



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: 5026-21
Ref: Signature Date



Dear Petitioner:

This 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.

Although you did not file your application in a timely manner, the statute of limitations was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 20 December 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). Additionally, the Board considered a 29 October 2021 advisory opinion (AO) furnished by a qualified mental health provider, a copy of which was provided to you and to which you did not provide a response.

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 Marine Corps on 7 November 1989 and you completed an honorable enlistment on 6 November 1993. You reenlisted in the Marine Corps and commenced another period of active duty on 15 June 1995. On 21 September 2000, you were placed into pretrial

confinement due to allegations of rape and/or indecent acts with a minor. In 2001, you were convicted by a general court-martial of charges relating to rape and/or indecent acts with a minor and your sentence included a dishonorable discharge. On 26 September 2007, your dishonorable discharge was executed and you were so discharged.

The Board carefully considered all potentially mitigating factors in your petition to determine whether the interests of justice warrant relief in your case including in accordance with the Wilkie Memo. You contend in your petition that your discharge was procedurally and substantively defective, and remains unfair. You included with your petition several news clippings of individuals who were exonerated by the use of DNA evidence. You also included several letters and other correspondence relating to legal matters concerning your conviction, but it does not appear that you provided documents evidencing that your conviction was overturned. Your petition also noted that you believe a mental health condition applies in your case, but you did not provide evidence to support that you had an applicable mental health condition.

In connection with your assertion that you suffered from a mental health condition, the Board requested, and reviewed, the AO. The AO reviewed your service record as well as your petition and the matters that you submitted. According to the AO:

Unfortunately, there is no evidence in Petitioner's limited service record that he was diagnosed with a mental health condition. Petitioner provided no post-service medical records indicating a mental health diagnosis. Additional information (e.g., the complete VA Compensation and Pension (C&P) exam or post-service treatment records describing the Petitioner's mental health diagnosis and its specific link to his misconduct) are required to render a medical opinion regarding the Petitioner's contention. Should he choose to submit additional records, they will be considered in the context of his claims.

The AO concluded, "it is my considered medical opinion that there is insufficient evidence that the Petitioner may have incurred a mental health condition during military service, and there is insufficient evidence that his misconduct could be attributed to a mental health condition."

Based upon its review, the Board concluded the potentially mitigating factors that you raised were insufficient to warrant relief. With respect to your contention relating to a mental health condition, inasmuch as you did not provide any supporting evidence concerning a mental health condition, the Board reviewed your assertion in light of all applicable memoranda. As a result of its careful review, the Board concurred with the findings of the AO. With respect to your other assertions, the Board noted that none of the material you provided demonstrated that your conviction was overturned, nor did you provide materials demonstrating that you were exonerated by DNA evidence. Rather, the correspondence you provided appeared to demonstrate that the DNA evidence available at your time of trial was inconclusive, and you did not provide any subsequent evidence demonstrating that you were later exonerated. Accordingly, based on its review, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon the 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,

1/14/2022

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Executive Director

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