



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

█
Docket No. 6534-22
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.

A three-member panel of the Board, sitting in executive session, considered your application on 26 January 2023. 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, as well as the 22 November 2022 Advisory Opinion (AO) provided to the Board by Headquarters Marine Corps Military Personnel Law Branch (JPL), and your rebuttal statement dated 26 December 2022.

The Board determined your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on the evidence of record.

The Board carefully considered your request to set aside your retirement in paygrade O-4, grant retirement in paygrade O-5, and correct "all other military records." You contend you "qualify" for retirement in the grade of Lieutenant Colonel because you were promoted on 1 May 2011 and completed over 11 years of service in the grade. Further, you contend SECNAVINST 1920.6C requires the Board to recommend the grade in which you last served satisfactorily for a period of not less than six months. The Board also considered your contention your rights were violated due to the fact the Board of Inquiry (BOI) was improperly convened because there was not a Reserve officer serving on the BOI. Further, you contend you were denied due process because there were no minority members present at the BOI. The Board also considered your contention the BOI erred in its finding because there was no evidence to corroborate the allegations of

misconduct. Specifically, you contend the BOI made arbitrary and capricious findings that were unsupported by the evidence and never considered the substantial evidence of your adopted daughter's oversexualization. As proof, you contend [REDACTED] [REDACTED] declined to prosecute the case due to lack of corroborating evidence. Lastly, the Board considered your contention that, in the interests of justice and equity, you should be retired as a Lieutenant Colonel.

The Board also carefully considered the additional contentions mentioned in your rebuttal to the AO. Specifically, you contend the BOI did not have all the information concerning your adopted daughter's allegations and behavior, failed to consider all the evidence you presented, and failed to explain what facts and evidence it considered to support its findings and recommendations. Again emphasizing the lack of a minority member, in the AO rebuttal you note the "optics of three white officers eliminating an African American officer" after 35 years of service, with an other than honorable characterization of service, based on a false allegation, without even explaining how they arrived at their recommendation. In the rebuttal, you explain that "on the advice of counsel" you did not appeal the BOI recommendation. Lastly, the Board considered your contention the Navy is "not entitled to the presumption of regularity" because too many material and prejudicial errors are present. Specifically, you contend the following errors overcome the presumption: 1) BOI was never properly constituted because there was no Reserve officer; 2) BOI had no personal jurisdiction; 3) The [REDACTED] and the Marine Corps investigated the allegations and declined to prosecute; 4) The BOI failed to explain how it established personal jurisdiction; and 5) BOI failed to explain how it connected the facts with its recommendations.

The Board, however, substantially concurred with the AO and determined the retirement grade determination was not erroneous or unjust. Specifically, the Board noted the Deputy Commandant, Manpower and Reserve Affairs (DC (M&RA)) found that, because your conduct occurred as a Lieutenant Colonel, the last grade at which you satisfactorily served honorably was Major. Further, the Board noted the BOI substantiated that you committed, among other offenses, rape by force of a child that had attained the age of 12 and your retirement in grade, as a Lieutenant Colonel, was unwarranted.

The Board also determined there was insufficient evidence to support your contention the BOI was improperly convened. Specifically, the Board noted you did not provide convincing evidence that one of the BOI members was anything other than a member of the Selected Marine Corps Reserve, rather, you "made no argument, provided no evidence, and did not demonstrate why, if there was an error, the error was material or unjust." The Board also substantially concurred with the AO and determined your argument that you were denied due process and fair treatment because the BOI lacked a minority member lacked merit and supporting evidence.

Further, the Board concurred with the AO's determination that the BOI findings were not arbitrary and capricious but were supported by substantial evidence presented by the Government, to include live witnesses (the child forensic interviewer, your ex-wife, and your adopted daughter) which your counsel had the opportunity to cross-examine. Additionally, the Board substantially concurred with the AO's determination that your contention the BOI failed to consider evidence of your adopted daughter's oversexualization is clearly contradicted by the

record, specifically the portions of the BOI transcript provided by you. The Board noted the standard for the civilian and criminal courts is “beyond a reasonable doubt” whereas the BOI, which is an administrative action, applies the “preponderance of the evidence” standard and concluded your contention, that the fact the civilian and criminal courts did not pursue the charges should have a bearing on the Board’s decision, lacks merit. Further, considering your contention regarding personal jurisdiction, the Board specifically noted the issue of personal jurisdiction was discussed, but not argued against, by your civilian counsel at the BOI and determined there is insufficient evidence to support your contention.

After a thorough review and consideration of your contentions, as discussed above, the Board concluded there was insufficient evidence to support your contentions regarding errors in the BOI constitution or violations of due process. Additionally, although one might consider it a “best practice” for the BOI to include a minority member, the Board determined it was not error or unjust for a minority member to not be a BOI member and, noting your civilian counsel did not object to the lack of a minority member, concluded the BOI was properly convened. With regard to your contention the BOI’s findings were arbitrary and capricious, the Board noted there is no legal requirement for the BOI to “explain what facts and evidence it considered to support its findings and recommendations.” Regardless, based on the record, the Board found the BOI findings to be supported by a preponderance of the evidence.

The Board, in carefully considering your contentions regarding the BOI’s findings, specifically noted the BOI considered each individual allegation of misconduct and did not substantiate all the alleged misconduct. Further, the Board determined there is insufficient evidence of an error or injustice to “remove the entitlement” of presumption of regularity, and determined there was insufficient evidence to warrant “second guessing” the BOI’s findings and recommendations. Specifically, the Board noted the BOI “had the facts in front of them,” had the ability to hear and see the critical witnesses, and had sufficient evidence to determine credibility and conclude the allegations of misconduct were substantiated. Based on the above, the Board concluded there is insufficient evidence of a material error or injustice warranting your requested 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,

2/24/2023

