



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: 3537-21
Ref: Signature Date



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.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 8 October 2021. The names and votes of the panel members 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 Kurta Memo, the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo), and the relevant Advisory Opinion.

The Board determined that your personal appearance, with or without counsel, would 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.

You enlisted in the Navy and began a period of active duty on 29 August 1995. Beginning in August 1998, you conspired with a Sailor at Personnel Support Detachment to have the Navy recognize your female roommate as your lawful dependent by submitting her as your step-daughter in DEERS. In 1998, you wrongfully obtained a Dependent Identification Card for your

roommate, and in December 1998, you began receiving basic allowance for housing (BAH) at the dependent rate. In March 2000, you signed an Emergency Data Dependency Application listing a fictitious person as your husband. On 26 March 2002, at General Court Martial proceedings (military judge alone), in accordance with your pleas, you were found guilty of conspiring to commit both frauds against the Government and larceny of US currency in excess of \$100, and one specification of presenting a false claim against the Government in violation of Articles 81, 107, 121, and 132 of the Uniform Code of Military Justice (UCMJ). The military judge sentenced you to confinement for eight months and a bad conduct discharge. The convening authority approved the sentence as adjudged. Your case was reviewed by the US Navy Marine Corps Court of Criminal Appeals, and on 25 May 2004, the Court concluded that the findings and sentence were correct in law and fact and that no error materially prejudicial to your substantial rights was committed. On 30 March 2005, the United States Court of Appeals for the Armed Forces denied your Petition for Grant of Review. You were discharged from the Navy on 7 April 2005, on the basis of the court martial conviction, and received a bad conduct discharge and a reentry (RE) code of RE-4.

In your previous applications to the Board, NR18-811, NR17-64, NR15-9455, and NR14-10730, you sought an upgrade to your discharge characterization and inferred you would like your RE-4 changed so that you could return to active duty. Your most recent petition, NR21-3537, requested clemency and asserted that in part that your discharge was unjust in consideration of the repeal of "Don't Ask, Don't Tell" (DADT). You stated that at the time you were receiving BAH for your female roommate, female partners were not permitted to openly service. The most recent Board, NR18-811, considered your request in light of both the Wilkie memo and the repeal of DADT, and took into consideration your mental health issues. The previous Board denied your request but noted that it would have found additional information supporting your contention that you were in a committed relationship with your roommate comparable to a marriage that would have qualified you for the lawful receipt of BAH.

In your current application, you request approval for a return to active duty or an honorable discharge to current date. You state that your ability to serve openly in the Navy in a same-sex relationship was restricted by the DADT policy, and that you would have been entitled to BAH allowance based on being in a committed relationship with your female partner but for the policy. You note that such a relationship is acceptable today. You provide an affidavit from a friend who stated that she has personally known you and your female partner since 1998, and that you were in a committed relationship to one another from 1998 to 2001. Your former partner also submitted an affidavit in which she stated that you were joined as a dedicated couple in a Civil Union Marriage ceremony on 19 December 1998, and that you provided full financial support to her during the relationship.

In your current application you again assert that your General Court Martial charges were improperly referred after being dismissed, with prejudice, by the Convening Authority onboard the █. You also contend that you were denied a right to speedy trial pursuant to RCM 707, and you ask that mental health issues be taken into consideration.

As part of the review process, a Physician Advisory reviewed your request and issued an Advisory Opinion dated 24 September 2021. The Advisory Opinion considered your claim that mental health conditions may have mitigated the misconduct that led to your characterization of service. The Advisory Opinion noted that you requested that the Board consider the emotional distress you were under for someone with a mental illness and to consider the severity of your Bipolar disorder. The Advisory Opinion noted in part that you were hospitalized at Naval Medical Center Portsmouth in April to May 2001, and that the discharge summary documented psychological distress due to being overwhelmed by multiple stressors, decreased sleep, racing thoughts, hearing sounds and auditory hallucinations, paranoia, high frequency of mood swings, increasing irritability, and difficulty concentrating. Your in-service records further document a diagnosis of Bipolar Disorder Type II. You were again hospitalized from 25 to 26 July 2001, following a suicide attempt. The Advisory Opinion noted that you provided a 15 December 2020 Veterans Affairs Summary of Benefits letter stating that you were service-connected for a disability rating of 30%, but that the letter did not clarify the diagnosis or provide an accompanying clinical history. The Advisory Opinion found that there was a marked change in your behavior and performance between your first enlistment and your second period of active duty service, and determined that based on the available evidence, that there was sufficient indirect evidence that you suffered from Bipolar Disorder Type II at the time of your service which may have mitigated your in-service misconduct.

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 statement that you were suffering from a mental health condition that mitigated your conduct and that you were in a committed relationship with a female partner that would have entitled you to BAH but for the DADT policy. The Board carefully reviewed the information you provided and took into consideration the analysis and conclusions of the Advisory Opinion. The Board found that although there is sufficient indirect evidence that you suffered from Bipolar Disorder, Type II, the nature of your misconduct was such that it is not mitigated by your in-service mental health condition. The Board specifically found that committing a fraud against the government by giving a copy of a birth certificate to force a marriage license dated 24 September 1998, submitted a false official record into DEERs, and claiming entitlement to BAH from September 1998 through October 2001 was not sufficiently mitigated by your mental health struggles to merit an upgrade to your discharge characterization.

The Board took particular note of the affidavit from your female partner in which she stated you had a Civil Union marriage ceremony on 19 December 1998. The Board considered that your fraudulent marriage in your Official Military Personnel File was dated nearly three months earlier, on 24 September 1998. The Board determined that given that you committed the fraud of entering a false marriage certificate into your personnel file and began claiming BAH in September 1998, but did not join in a committed civil union until 19 December 1998, you were not entitled to relief in consideration of the repeal of DADT to correct an injustice or as a matter of clemency.

With regard to your contention of wrongful preferal of charges in November 2001, after the Commanding Officer, █ issued a letter dated 17 September 2001 stating “Dismiss all charges. . . ‘ (With prejudice)” the Board took NR18-811’s and NR17-454’s Decision Documents into consideration. The current Board substantially concurred with the previous Boards’ analysis and findings as articulated in detail in NR17-454’s Decision Document. NR17-454 considered RCM 604 and noted that withdraw and referral of charges was permitted as long as the withdraw was not for an improper reason. NR17-454’s Board determined that the withdraw of charges does not appear to have been made for an improper reason and therefore the referral of charges to a court martial was not erroneous or unjust. The current Board also noted that the United States Navy-Marine Corps Court of Criminal Appeals affirmed your punitive discharge on 19 June 2004, and the US Court of Appeals for the Armed Forces denied your petition for grant of review on 30 March 2005. The current Board again found that you did not establish that the charges were erroneously or unjustly withdraw, preferred and then referred to General Court Martial proceedings that resulted in a bad conduct discharge.

The Board noted your claim of error and injustice with regard to the speedy trial issue. RCM 707 states that in general, the accused shall be brought to trial within 120 days after the earlier of . . . preferal of charges.” RCM 707 further states that a plea of guilty which results in a finding of guilty waives any speedy trial issues as to that offense. Based on your 26 March 2002 General Court Martial Record of Trial, you entered pleas of guilty to Charge I and its sole supporting specification, Charge II and the five supporting specifications, Charge III and its sole supporting specification, and Charge IV and its sole supporting specification. The military judge discussed your please of guilty, you had the benefit of defense counsel, and in accordance with RCM 707, you waived any speedy trial issues to the offenses to which you pled guilty. The Board noted that speedy trial issues were not raised by your defense counsel during the General Court Martial, that you entered pleas of guilty, and a speedy trial issue was not identified or articulated upon appeal. Accordingly, the Board found that you were not improperly deprived of a right to speedy trial.

The Board found that your current bad conduct discharge was proper as issued and that even in consideration of the new information you provided, that relief is not warranted. The Board determined that the seriousness and nature of the misconduct was not mitigated by the circumstances of your in-service mental health struggles, the nature of your relationship with your female partner due to the timing of the civil union, or the manner in which your general court martial proceedings were conducted. The Board concluded that your bad conduct discharge on the basis of the court martial conviction was issued without error or injustice, and that corrective action is not warranted.

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,

11/10/2021

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Executive Director

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