



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. 4882-24
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 21 May 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.

The Board carefully considered your request to remove the 21 February 2023 Report of Non-judicial Punishment (NJP), Report of Civilian Conviction, Punitive Letter of Reprimand, and adverse material related to the NJP. You also request to remove the fitness report for the reporting period 1 November 2022 to 6 December 2022 and promotion to first lieutenant (1stLt/(O-2) effective 27 March 2023. The Board considered your contention that the documents should be removed based on the voluntary dismissal by the state court. You also contend that the command had the option to wait on the court's finding instead; you were notified of the intent to impose NJP for Article 133, Uniform Code of Military Justice (UCMJ). You assert that the adverse material formed the basis for the denial of your promotion, however the General Officer chain of command did not recommend separation, supported your retention and potential for future service, and you received positive endorsements. You claim it was the intent of the chain of command that you remain in the Marine Corps and be promoted with your original date of rank. In support of your request, you cited two previous Board cases: Docket No. 6094-12 and Docket No. 82-06.

The Board noted that on 28 October 2022, you were arrested and charged with Driving While Impaired (DWI), Reckless Driving to Endanger, and "Conceal Handgun Permit Violation." The

Board also noted that you received NJP on 6 December 2022, for violating Article 133, UCMJ for driving under the influence and having a concealed handgun while under the influence of alcohol. You accepted NJP, pled guilty, the Commanding General, Second Marine Division (CG, 2d MarDiv) found you guilty at NJP, awarded a Punitive Letter of Reprimand, and you did not appeal the NJP. According to the *Manual for Courts-Martial* (MCM) (2000 ed.), the nature of Article 133 is conduct that is likely to seriously compromise an officer's standing. Moreover, "A military officer holds a particular position of responsibility in the armed forces, and one critically important responsibility of a military officer is to inspire the trust and respect of the personnel who must obey the officer's orders. Conduct in violation of this article is . . . action or behavior in an unofficial or private capacity that, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. This article includes misconduct that approximates, but may not meet every element of, another enumerated offense." The Board determined that you were properly charged with violating Article 133, UCMJ, your CG acted within his discretionary authority, and conducted your NJP pursuant to the MCM. The Board also determined that your CG relied on a preponderance of the evidence that included the police report and your guilty plea when finding you guilty.

Concerning your contention that the CG had the option to wait on the court's finding, the Board determined the CG had no obligation to wait on the court's findings before imposing NJP. In fact, paragraph 0124 of the Judge Advocate General Manual (JAGMAN) limits a Commander's ability to refer charges or impose NJP after an individual has been tried in civilian court. According to the JAGMAN, "[when] a person in the Naval service has been tried in a state or foreign court . . . military charges shall not be referred to a court-martial or be the subject of NJP for the same act or acts, except in those unusual cases where imposition of NJP is considered essential in the interest of justice, discipline, and proper administration within the Naval service." Thus, the CG's decision to impose NJP prior to your plea agreement was not an error or injustice.

The Board noted on 23 February 2023, you pled guilty in civilian court to reckless driving in exchange for dismissal of the DWI charge. On 16 March 2023, the CG, █ MarDiv submitted a Report of Civilian Conviction documenting your conviction for reckless driving and the circumstances that brought about the requirement for the report. The Board determined that the Report of Civilian Conviction was issued in accordance with the Marine Corps Legal Support and Administration Manual (LSAM). In this regard, the LSAM requires a Report of Civilian Conviction in all cases when an officer is convicted in civilian court. A Report of Civilian Conviction is also required even in cases where the officer *pleads to a lesser offense*, receives a deferred prosecution, receives a probation in judgment, participates in a court-sanctioned diversionary program that permits the subsequent dismissal of the charge, or similar cases. The Board also determined that your contention regarding "voluntary dismissal by the state court" appears inaccurate. According to the Prosecutor's Dismissal and Explanation document, the charge for DWI was only dismissed because you agreed to plead guilty to a lesser offense. As provided above, pleas to a lesser offense requires the submission of a Report of Civilian Conviction.

Concerning your request for promotion, the Board noted that you were properly notified that your promotion was delayed, and your name removed due to potentially adverse information. On 7 September 2023, you were notified that the Commandant of the Marine Corps (CMC) determined you are not qualified for promotion. The Board also noted the favorable endorsements by your

chain of command, however, the CMC is the promotion authority and he properly removed your promotion in accordance with SECNAVINST 1420.6M. The CMC is responsible for establishing procedures to review and recommend appropriate action on all cases involving adverse or reportable information. The CMC is also the authority for establishing procedures for administering the appointment, promotion, delay of promotion, retention, or discharge of second lieutenants. In addition to determining those officers who are fully quailed for promotion to the grade of O-2. The Board determined that the CMC properly considered your adverse material and all related endorsement when finding you unfit for promotion.

Concerning Docket No. 82-06 and 6094-12, the Board noted the circumstances of each case and determined that all cases are decided on the unique merits of the case. In this regard, the Board found no similarities between your case and those cited in your application. The Board thus concluded that there is no probable material error, substantive inaccuracy, or injustice warranting corrective action. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Concerning your request to remove your fitness report, the Board determined that you have not exhausted your administrative remedies. In accordance with the Marine Corps Performance Evaluation System Manual, the Performance Evaluation Review Board (PERB) is the initial agency for fitness report appeals; therefore, you must submit your request to the PERB prior to this Board taking any action on your request.

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,

6/6/2024

