



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

[REDACTED]
Docket No. 7450-16

NOV 09 2017

[REDACTED]
Dear [REDACTED]

This is in reference to your reconsideration request received on 19 July 2016. You previously petitioned the Board and were advised in our letter of 11 February 2008, that your application had been denied. Your case was reconsidered in accordance with Board of Correction of Naval Records procedures that conform to *Lipsman v. Secretary of the Army*, 335 F.Supp.2d 48 (D.D.C. 2004).

The Board found it in the interest of justice to consider your request. In this regard, your current request has been carefully examined by a three-member panel of the Board for Correction of Naval Records on 31 July 2017. 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.

You enlisted in the Marine Corps and began a period of active duty on 3 February 1964. On 23 November 1964, you were convicted at a special court martial (SPCM) for assault with a dangerous weapon (knife). On 18 May 1965, you received nonjudicial punishment (NJP) for threatening an assault with a knife. The Board noted three witness statements from shipmates dated 3 November 1965 alleging that you fondled their private parts while they were asleep. Additionally, you wrote your own statement the same day denying the allegation. On 4 November 1965, you underwent a psychological evaluation where you did not admit to any homosexual acts and the doctor concluded that you were not suffering from any mental health condition and you were not feigning homosexuality. The Board noted that on 7 January 1966, you requested an undesirable discharge for the good of the service to escape trial by court martial and waived your rights. You also wrote a statement admitting to homosexual acts while in service and stated that the reason you lied about previous allegations of fondling shipmates was because you were too nervous to admit it. As a result of the foregoing, your Commanding Officer (CO) recommended you be separated with an other than honorable (OTH) discharge due to homosexual involvement. On 31 January 1966, you were discharged with an OTH characterization of service.

Under the Don't Ask, Don't Tell (DADT) Repeal Act of 2010, and the Under Secretary of Defense Memo of 20 September 2011 (Correction of military records following repeal of 10 U.S.C. §654), the Board can grant a request to upgrade a discharge that was based on homosexuality when two conditions are met: (1) the original discharge was based solely on "Don't Ask Don't Tell" (DADT) or similar policy, and (2) there were no aggravating factors such as misconduct. In reviewing your record, the Board determined your discharge was not based solely on homosexuality. The Board found that there were aggravating factors present, due to the pending charges of assault. Your record also contained a court-martial and NJP for assault and threatening assault.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. The Board carefully weighed your desire to upgrade your characterization of service and contention that your misconduct was a result of your inability to disclose your sexual preference due to the Don't Ask, Don't Tell Act. However, the Board concluded these factors were not sufficient to warrant re-characterization of your discharge given the seriousness of your admitted misconduct. The Board also noted that the record shows you were notified of and waived your procedural right to present your case to an administrative discharge board (ADB). In doing so, you gave up your first and best opportunity to advocate for retention or a more favorable characterization of service. Accordingly, your application has been denied.

It is regretted that the circumstances of your reconsideration petition are such that favorable action cannot be taken again. You are entitled to have the Board reconsider its decision upon the submission of new and material evidence. New evidence is evidence not previously considered by the Board. In the absence of sufficient new and material evidence for reconsideration, the decision of the Board is final, and your only recourse would be to seek relief, at no cost to the Board, from a court of appropriate jurisdiction.

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,



Executive Director