



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. 9247-24
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 24 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 your 8 February 2023 Administrative Remarks (Page 11), rebuttal statement, 15 May 2023 Report of Misconduct (ROM), and all related adverse material. You also request promotion to first lieutenant (1stLt) effective 20 November 2023. The Board considered your assertion that correction is warranted due to the voluntary dismissal by a state court of the alleged driving while intoxicated (DWI) charge because you were under the legal limit, and the negative effect of these materials. You contend:

- (1) The command had the option to wait for the civilian court proceeding but did not.
- (2) The counseling referenced the initial portable breath test (PBT) results of .11 percent, which was unfair and disingenuous. A PBT is not reliable, which is why they are not admissible in █ state court. The breath test at the police station, showed you were under the legal limit, and led to the charge being dismissed. To keep the page 11 that led to the ROM and subsequent entries exaggerates the alleged misconduct.

(3) The Commanding General, ██████████ and ██████████ agreed that you had the potential for future honorable service and you should be retained based on your performance up to that point. Additionally, your chain of command expressed that your performance has been exemplary, and you are qualified for promotion to 1stLt.

(4) The adverse material is the basis for the denial of your promotion and the fact that you have already been denied reconsideration. This threatens your ability to continue serving. The adverse material should be removed, as it is the spirit and intent of your entire chain of command.

(5) You cited two previous Board cases: Docket No. 6094-13, in which a Petitioner was issued a revocation letter and two Page 11 entries for unsubstantiated misconduct. Specifically, for lacking the integrity and moral courage to make the unpopular decision to prohibit his unit from consuming alcohol and denying off base liberty. The Board granted relief. Part of the basis for your counseling was a claim that you had driven while impaired; that charge was withdrawn and dismissed when it was discovered that your BAC was under the legal limit. Docket No. 82-06, in which a Petitioner argued to remove the delay of promotion letter because he was acquitted at a court-martial for the alleged misconduct. The Board granted relief because it would unfairly prejudice to the Petitioner. Like that, Petitioner retaining the adverse material would adversely prejudice you.

The Board noted that pursuant to paragraph 3005 of the Marine Corps Individual Records Administration Manual (IRAM), you were issued a Page 11 entry counseling you for violating Article 133, Uniform Code of Military Justice (UCMJ) for poor judgment when you decided to operate a motor vehicle while impaired by alcohol in willful and wanton disregard for the rights and safety of others. The entry noted the citation for driving 51 miles per hour (MPH) in a 35 MPH zone, subsequent failure of a field sobriety test, and preliminary breathalyzer test on scene of .11 percent. The Board also noted that you acknowledged the entry and, in your statement, you indicated that you reached out to the Substance Abuse Control office and completed the appropriate class. You noted your blood alcohol concentration (BAC) of .08 and .07 percent at the Sheriff station. The Board, however, determined that the contested entry was written and properly issued in accordance with the IRAM. Specifically, the entry provided written notification concerning your deficiencies, afforded you the opportunity to submit a rebuttal, and the Commanding General (CG) signed the entry.

The Board determined that the CG, ██████████ acted with his discretionary authority and relied upon sufficient evidence that included your BAC tests, which confirmed your consumption of alcohol, your failed sobriety test, and police report when determining that you operated a motor vehicle while impaired by alcohol in violation of the UCMJ. The Board further determined that the CG was not prohibited from taking administrative action to address your misconduct until after adjudication in civilian court. Further, even if the CG delayed administrative action, the CG was bound by the civilian court decisions. Moreover, it is immaterial whether the charge was dismissed, the civilian courts action does not change the character of the initial misconduct, which is supported by sufficient evidence.

The Board also noted that the CG, █ submitted a ROM recounted the circumstances giving rise to the ROM and noting that he administratively counseled you. The ROM also noted that you were charged and arraigned for DWI with a BAC of .07 percent and speeding, the DWI was dismissed without leave by the District Attorney, and the disposition reason was per the plea agreement and your guilty plea for speeding. Due to your conviction, the CG, █ submitted a Report of Civilian Conviction. After considered all aspects of your case, including the nature of the misconduct, matters you submitted and your service to date, the CG, █ concurred with the administrative counseling to address your misconduct. He also concurred that the ROM and Report of Civilian Conviction properly documented your misconduct. As the Show Cause Authority, the Deputy Commandant, Manpower and Reserve Affairs (DC, M&RA) closed your case, determined that processing for separation was not warranted, and directed the adverse material concerning this matter be included in your OMPF.

Concerning the PBT results, the Board determined there was no error in documenting the PBT results. In this regard, the counseling entry specifically states, “preliminary breathalyzer test on scene of .11 percent.” The Board determined that the counseling entry is factual and does not exaggerate your misconduct. The Board also determined that an administrative counseling is not bound by the Manual for Courts-Marital (MCM) Rules of Evidence or the same standard of proof as a court martial or civilian trial. In accordance with the Marine Corps Legal Support Administration Manual, the CG, █, as the General Court Martial Convening Authority (GCMCA) determined that you committed misconduct and exercised poor judgment when you operate a motor vehicle while impaired by alcohol. The CG, █ was within his lawful discretionary authority to make that determination.

The Board noted that the LSAM requires a ROM in all cases where the GCMCA determines that the officer committed misconduct. The report provides the Alternate Show Cause Authority and the Show Cause Authority with sufficient information to make a decision on whether to process the officer for administrative separation and provides a complete record of the misconduct and its disposition for inclusion in the officer’s OMPF. The ROM is also required in all cases in which the command addresses the officer’s misconduct administratively; a copy of the officer’s formal counseling will be included as an enclosure to the ROM. Moreover, a Report of Civilian Conviction is required in all cases in which the officer is convicted in civilian court, 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.

Concerning your promotion to 1stLt, the Board noted that your promotion to 1stLt was properly withheld pursuant to SECNAVINST 1412.6M due to adverse information. The Board also noted that the Commandant of the Marine Corp (CMC) is the final authority for determining those officers who are fully quailed for promotion to the grade of 1stLt. Policy directs that any adverse or reportable information, that pertains to the officer and is entered into the officer’s official service record be considered in determining the officer’s qualifications and fitness for promotion. Moreover, an officer’s name should be withheld from the appointment scroll if there is cause to believe that the officer is not mentally, physically, morally, or professionally qualified for promotion to the grade of O-2 because of the adverse or reportable information.

The Board also noted that the favorable promotion recommendations, all matters on your behalf, and your service record were considered by the CMC prior to making his decision to withhold your promotion. Although your promotion was withheld, correspondence from the CMC and Headquarters Marine Corps notified you that you may request to be reconsidered for promotion. Contrary to your statement that you were already denied reconsideration, the Board found no evidence of your reconsideration package or the CMC's denial of your request. The Board thus determined that you have not exhausted your administrative remedies with the Marine Corps by requesting reconsideration for promotion.

Concerning the previous Board cases that you cited, the Board determined that you are not similarly situated as those Petitioners. Unlike the Petitioner in Docket No. 6094-13, your misconduct was substantiated. The Manual for Courts-Martial does not require a specific BAC or civilian court conviction for DWI for the GCMCA to determine that you committed misconduct when operating your vehicle while impaired. The Board noted that your DWI was dismissed due to a plea agreement, you were not acquitted of DWI by a court martial or jury. The characterization of your misconduct is factual, and policy requires that it be documented in your official record. Therefore, your adverse material is not unfairly prejudicial. 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.

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,

10/11/2024

