



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: 3250-22

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 you did not file your application in a timely manner, the statute of limitation 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 19 August 2022. 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 also considered the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. You were afforded an opportunity to submit an AO rebuttal but chose not to do so.

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 and entered active duty on 11 May 1999. Your pre-enlistment physical examination, on 12 March 1999, and self-reported medical history both noted no neurologic or psychiatric conditions or symptoms.

On 30 March 2000, contrary to your pleas, you were convicted at a General Court-Martial (GCM) of rape and two separate specifications of indecent assault. You were sentenced to confinement for ten (10) years, total forfeitures of pay, reduction in rank to the lowest enlisted paygrade (E-1), and a Dishonorable Discharge (DD) from the Marine Corps. On 6 September 2001, the convening authority approved the adjudged GCM sentence. On 20 March 2003, the Naval Clemency and Parole Board denied granting any clemency.

On 20 February 2007, the U.S. Court of Appeals for the Armed Forces (CAAF) set aside the GCM guilty findings and sentence. However, CAAF authorized a rehearing for the original charges.

Your command determined that a rehearing for the same charges was appropriate. While such the same GCM charges were pending, on 25 June 2007, you submitted a voluntary written request for an administrative discharge in lieu of trial by court-martial. Prior to submitting this voluntary discharge request you conferred with a qualified military lawyer, at which time you were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. You indicated you were entirely satisfied with the advice you received from counsel. You expressly admitted that you were guilty of each of the two indecent assault charges but not the rape charge. You acknowledged that with an Other Than Honorable (OTH) conditions characterization of discharge, you may be deprived of virtually all veteran's rights otherwise provided to you under both federal and state law. You also understood that with an OTH you may expect to encounter substantial prejudice in civilian life in situations wherein the character of my service in, and subsequent discharge from, any branch of the armed forces may have a bearing. As a result of this course of action, you were spared the stigma of a court-martial conviction for your sexual assaults, as well as the negative ramifications of receiving a punitive discharge from a military judge. Ultimately, on 20 September 2007, you were separated from the Marine Corps with an OTH discharge characterization and assigned an RE-4 reentry code.

On 10 April 2013, the Naval Discharge Review Board (NDRB) denied your discharge upgrade application. The NDRB determined that your discharge was proper and that no change was warranted.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warranted relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to: (a) CAAF reversed the GCM findings and sentence, (b) you suffer from PTSD from the time you spent incarcerated for a crime you did not do, (c) you have focused on becoming a model citizen and raising your daughters, and (d) you have worked and lived on the front lines of the COVID-19 pandemic as a registered nurse. For purposes of clemency consideration, the Board noted you provided supporting documentation describing post-service accomplishments but no advocacy letters.

As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 8 July 2022. The Ph.D. stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or a nexus with his misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, “[b]ased on the available evidence, it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to a mental health condition.”

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your admission to two specifications of indecent assault, outweighed these mitigating factors. In accordance with the Hagel, Kurta, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced and their possible adverse impact on your service. However, the Board concurred with the AO and concluded that there was no convincing evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. Moreover, the Board observed that you did not submit any clinical documentation or treatment records to support your mental health claims despite a request from BCNR, on 9 May 2022, to specifically provide additional documentary material. Even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was willful and intentional and demonstrated you were unfit for further service. The Board also determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not be held accountable for your actions.

Additionally, the Board observed that while CAAF set aside your conviction in February 2007, the Marine Corps authorized a rehearing for the same GCM charges you faced in 2000. The Board noted that you expressly admitted committing the two charged indecent assaults as part of your June 2007 administrative discharge in lieu of trial by court-martial request. The Board thus determined that CAAF setting aside your 2000 conviction was not persuasive given that you admitted to sexually assaulting two different female Marines.

Further, the Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board determined that characterization under OTH conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Marine. The simple fact remains is that you sexually assaulted two female Marines with the intent to gratify your sexual desires. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. As a result, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your serious misconduct clearly merited your receipt of an OTH characterization and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge. The Board carefully considered matters submitted regarding your post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded insufficient evidence of an error or injustice exists to warrant upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. 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,

8/24/2022

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Executive Director

Signed by: █