



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

█  
Docket No: 7614-22

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 2 December 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 the 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 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo).

You originally enlisted in the Marine Corps and entered active duty on 12 August 2002. Your pre-enlistment physical examination, in January 2002, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You last reenlisted, on 14 October 2017, for four years.

On 21 July 2019, you were arrested by █ County Police in █ and charged with both aggravated sexual battery and object sexual penetration involving your sister-in-law. You were initially held without bond and an emergency protective order was issued later that day prohibiting you from having any contact with, or being in the physical presence of your sister-in-law.

According to the police reports and interview results obtained by the Marine Corps, following a night of heavy drinking by you, your sister-in-law, and others at your house that continued well

into the early morning hours, you entered the guest bedroom of your house where your sister-in-law was sleeping, pulled down her shorts, and began to digitally penetrate her while she was passed out on the bed. Your wife subsequently entered the guest bedroom and caught you on top of your incapacitated sister-in-law (her sister) while you were inserting some of your right-hand fingers inside her vagina. Your wife stated you were almost straddling her while your sister-in-law was face down on the bed and it appeared to your wife that you were also recording the digital penetration on your smart phone. Your wife began to scream, and you dismounted your sister-in-law who awoke during this time in an apparent stupor. Your wife screamed words to the effect of "What are you doing?" and you replied with words to the effect of "It was all me."

Your wife reiterated her eyewitness account of the sexual assault to police in an interview later that day at the police station. Her second statement was consistent with the initial account of her story at your house that morning. Your wife further stated there was no way you could have been confused and somehow thought your sister-in-law was your wife, and your wife noted you were lucid enough to video record the incident.

The victim's account of the story was consistent with your wife's, both at the house immediately after the assault, and down at the police station. The sister-in-law stated to police that she was passed out on the bed and had fallen asleep wearing her clothes from the night before. When she awoke to her sister's screaming, she observed that the front of her shorts were unfastened and pulled down to expose her buttocks. Your sister-in-law stated to police she was baffled that she did not wake up during that assault, and that she had no idea what was happening because she was passed out due to drinking alcohol the night before. The victim stated to police words to the effect that she was asleep and incapacitated due to alcohol consumption at the time of the sexual assault. The victim emphatically denied that your digital penetration of her was a consensual act. The victim stated to police at your house that she wished to move forward with the investigation and your prosecution.

During your interview with police on the day in question, you admitted to digitally penetrating your sister-in-law's vagina for around fifteen (15) minutes. You also stated that when your wife caught you in the act, you responded with words to the effect that your sister-in-law was sleeping because you did not want to cause a rift between your wife and her sister and you wanted to take all the blame.

On 7 August 2019, your wife contacted police and informed them that your family no longer wanted to move forward with your criminal case. Your wife stated that your family were all ready to move on and not deal with this situation any longer. On 8 August 2019, police representatives contacted the Assistant Commonwealth Attorney who ultimately decided to have the charges against you "nolle prossed" (nolle prosequi). According to your counsel, at some point the criminal charges were expunged from the Commonwealth records.

However, in a statement given to military authorities in December 2019, the victim reiterated that she was "sleeping (passed out)" when her sister walked into the bedroom and found you sexually assaulting her. The victim stated that your actions have caused her intense and constant anxiety, and crippled her relationship with her sister (your wife). The victim stated you deserved

administrative punishment for your actions, but that she also believed in second chances and forgiveness.

Notwithstanding that civilian authorities not to pursue your criminal case, on 5 March 2020, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. Your command stated the basis for this recommendation was your substantiated sexual assault incident. You consulted with counsel and requested a hearing before an administrative separation board (Adsep Board).

The appointing order for the Adsep Board indicated the hearing was initially scheduled for 10 June 2020 on board Marine Corps Base, ██████████, ██████████. Per MARCORSEPMAN paragraph 6210.4c, processing for an administrative separation is mandatory following a substantiated incident of sexual misconduct. Paragraph 6210.4d stated that an incident is substantiated when a commander determines, based on a preponderance of the evidence, that an incident of sexual misconduct has occurred.

An Adsep Board convened to hear your case. According to your counsel, representatives from the civilian police force, who arrested you, testified at the Adsep Board. Following the presentation of evidence and witness testimony, the Adsep Board members determined that the misconduct allegations were supported by a preponderance of the evidence and recommended that you be separated from the Marine Corps. Ultimately, on 7 August 2020, you were separated from the Marine Corps for misconduct with an under Other Than Honorable (OTH) conditions discharge characterization and assigned an RE-4 reentry code.

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 desire for a discharge upgrade, change to your narrative reason for separation, and expungement of civilian charges from your record. In addition, you content that: (a) your chain of command made material errors of discretion and created material injustice when they administratively discharged an innocent man, used the administrative discharge process to avoid having to prove a crime occurred beyond a reasonable doubt by court-martial, and failed to recognize that an other than honorable discharge is punitive, (b) by administratively discharging you, the Department of the Navy circumvented the United States Constitution, the laws of the Commonwealth of ██████████, the requirements of evidence, and the standards of proof of a court-martial, (c) the Department of the Navy decided to remove a Marine of almost eighteen years of exemplary and decorated service based on redacted information of an alleged victim and police report under administrative separation, (d) the Adsep Board used documents that were redacted or supposed to be expunged, clearly prejudicing you for an allegation that was unfounded and untried, and the Adsep Board continued violating an innocent Marine's rights by presenting unexamined statements of the alleged victim, (e) the best piece of evidence of what happened was a polygraph report which indicated no deception, (f) you never forced yourself on your sister-in-law or any female which was why there were no charges and your civilian record was expunged, and (g) the Department of the Navy abandoned an innocent Marine a few days short of eighteen years of exemplary service. For purposes of

clemency and equity consideration, the Board noted you provided supporting documentation including a brief from your legal counsel.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. The Board unequivocally did not believe that your record was otherwise so meritorious to deserve a discharge upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record during your military service. The Board determined that your misconduct constituted a significant departure from the conduct expected of a Marine, and that the record clearly reflected your misconduct was intentional and willful and indicated you were unfit for further service. Moreover, the Board noted that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not otherwise be held accountable for your actions.

The Board determined an Adsep Board was an entirely appropriate forum to adjudicate your sexual assault offense. The Board noted that a court-martial was not a viable command option because the military could not compel the victim's appearance, and certain evidentiary spousal privileges would prevent your spouse's testimony. The Board also noted your spouse's declaration to civilian authorities that she no longer wanted to deal with this case. The Board concluded any arguments alleging that, by taking you to an Adsep Board, the Marine Corps somehow circumvented Constitutional safeguards and due process protections were without merit and not persuasive. The Board noted that once your command determined that a substantiated incident of sexual misconduct occurred, the MARCORSEPMAN required your processing for an administrative separation. Thus, your command could no longer exercise their discretion in whether or not to process you for discharge. The Board also noted that Adsep Boards provide adequate substantive and procedural due process protections to fairly hear and adjudicate contested offenses.

The Board noted that Article 120 of the Uniform Code of Military Justice (UCMJ) provides, in part, that:

Any person subject to this chapter who: (1) commits a sexual act upon another person (a) without the consent of the other person; or (b) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring, OR  
(2) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to impairment of any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person...is guilty of sexual assault.

The Board unequivocally concluded, even after looking at the evidence in the light most favorable to you, that you sexually assaulted your sister-in-law the morning of 19 July 2019 in violation of UCMJ Article 120. The Board found that the record is clear and unambiguous that your sister-in-law did not consent to your digital penetration of her. Moreover, at the time of such digital penetration, the Board determined that you knew or reasonably should have known





at the time your sister-in-law was either: (a) asleep or otherwise unaware that the sexual act was occurring, and/or (b) the victim was incapable of consenting due to impairment by an intoxicant or alcohol.

The Board determined that your favorable civilian polygraph results were not persuasive. The Board also determined your statement of words to the effect that: the sexual contact was consensual and the victim was awake and an active participant, and that you maintained the lie to your wife that the victim was instead asleep up until the day of your Adsep Board – that such statement lacked credibility. Additionally, whether charges were dropped by civilian authorities and certain records were expunged was of no consequence to the Board. The Board determined military authorities were on notice that a sexual assault allegedly occurred out in town and were obliged to process such sexual misconduct under current Marine Corps directives and policy once your command determined the sexual assault was substantiated by a preponderance of the evidence.

The Board noted that there is no provision of federal law or in Department of the Navy directives or regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. Moreover, 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 the Board concluded that your serious misconduct clearly merited your receipt of an OTH, and that such characterization was in accordance with all Department of the Navy directives and policy at the time of your discharge. While the Board carefully considered the evidence you provided in support of your application, 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 upgrading your characterization of service or granting an upgraded characterization of service 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,

12/20/2022

