



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. 7964-22
Ref: Signature Date

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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 10 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.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will 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.

The Board carefully considered your request to change your retirement grade to Commander (CDR/O-5). Alternatively, you request a Special Selection Board (SSB) for the Fiscal Year (FY) 2019 and FY 2020 Navy Active Duty Commander Promotion Selection Boards (PSBs). The Board considered your contentions that it was materially unfair according to 10 U.S.C. section 628 for the promotion boards to look at your record while you were pending Temporary Disability Retired List (TDRL) status. You also contend that the PSBs considered negative marks regarding your respiratory condition but did not consider the impact of your physical disability on your performance standards. Moreover, by flouting section 1372, the PSBs acted contrary to law amounting to you being considered in an unfair manner. You claim that you initially received retirement pay at the O-5 rate, the Defense Finance and Accounting Service (DFAS) sent a letter, and paid you as an O-5 because it understood that you would have been

promoted to O-5. Then on 7 December 2019, you received a debt letter, but have not received an explanation why you no longer receive retirement compensation as an O-5.

The Board substantially concurred with the previous Board's decision and found no basis to support your request for promotion to CDR. In this regard, the Board found no evidence that your failures of selection were due to your physical disability or TDRL status and you provided none. The Board noted that pursuant to 10 U.S.C. section 628, to convene a SSB, you must provide sufficient evidence of material unfairness. Specifically, that the actions of the promotion boards were contrary to law in a matter material to the decision of the board or involved material error of fact, material administrative error; or that the board did not have material information before it for consideration. The Board determined that your evidence was insufficient to warrant consideration by a SSB.

Regarding your contention that it was materially unfair for the Board to consider your record while pending TDRL status. The Board determined that there are no regulations or statutes that exclude a service member from promotion consideration while pending transfer to the TDRL. The Board found no evidence that the PSBs were aware of your pending transfer to the TDRL and there is no evidence of negative material related to your physical disability in your record and you provided none.

The Board noted the correspondence from DFAS and determined that the correspondence indicates that DFAS made an administrative error and subsequently corrected that error. The Board determined that DFAS is not involved in the promotion process and could not presume an entitlement to promotion. Therefore, your claim that DFAS understood that you would have been promoted lacks merit and is not supported by evidence.

Moreover, according to the 10 February 2015, Under Secretary of Defense memo, Military Department correction boards do not have the authority to remedy perceived errors or injustice by correcting records to show that an officer has been appointed to a certain grade when the officer has not been appointed to that grade by the President or the Secretary of Defense. In consideration of the totality of evidence, the Board concluded that there is insufficient evidence of a probable material error, substantive inaccuracy, or injustice warranting corrective action.

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,

1/23/2023

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