



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

█  
Docket No. 7848-24  
Ref: Signature Date

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Dear Petitioner:

This letter is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. After careful and conscientious consideration of the entire record, the Board for Correction of Naval Records (Board) found the evidence submitted was 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 19 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.

The Board considered your request for removal of a Report of Misconduct (ROM) dated 11 August 2023 and Administrative Remarks (Page 11) counseling dated 11 August 2023 from your official military personnel file (OMPF). Regarding your request to remove your fitness report for the reporting period 1 June 2023 to 3 May 2024, the Board noted that you have not exhausted your administrative remedies. The Headquarters Marine Corps Performance Evaluation Review Board (PERB) is the initial action agency for fitness report appeals, therefore, pursuant to the Marine Corps Performance Evaluation Section Manual, you must first submit your petition to remove the contested fitness report to the PERB.

The Board considered your contentions that you did not commit the misconduct alleged in the Page 11 and ROM, that your actions were not in violation of the Uniform Code of Military Justice (UCMJ), and that you were exercising your constitutional rights. The Board also considered your entire personal statement, to include your contention that charges dismissed in civilian court by motion of *nolle prosequi* and are now expunged from your civilian record. Lastly, the Board considered your assertions that it is fundamentally unfair to suffer military consequences for an action that has been expunged by all other authorities.

The Board noted that on 22 January 2023, in the City of ██████████, ██████, you were arrested for Public Intoxication and Drinking in Public, a Class 4 misdemeanor, by a uniformed police officer on patrol who observed you appearing to hold a beer bottle while on a public sidewalk of a city street. According to the Reporting Officer's Narrative, the police officer approached you and asked you to come over and talk to him. Disregarding the police officer's order, you turned away and ran. A foot chase ensued. You eventually fell enabling the police officer to catch you and place you under arrest.

As a result of this incident, on 11 August 2023, the Commanding General (CG), ██████████ ██████████ issued you a written counseling for conduct unbecoming an officer. The same day, the CG submitted a ROM and determined your public drunkenness and attempt to flee from a duly authorized police officer in the performance of his duties constituted conduct unbecoming an officer in violation of Article 133, of the UCMJ. On 16 October 2023, the CG, ██████████ after reviewing the ROM and underlying evidence, concurred with your CG's recommendation and determined that that your actions were not in keeping with the high standards of conduct and performance expected of Officers of Marines. The CG, ██████████ recommended that you not be required to show cause for retention in the Marine Corps at a Board of Inquiry (BOI) pursuant with SECNAVINST 1920.6D, but that all adverse material should be placed in your OMPF. On 2 January 2024, the Deputy Commandant for Manpower and Reserve Affairs (DC, M&RA), designated as the Show Cause Authority for the Marine Corps, reviewed the information provided and determined, while adverse, it did not warrant processing for administrative separation and directed that your case be closed and that any adverse material concerning the matter be included in your OMPF.

In regard to your contention that the incident was dismissed and expunged from your civilian record, the Board determined you provided insufficient evidence that the misconduct alleged did not occur. The Board noted in your 24 August 2023 response to the ROM, you admit that you were not thinking clearly due to the late hour, the fact that you had been drinking, and that you ran when the police officer called you over. Additionally, the Board noted that military and state justice systems are separate and concurrent jurisdictions, and each retains the independent prerogative to charge and try members. Because each system has independent jurisdiction, they may reach differing conclusions. The Board further noted a *nolle prosequi* simply acts as an indefinite adjournment to the case and does not amount to an acquittal or prove your innocence. Therefore, the Board noted the fact that the ██████████ court agreed to dispose of your charges with a *nolle prosequi* and later agreed to expunge the charges on 28 September 2023, it does not negate the evidence that you were arrested for Public Intoxication and Drinking in Public nor does it invalidate the CG's decision to issue you a written counseling or ROM.

The Board considered your contention that your actions were not in violation of the UCMJ and that you were exercising your constitutional rights. However, the Board determined you provided insufficient evidence to support this contention. The Board noted upon review of the available evidence, the CG determined there was sufficient evidence that the citizen-police interaction was not a consensual encounter, but instead it was the result of a police officer making observations of your unusual conduct, which you admit to engaging in, that led the officer to reasonably conclude that an investigative stop was necessary, as was his right to do. The CG further noted, and the Board agreed, that the alcohol-related incident and your personal

conduct on 22 January 2023, surpassed the expectations of an officer and constituted conduct unbecoming an officer in violation of Article 133, UCMJ.

The Board, upon consideration of all of your claims and review of the available evidence and facts, determined you provided insufficient evidence to support your claim of error and injustice. The Board substantially concurred with the CG's determination that you committed the misconduct documented in the Page 11 and ROM. The Board noted that, pursuant with MCO 5800.16, Legal Support and Administration Manual (LSAM), if the General Court Martial Convening Authority determines an officer did commit the misconduct alleged, he must notify the Commandant of the Marine Corps (CMC) of his or her conclusion and forward a ROM to the CMC. Moreover, the Board noted, pursuant with the LSAM, all alcohol-related incidents must be reported and that an officer involved in an alcohol-related incident will receive a formal written counseling pursuant with paragraph 3005 of MCO P1070.12K, the Marine Corps Individual Records Administration Manual (IRAM). The Board noted that the contested counseling provided written notification concerning your deficiencies and it afforded you the opportunity to submit a rebuttal. You acknowledged the counseling and indicated in your rebuttal statement that this was an isolated even in which you deeply regret the decisions as well as your disappointment in allowing yourself to make such a poor decision. Moreover, the Board noted your CG, in issuing the counseling, determined that your misconduct was a matter essential to record, as it was her right to do.

The Board determined the available evidence supports the CG, relying on a preponderance of evidence, and acting within her discretionary authority, issued the contested counseling and ROM in accordance with relevant policies. Moreover, the Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. The Board determined the evidence you provided was insufficient to overcome this presumption. 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,

10/16/2024

