



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. 8536-24
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 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.

The Board carefully considered your request to remove the 7 December 2023 Unit Punishment Book (UPB)/Non-judicial Punishment (NJP) and associated Administrative Remarks 6105 (Page 11) counseling entry. You also request to remove your fitness report for the reporting period 1 August 2023 to 7 December 2023. The Board considered your contentions that the Military Police (MP) had a biased opinion and did not take into consideration your medications and medical conditions. You also contend the command did not act in your best interest and you were punished prior to dissolution by the off base court, which dismissed the charges without prejudice. You claim that you took prescription medications on the evening in question, which causes drowsiness and are not controlled substances. You further contend that the combination of your medical conditions invalidates the field sobriety tests. You argued that there is no video or photographic evidence to substantiate claims of empty beer cans and other alcohol containers, possession of empty cans is not illegal or criminal, and the odor of alcohol beverages cannot be substantiated because the odor of alcohol does not indicate how much alcohol a person has consumed, what type of drink they had, or even if they are intoxicated. You also argue that there is no substantial basis to charge you for violating Uniform Code of Military Justice (UCMJ), Article 113 because there are no chemical test results to support the charge. Additionally, there is absolutely no evidence of reckless driving, nor was there any erratic or dangerous driving

mentioned in the report. As evidence, you provided medical documents and a list of medications.

The Board noted that you received NJP for violating UCMJ, Article 113 for operating a vehicle while being impaired by alcohol consumption, and Article 92 for operating a vehicle while possessing a bottle of hard liquor approximately halfway full, in violation of California Vehicle Code 23222. The Board also noted that you acknowledged your Article 31, UCMJ Rights, acknowledged that you were afforded the opportunity to consult with a military lawyer, you accepted NJP, and did not appeal your Commanding Officer's (CO's) finding of guilt. The Board found no evidence of error and determined that your NJP was conducted pursuant to the *Manual for Courts-Martial* (2023 ed.). The Board also determined that your CO acted within his lawful discretionary authority and relied upon a preponderance of evidence that included the MP Report.

The Board also noted that pursuant to paragraph 6105 of the Marine Corps Separation and Retirement Manual (MARCORSEPMAN), you were issued a 6105 entry counseling you for receiving Battalion NJP for violation of Article 113 (Drunken or reckless operation of a vehicle, aircraft, or vessel) and Article 92 (Failure to obey order or regulation). The Board also noted that you acknowledged the entry and elected not to make a statement. The Board determined that the contested entry was written and issued according to the MARCORSEPMAN. Specifically, the entry provided written notification concerning your deficiencies, specific recommendations for corrective action, where to seek assistance, the consequences for failure to take corrective action, and it afforded you the opportunity to submit a rebuttal. Moreover, your commanding officer (CO) signed the entry, and determined that your misconduct was a matter essential to record, as it was his/her right to do.

The Board considered the MP Report documenting the 15 October 2023 random vehicle search. The MP Report states that you were instructed to exit the vehicle and you stumbled out of the vehicle while bracing yourself against the truck door in order to maintain your balance. While conducting the search, MP E. and MP W. observed a grocery bag hanging on the steering column gear shifter, which contained three empty beer cans. There was a small half-empty bottle of hard liquor in the cup holder, and a nearly empty flask that gave off the odor of alcoholic beverages. The MP Report also noted the MP's determination, based on your performance during the field sobriety test, that you were impaired and unable to operate a motor vehicle safely. The MP Report further noted that you refused to provide a breath or blood test to determine your blood alcohol concentration (BAC) and you made the spontaneous utterance, "it was my fucking choice to drink and drive through the fucking gate." Based on the MP Report, the Board found no evidence that the MPs were bias. In the Board's opinion, the MP Report demonstrates that the MPs properly executed a lawful search of your vehicle and your behavior, empty alcohol containers, and failed sobriety tests were sufficient to reasonably conclude that you were under the influence and unable to safely operate a vehicle. The Board found your contentions and evidence regarding medication unconvincing and not supported by the evidence.

Concerning your assertions regarding sufficient evidence to support the UCMJ, Article 113 violation, the Board determined that NJP is not a criminal trial. As such, the standard of proof by which facts must be established at NJP is a preponderance of the evidence, rather than

"beyond a reasonable doubt," as it is at courts-martial. Therefore, no video or audio recordings were required to find you guilty. The Board noted that you were afforded an opportunity to provide a breath or blood test to determine your blood alcohol concentration (BAC), but you refused. Therefore, the Board determined your CO properly relied on the existing evidence to make his findings. Concerning the purported dismissal of your charges, the Board found your evidence inconclusive, regardless of the outcome in your civil case; the Board determined that a decision by a civilian court is not binding on a CO's authority to impose NJP. Moreover, a conviction for driving under the influence is not an element of UCMJ, Article 113 and according to section 0124, of the Manual of the Judge Advocate General; NJP may be imposed at any time *before* adjudication by a civilian court.

The Board noted that during the adjudication of your misconduct, you were afforded opportunities to either appeal your NJP or provide statements in mitigation or rebuttal to your counseling entry and fitness report; but you elected not to. The Board determined that your consistent election not to provide any statements in mitigation of your misconduct indicates that you conceded to the underlying adversity. 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. 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,

9/26/2024

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