



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. 5817-24
Ref: Signature Date

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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 10 September 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, to include the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). In addition, the Board considered the 8 July 2024 advisory opinion (AO) furnished the Marine Corps Military Personnel Law Branch (JPL). Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will 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.

The Board carefully considered your request to remove the [25] October 2022 Administrative Remarks 6105 (Page 11) counseling entry, rebuttal statement, and promotion restriction entries. You also request promotion to lance corporal (LCpl/E-3), your characterization of service be changed to Honorable, and a RE-1 reentry code. The Board considered your statement and contention that the corrections to your record are warranted because the Command Inspector General (CIG) took action on your complaint. You also contend your discharge was a reprisal based on false statements and accusations. You claim your command punished you with weekend duty for more than six weeks and placed you on promotion restriction with a

counseling entry until you filed the CIG complaint. You also claim that you were coerced to sign a document that supposedly gave the Company First Sergeant authority to search your car, but you did not understand there were other requirements. You further claim that you were subjected to “Cats Paw” and “Work Place Mobbing.”

The Board noted that you received NJP, on 28 April 2022, for consuming alcohol under the legal age of 21 and having a .261 percent blood alcohol concentration (BAC). Pursuant to the Marine Corps Separation and Retirement Manual (MARCORSEPMAN), you were issued numerous 6105 page 11 entries. Specifically, on 14 October 2022, you were counseled for failing to obey an order by the Company Commander not to consume alcohol during travel from ██████████. In your statement, you admitted to taking the risk and ordering drinks at a bar in ██████████, while also being underage. On the same date, you were notified that you are not recommended for promotion to LCpl for three months. On 25 October 2022, you were counseled on underage drinking. The entry also noted that during an authorized search of your vehicle, the Company First Sergeant found an open container of alcohol. In your statement, you claimed the bottle belonged to a close friend. On the same date, you were notified that you are not recommended for promotion to LCpl for three months.

On 7 December 2022, your CO notified you of his intent to recommend administrative separation proceedings, for a pattern of misconduct; citing the 25 October 2022 counseling and for being found guilty of violating Article 92, UCMJ.

On 30 March 2023, you were counseled for failing to comply with pre-trial restriction check in on 22 March 2023 and 25 March 2023. On 10 April 2023, you were counseled for failing to comply with pre-trial restriction check-in on 8 April 2023 and for being under the influence of alcohol, as evidenced by a fit for duty screening indicating a .185 percent BAC.

On 10 April 2023, you acknowledged your rights during separation proceedings and indicated that you “do NOT” request a hearing before an Administrative Separation Board. On 11 April 2023, your CO recommended you be administratively separated with an Other Than Honorable characterization of service. As justification, the CO cited your documented misconduct on 30 September 2022, 20 March 2023, and 8 April 2023. Acting within his lawful discretionary authority, the Commanding General (CG), Second Marine Division, approved your discharge with a General (Under Honorable Conditions) characterization of service, separation code JKA1-pattern of misconduct, and RE-04 reentry code. On 24 April 2023, you were so discharged.

Regarding your request to remove the 25 October 2022 counseling, the Board substantially concurred with the AO that your Commanding Officer’s (CO’s) use of a formal counseling on 25 October 2022 was proper. In this regard, the Board noted that the entry referenced Marine Corps Alcohol and Beverage Control order that provides guidance on the minimum age to possess or drink alcoholic beverages. The entry also documented the authorized search of your vehicle and open container found by the Company First Sergeant. You acknowledged the counseling entry and availed yourself of opportunity to submit a statement. The Board determined the contested counseling entry was written and issued according to the MARCORSEPMAN. Specifically, the entry provided written notification concerning the aforementioned deficiencies, specific recommendations for corrective action, where to seek

assistance, consequences for failure to take corrective action, and it afforded you the opportunity to submit a rebuttal. Moreover, your CO signed the entry, and acted within his lawful discretionary authority when determining your misconduct was a matter essential to record; as it was his/her right to do. Other than your statement, the Board found no evidence that the search of your vehicle was unlawful.

Concerning the removal of your promotion restriction, the Board determined that your page 11 entries not recommending you for promotion are valid and issued in accordance with the Marine Corps Enlisted Promotion Manual and Individual Records Administration Manual (IRAM). In this regard, the IRAM requires commanders to make a record book entry for privates through corporal not recommended for promotion and after counseling a Marine for any alcohol-related misconduct or unsatisfactory performance. Concerning promotion to LCpl, the Board substantially concurred with the AO that promotion to LCpl is not automatic. According to the Marine Corps Enlisted Promotion Manual, "Marines in the grades of PFC and LCpl are required to exercise an ever-increasing degree of maturity, leadership, and professionalism. No Marine shall be promoted to PFC or LCpl who has not demonstrated these traits . . ." In accordance with policy, the decision to promote to the grades of private first class through sergeant rests solely with designated commanders and the commander must determine if the Marine is qualified for promotion. The Board determined that your CO's acted within his discretionary authority when finding you unqualified for promotion.

Regarding your request for a discharge upgrade, the Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo. These included, but were not limited to, your desire for a discharge upgrade and previously discussed contentions. For purposes of clemency and equity consideration, the Board noted you provided a personal statement and documents from your record but no documentation describing post-service accomplishments or advocacy letters.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant a discharge upgrade. Specifically, the Board determined that your misconduct, as evidenced by your NJP and multiple counseling entries, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Further, the Board observed you were given multiple opportunities to correct your conduct deficiencies and chose to continue to commit misconduct. Therefore, the Board determined you were fortunate to receive a General (Under Honorable Conditions) characterization of service. Finally, the Board noted the correspondence from the CIG indicating that "appropriate action was taken;" however, the Board determined that the CIG correspondence does not indicate any instances of misconduct or impropriety by your command. The Board also determined that the "appropriate action" by the CIG does not change the nature or seriousness of your documented misconduct; which formed the basis for your administrative separation. Additionally, other than your statement, the Board found no evidence that you were subjected to "Cats Paw" or "Work Place Mobbing."

You also indicate in your application that you are the victim of reprisal due to false statements and accusations. The Board, however, determined that there was insufficient evidence to

conclude that your separation was processed as reprisal in violation of 10 U.S.C Section 1034. In making this determination, the Board noted that you filed a CIG complaint and the CIG took appropriate action; however, there is no evidence, other than your statement, that your administrative separation was processed as a reprisal action due to false statements and accusations. Moreover, the Board relies on a presumption of regularity to support the official actions of public officers, in the absence of substantial evidence to the contrary, the Board will presume that they have properly discharged their official duties. The Board found your evidence insufficient to overcome this presumption. Therefore, the Board was not persuaded by your contentions and determined that your administrative separation for a pattern of misconduct is valid.

As a result, the Board concluded significant negative aspects of your service outweigh the positive aspects and continues to warrant a General (Under Honorable Conditions) characterization. Even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants granting you a discharge upgrade or granting an upgrade as a matter of clemency or equity.

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.

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, ██████████. 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.

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.

Since you were discharged after December 20, 2019, you have the right to appeal the Board's denial of your requested upgrade of the characterization of your discharge or dismissal to the Department of Defense Discharge Appeal Review Board (DARB). Pursuant to Section 1553a of Title 10 of the United States Code, the DARB's review is limited to conducting a final review of a request for an upgrade in the characterization of a discharge or dismissal. All DARB requests must be submitted through the Air Force Review Board Agency eApplication Portal (<https://afriba-portal.cce.af.mil>). The DARB will have access to and review the facts of your previous Board case. Please do not submit any new evidence in support of your request to the DARB as this will result in their administrative closure of your application. The DARB is the highest administrative level of appeal for a request to upgrade the characterization of a discharge or dismissal and their decisions are final.

Sincerely,

