide a basis for separation, it demonstrates an inability to recover from the original misconduct.” Furthermore, the CMC stated the Article 113 and Article 133 violations, by themselves, demonstrated you had not potential for future service and outweigh the positive aspects of your career.

On 21 June 2023, ASN (M&RA) approved your separation with a General (Under Honorable Conditions) characterization of service.

On 27 July 2023, you were discharged with a General (Under Honorable Conditions) characterization of service by reason of misconduct with a separation code of “JKM-1.”

The Board carefully considered the following summarized contentions:

(1) The Article 112 (drunkenness and other incapacitation offenses) charge was deficient.

(a) The violation claimed you were “incapacitated” and as a result unable to perform your duties. However, incapacitation as it relates to alcohol is defined as “a state beyond drunkenness or intoxication. A person is not necessarily incapacitated merely as

a result of drinking.” In your case, you were alleged to not be drunk or intoxicated but incapacitated which is drastically different. You would not have been considered drunk nor would you be described as incapacitated, as a person deemed incapacitated (unable to form logical thoughts or make decisions) is deemed to be more than drunk.

(b) You further contend the military attorney with whom you consulted did a cursory review of the allegations or offer of NJP as he had not been appointed or detailed to represent you or form an Attorney-Client relationship. Instead, the counsel was limited in the info he was able to provide, which was the choices you had – to either accept NJP or refuse and the implications of either course of action. At no time during this initial counseling related to the NJP did a military defense counsel inform you of the term “incapacitated” or how it would have related to what you were being accused of. Therefore, you were not informed of these “nuances of certain words such as incapacitated” – neither from the military defense counsel you consulted or the Staff Judge Advocate.

(c) A service member cannot appeal the NJP itself or the charges that formed the basis for the NJP. Thus, you would not have been able to appeal the NJP based on the issue regarding the use of the term “incapacitated” as that is unrelated to the punishment imposed. Even if one could argue you could have appealed based on disproportionate punishment, you would need to have been informed of the issue, which you never were.

(2) In his recommendation that you be administratively separated, the CG did not mention the crucial fact that the charges stemming from the 30 June 2022 traffic stop had been dismissed based on the police officer creating a false official document by deliberately lying in his police report. The CMC [in the 13 June 2023 recommendation] noted the civilian charges were dismissed but failed to provide any context or amplifying details, and it is important to understand how and why these charges were dismissed. Based on the officer’s fraudulent report, it led to these charges which led to what transpired in the Marine Corps. If the police officer had not lied and if he actually had probable cause to pull you over, we would not be in this situation. Therefore, without a complete understanding of all the circumstances surround the alleged misconduct that formed the purported bases for separation, ASN(M&RA) approved the recommendation for separation with a general characterization of service.

(3) The basis for your separation was solely for the Article 113 and Article 133 violations which had initially been handled by the issuance of the counseling entry with the CG’s support for your continued service. You contend the use of the additional alleged misconduct as part of the basis for the involuntary separation without overtly stating it was unjust and improper.

(4) The actions taken by [the subsequent CG] appeared vindictive and excessive. It is clear you were not given a fair opportunity for continued service once the new CG took command. When he assumed command on 18 August 2022, it appears you may have been an officer he wanted to make an example of. This appearance was created by the way in which the alleged misconduct was adjudicated. While NJP is reserved for minor misconduct, imposing NJP for being late to work was excessive. The CG also included an allegation of Article 112 but your BAC was less than the required .08. Using the word “incapacitated” meant you were more

than drunk, which was not accurate. When comparing the alleged misconduct for which NJP was imposed to the alleged misconduct in the Page 11 counseling, it gives the appearance that [the subsequent CG] wanted to elevate your punishment.

(5) The Inspector General (IG) complaint which was investigated but unsubstantiated – likely means the CG was informed of what you had accused him of. Following the IG complaint filed in February 2023, the CG created a second recommendation for your involuntary separation, and again, while he noted the original charges from ██████████ that ignited the case, the CG again failed to make mention that the charges had been dismissed and that the police officer who initially cited you had lied.

(6) Consistent throughout the disposition and adjudication of your case within the Marine Corps was the failure to notate that the original charges that formed the purported basis for the Page 11 counseling were dismissed or even the reason why they were dismissed.

(7) Even when the military pursues administrative hearings, Boards of Inquiry (BOIs), or NJP, there are standards of proof that are still required. While there is no specificity on the required standard of proof needed to issue a negative counseling, “some evidence” is required when determining when a Marine has overcome the deficiency noted so we can presume that “some evidence” is required to issue a negative counseling. A finding of probable cause does not require the same quantum of evidence as preponderance of the evidence. Since the charges were withdrawn and dismissed based on a lack of probable cause, the counseling and all other adverse materials that have stemmed from it should be removed – to include the NJP as the purported basis for its imposition was the claim you were not in compliance with your treatment plan provided by the SACC.

(8) The two adverse FITREPs<sup>3</sup> have a myriad of issues that were not in compliance with what is required by the Performance Evaluation System Manual.

(9) When the new CG assumed command (of ██████████ he usurped the original intent of his predecessor in command by imposing NJP on you for alleged misconduct that was even more minor than an alleged DWI. Based on the roles you served in and the roles you were entrusted with, as supported in the advocacy letters submitted on your behalf, it was clear the intent of the original CG was to allow you to continue serving. However, you were ultimately separated specifically based on the same initial allegations even though they had been dismissed because a police officer created a fraudulent report and because the subsequent CG could not use the alleged misconduct from the NJP he imposed as a basis for separation.

(10) A Report of No Civilian Conviction<sup>4</sup> was never created and the fact that the charges were dismissed based on the police officer’s false official statement was rarely mentioned or properly considered.

---

<sup>3</sup> The Board, noting you have not exhausted your administrative remedies by requesting correction by the Marine Corps Performance Evaluation Review Board, declined to consider your request to remove the adverse FITREPs.

<sup>4</sup> The Legal Support and Administration Manual (LSAM) does not discuss a Report of No Civilian Conviction as an option. The types of reports are: Report of Misconduct, Report of NJP, Report of Court-Martial, Report of Civilian Conviction, and a Report of No Misconduct (when a GCMCA determines the officer did not commit misconduct.)

(11) Maintaining adverse material in your OMPF impacted your ability to progress alongside your peers who did not have adverse materials in their OMPFs.

(12) You contend three previous decisions by this Board – Docket Nos 7530-20, 6094-13, and 82-06 – provide precedent this Board should follow.

As part of its review, the Board requested JPL review your submission and provide an AO. In support of its recommendation to deny your requested relief, the AO analyzed and discussed the below arguments, ultimately recommending your request be denied because there is insufficient evidence of probable material error or injustice to overcome the presumption that the multitude of officials involved in processing your misconduct case properly discharged their official duties.

(1) Civil authorities dismissed the charge<sup>5</sup> after determining the police officer lacked probable cause for the stop. However, the court did not make a determination regarding P's BAC. While the probable cause issue prevented judicial proceedings, those same constitutional protections do not apply to administrative proceedings. ██████████, could utilize the .20 BAC to determine, based on a preponderance of the evidence, that you committed misconduct for which counseling was appropriate. Similarly, there was sufficient evidence upon which the CG could determine you committed misconduct and report that finding as required by the LSAM. Further, to the extent, if any, the DWI influenced the decision to impose NJP, it was a proper item for command consideration. Lastly, it bears repeating that your NJP was based on the October conduct vice the June 2022 DWI arrest, and the October conduct was of sufficient magnitude to warrant NJP.

(2) NJP is an administrative action that uses the preponderance of evidence standard for the disposition of a case; it does not require the precision associated with a court-martial or civilian criminal trial. You were properly notified of the offense, your right to seek counsel, the right to refuse NJP, your right to appeal NJP, and punishment was imposed based on your admission of culpability. That your choices resulted in outcomes you find unfavorable or that a court-martial may have taken issue with the text of the specifications is not a basis for relief. The record contains sufficient information upon which the CG could determine you committed misconduct and report that misconduct.

(3) Nothing binds a successor in command prior to a final action that retains an officer on active duty. To the extent informal deference is due the prior CG's decision, it was overborn by your later misconduct.

(4) The separation authority was aware the civilian charges were dismissed. The basis for the dismissal is not material to separation processing. Further, you could have highlighted the dismissal detail in your response to the separation notice vice submitted a letter in which you took responsibility for your actions and did not deny what had occurred.

In rebuttal to the JPL AO, you contend the AO ignores the issues raised in your petition and submit the following summarized rebuttal points:

---

<sup>5</sup> The Board noted the AO erroneously stated civil authorities dismissed the court-martial charge.

(1) The AO fails to explain why the state court dismissed the charges. Charges were not dismissed simply because there was a “minute issue” in the case. They were dismissed because an officer of the law created and submitted a false official report and the state of [REDACTED] deemed the entire report to be fruit of the poisonous tree, leading to the dismissal. Yet the AO is silent on this incredibly important detail of the underlying facts for why charges were dismissed.

(2) The court did not need to comment specifically on the BAC since the initial stop that led to the BAC was deemed to have been unlawful, thus anything resulting from the unlawful stop is also dismissed.

(3) The AO notes the state court’s resolution is not binding on the command nor the Marine Corps. The command determined a Page 11 counseling was appropriate without further processing whether through separation proceedings via notification or by ordering you to show cause for retention at a BOI – both of which would have been available options to the CG at the time. However, by only issuing a Page 11 without further action, it gives the appearance that perhaps the underlying misconduct of an officer of the law was considered when determining what was most appropriate in your case.

(4) The term “incapacitated” in the NJP charge was in error and not supported by any of the relied-upon documents when offering the NJP. Your 0.065 BAC does not meet the threshold for either being “incapacitated” or “drunk” therefore there was nothing to support the claim nor was there any evidence to support that you were even drunk let alone incapacitated. Further, there was also zero evidence you were ill as a result of consuming alcohol thus the language “incapacitated” renders the charge deficient, inserting error into the record.

(5) The conversation with a military defense counsel was solely regarding your ability to either accept NJP and plead guilty or refuse NJP and demand trial by court-martial. There were no details regarding any issues with the charges based on the evidence, options on pleading not guilty at NJP, or specifics on options the command would have if you refused NJP (because when a service member refuses NJP and “demands court-martial” it does not mean that the CA will pursue court-martial). You were not advised of these details, let alone the glaring issue with how this particular charge was captured. The AO relies on this to support its position you made your choice with a full understanding of its consequences – but that isn’t the case. You do not have a legal background but simply relied on a service member who did to provide you all of the details that you have only later learned.

(6) Furthermore, the initial offer of NJP was drafted by the Staff Judge Advocate (SJA), the legal advisor to the command and CG who imposed NJP. This SJA failed to ensure all legal matters were accurate when he included the term “incapacitated” that was simply not supported by the evidence.

(7) The AO, highlighting that you didn’t raise these legal issues in your response to



the recommendation or notification of separation, is placing the blame solely on you – someone who does not have a legal background nor fully understands the ramifications. Further, you did not have legal representation or any military defense counsel assigned to represent you because when a probationary officer is merely notified of separation without the opportunity for a BOI, they do not rate legal counsel.

After a careful review and thorough consideration of the record and your contentions, the Board determined there was insufficient evidence of an error or injustice warranting your requested relief. Specifically, the Board substantially concurred with the AO's analysis regarding the traffic stop on 30 June 2022. In its review, the Board noted the court documents provided by you for consideration never indicate the police officer lied or fabricated evidence to support the traffic stop. The available evidence only establishes that the prosecutor, based on his review of the evidence and video, determined "there was no basis for the stop" and "believe[d] the stop should be suppressed based upon a review of the evidence." The Board, noting the same documentation states you had an alcohol concentration of 0.20 and further, that nowhere in the evidence have you denied you were drinking or had an open container of alcohol in the vehicle, substantially concurred with the AO and concluded that "[w]hile the probable cause issue prevented judicial proceedings [by the civil authorities], those same constitutional protections do not apply to administrative proceedings." Specifically, the Board determined the subsequent dismissal of the charges by the civil authorities did not make the CG's decision to utilize the 0.20 BAC in determining you committed alcohol-related misconduct an error or injustice. The Board concluded the Page 11 counseling, which was the "catalyst for the remaining alleged misconduct" was supported by the evidence and not in error or unjust.

Having determined there was sufficient evidence to support the Page 11 counseling, the Board considered your contentions regarding the administrative actions that flowed from the alcohol-related misconduct. The Board found no error or injustice in the submission of the ROM which was required by the LSAM. Further, the Board concurred with the AO that the CG's decision, at the time of the ROM, to recommend retention was not binding on the subsequent CG, especially in light of the fact you committed additional alcohol-related misconduct while in aftercare treatment.

The Board also substantially concurred with the AO's discussion of the NJP process. The Board noted the CMC's explanation that when your chain of command contacted you, you indicated you were not at your place of duty "because [you] had been heavily drinking the night prior." Further, the Board noted a subsequent blood test – presumably taken after your absence from your place of duty ended at approximately noon – showed a blood alcohol content of 0.065. Relying on the AO, the Board determined NJP, which is an administrative action that uses the preponderance of evidence standard, does not require the precision associated with a court-martial or civilian criminal trial. Additionally, the record indicates you were properly notified of the offense, your right to seek counsel, your right to refuse NJP, and your right to appeal the NJP and/or the punishment imposed. The Board further noted the record – to include your present submission – does not dispute that you, an Officer of Marines, was absent from your appointed place of duty due to an overindulgence of alcohol – or by your statement "heavily drinking the night prior" – requiring the chain of command to reach out to determine your status. The Board determined your argument over the word "incapacitated" was not persuasive and concluded the

record contains sufficient information upon which the CG could determine you committed misconduct. Therefore, the Board concluded there was insufficient evidence of an error or injustice in the CG's decision to impose NJP, his choice of punishment, his required submission of a Report of NJP, and his recommendation for separation via notification procedures.

Faced with a second alcohol-related incident after completion of counseling services and during participation in aftercare services as part of the Substance Abuse Program, the Board concurred with the CG's determination to recommend administrative separation via notification procedures. Noting all known misconduct should be included, the Board determined it was not error or unjust for the current CG to include the misconduct that his predecessor adjudicated with counseling and without recommending separation. Additionally, the Board noted that the ROM submitted after your first alcohol-related incident had not been reviewed by the separation authority so a final determination had not been made concerning the repercussions of your misconduct. Further, as noted above, the Board found no evidence in the record to support your repeatedly emphasized contention the police officer lied and/or fabricated a story/evidence to support his traffic stop. The Board found no error or injustice with the CG's or CMC's explanation of the 30 June 2022 alcohol-related incident and the civil authority's dismissal and expungement of the charges. The Board noted you availed yourself of the opportunity to submit matters in rebuttal to the CG's recommendation which included a detailed personal statement and ten statements lauding your good character. The Board concluded there is insufficient evidence to overcome the presumption that the multitude of officials involved in processing your misconduct case properly discharged their official duties.

The Board also considered the noteworthy past decision of the Board but, even assuming the fact patterns and issues are the same, noted the current Board is not bound by precedent.

Additionally, the Board considered your contention the actions taken by the subsequent CG were vindictive and excessive. However, the Board determined insufficient evidence exists to support such a finding. Thus, the Board determined there was insufficient evidence to conclude you were the victim of reprisal in violation of 10 USC 1034. 10 USC 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 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.

Lastly, the Board noted that although you indicated "Other Mental Health" in block 14 of the DD Form 149 as an issue/condition related to your request, you did not provide explanation or evidence or a contention the misconduct was due to your mental health status.

As a result, the Board concluded there was insufficient evidence demonstrating a material error or injustice warranting a change 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,

8/22/2024

