



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

██████████
Docket No: 5523-22
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your son's naval record pursuant to Section 1552 of Title 10, United States Code. Your son will be hereinafter be referred to as "Service Member" (SM). After careful and conscientious consideration of relevant portions of SM's 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 23 November 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, 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). As part of the Board's review, a qualified mental health professional reviewed your request and provided the Board with an Advisory Opinion (AO) on 23 September 2022. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

SM enlisted in the U.S. Marine Corps (USMC) and began a period of active duty on 7 June 1999. In October 2004, an investigation was opened after a technician working on SM's computer from COMPUSA reported child pornography found on his computer hard drive. Consequently, SM was charged with possession of child pornography. In March 2005, SM's command was notified of the aforementioned investigation. On 1 November 2005, SM was

notified of his pending administrative separation by reason of misconduct for the commission of a serious offense as evidenced by his child pornography charge, at which time SM elected his right to consult with military counsel and present his case at an administrative discharge board. On 1 February 2006, an administrative discharge board was held, determined SM committed misconduct, and recommended he be discharged with an Other Than Honorable (OTH) characteristic of service. On 25 May 2006, the separation authority directed SM be discharged with an OTH discharge by reason of commission of a serious offense. On 1 June 2006, SM was so discharged.

Post-discharge, SM applied to the Naval Discharge Review Board (NDRB) for a discharge upgrade. The NDRB denied his request on 20 December 2007 after concluding his discharge was proper as issued.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in SM's case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire for SM's rank [SGT/E-5] and military status to be reinstated. You contend SM incurred a mental health condition as a result military service and ended his life. Specifically, SM suffered extreme duress following his dismissal from USMC, and was using prescribed medication for anxiety and depression/panic attacks. For purposes of clemency and equity consideration, the Board noted you provided supporting documentation describing post-service accomplishments and advocacy letters.

Based on your assertion that SM incurred mental health concerns during military service, which might have mitigated his discharge character of service, a qualified mental health professional reviewed your request for correction to SM's record and provided the Board with the AO. The AO stated in pertinent part:

There is no evidence that the (SM) was diagnosed with a mental health condition while in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a mental health condition during service. Additional records (e.g., post-service mental health records describing the (SM's) diagnosis and/or symptoms) would aid in rendering an alternate opinion.

The AO concluded, "it is my considered clinical opinion there is insufficient evidence of a mental health condition that existed post-service, however additional evidence would be helpful in determining whether or not a mental health condition was incurred during service. There is insufficient evidence that his [SM's] misconduct could be attributed to a mental health condition as the (SM) denied misconduct."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that SM's misconduct, as evidenced by his civil charge for child pornography, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of SM's misconduct and the discrediting nature of his conduct to the Marine Corps. Further, the Board concurred with the AO that there is insufficient evidence that SM's misconduct could be attributed to a mental health condition as he denied the misconduct. Although the Board understands how devastating his loss is to you as his mother,

the Board concluded SM's conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. Based on the evidence, the Board concluded he was appropriately discharged for his misconduct and found no basis to reinstate his rank or military status. While the Board commends SM's post-discharge accomplishments and good character, even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants reinstating his paygrade, military status, or granting relief as a matter of clemency or equity. 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,

12/13/2022

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Executive Director

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