



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. 7981-22
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.

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 9 May 2023. 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 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.

A review of your record shows that you enlisted in the Navy and you served an initial period of active duty from 6 April 1987 to 5 April 1990. Thereafter, you served in the Navy Reserve until June 2002, at which time, on 6 June 2002, you were commissioned an Ensign and commenced medical school at the █.

In or about April 2007, you were arrested for attempted coercion and enticement of a minor and travel with intent to engage in illicit sexual conduct. Thereafter, in September 2007, you were convicted by a U.S. District Court, placed into confinement, and disenrolled from █. On 31 July 2008, while you were in confinement, you were notified of show cause proceedings.

Through counsel, you requested to be present at your Board of Inquiry (BOI), but your request was denied and the BOI proceeded over your objection. The BOI recommended that you be discharged from the Navy with an Other Than Honorable characterization of service. Subsequently, the Defense Finance and Accounting Service (DFAS) was notified that you owed recoupment of advanced educational debt in the amount of approximately \$30,463.16. DFAS asserted they notified you of this debt in February 2012.

After your conviction was affirmed by the U.S. Court of Appeals for the ██████████ ██████████ in March 2013, you filed suit in the U.S. Court of Federal Claims (Court) requesting back pay and separation pay. The Court concluded it lacked jurisdiction to award you the relief requested but found that your discharge from the Navy was improper based on the denial of your request to be present at your BOI.

You were released from confinement in 2018 and, in 2019, received a disability rating of 70% from the Department of Veterans Affairs for Major Depressive Disorder. Your mental health provider submitted a letter, dated 13 October 2020, that confirmed your diagnosis of Depression/Anxiety and stated you suffer from total social and occupational impairment.

In 2020, you filed a petition with this Board. In your Petition, among other requests for relief, you sought to be medically retired from the Navy. On 20 January 2022, the Board denied your request, but provided a different form of relief. Specifically, the Board determined that, in order to address the error identified by the U.S. Court of Federal Claims, the evidence supported changing your narrative reason for separation, which had been Misconduct (Sexual Perversion), to Secretarial Authority. The Board provided a fulsome analysis of its findings, in part, as follows:

First Petitioner's request for placement on the disability retirement list after a medical board review was not supported by the preponderance of the evidence. In making this finding, the Board substantially concurred with enclosure (3) [an advisory opinion from a medical professional]. Specifically, the Board found that Petitioner failed to show that he met any of the criteria for a finding of unfitness at the time of his release from active duty. While the evidence shows that Petitioner was treated early in his Navy career for mental health symptoms and diagnosed with Major Depressive Disorder and Anxiety upon his release from confinement, the Board found no evidence that these conditions created any occupational impairment during his active duty service.

In particular, the Board noted Petitioner performed extraordinarily well as a Hospital Corpsman resulting in his acceptance into medical school and commissioning as a Medical Corps Officer. Petitioner's medical school transcripts showed he performed well academically. Based on these facts, the Board found that Petitioner was able to perform the duties of his office, grade, rank or rating despite the existence of any disability conditions that may have existed at the time. Therefore, in the Board's opinion, he did not qualify for referral to a medical board or placement on the disability retirement list.

Further, the Board noted Petitioner was processed for administrative separation for misconduct that qualified for an Other than Honorable characterization of service. This led the Board to conclude, even if his symptoms were sufficiently impairing to qualify for a medical board referral, he was not eligible for disability processing since disability regulations at the time directed misconduct processing to supersede disability processing.

Ultimately, the Board determined “it was in Petitioner’s favor to change his narrative reason for separation rather than order him into active service for another BOI. However, if Petitioner should feel otherwise, he may always request reconsideration of this Board’s decision. Therefore, the Board found no additional error or injustice meriting further change to his record other than the recommended change to his narrative reason for separation.”

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta Memo. These include, but are not limited to, your desire to have the Board reconsider its prior decision, to reinstate you to your rank at the time of your discharge, grant you back pay including allowances and entitlements dating back to the effective date of your separation, and to place you on the disability retired list based on the findings of the Department of Veterans’ Affairs (VA) as well as the materials that you set forth in your exhibits F, G, and H. Your exhibits F, G, and H consist of records relating to your mental health treatment and VA rating, a personal statement, and medical notes from the Federal Bureau of Prisons, respectively.

You argued in support of your petition that your unfitting conditions prevented you from reasonably performing your and would have continued to do so had you remained in the Service. Further, you assert that you were unable to fulfill your work responsibilities, as you outlined in your statement at exhibit G. In addition, you assert that your condition and the symptoms you experienced undoubtedly posed a medical risk to your health and interfered with your work, and these conditions would have imposed unreasonable requirements on the military to maintain you as a member given the extent of the ongoing treatment and observation required to address these conditions. Finally, you assert that having your narrative reason changed to Secretarial Authority from Misconduct (Sexual Perversion) denied you due process because you did not seek such a remedy.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, and the Board disagreed with your rationale for relief. With respect to your request for a medical retirement, the Board observed that in order to qualify for military disability benefits through the Disability Evaluation System with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or the member or to the welfare or safety of other members; the member’s disability imposes unreasonable requirements on the military to maintain or protect the member; or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting.

In reviewing your record, the Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the disability evaluation system at the time of your discharge. In reaching its decision, the Board observed that the new material you provided was insufficient to change its prior decision. As noted above in its discussion of the decision of the Board's decision on your prior petition, the Board's decision on your request for a medical retirement was well reasoned and was supported by the findings of an advisory opinion (AO) prepared by a medical professional. Notably, in addition to concurring with the findings of the AO, the Board observed that you failed to show you met any of the criteria for a finding of unfitness at the time of your release from active duty. The prior decision of the Board explained that it fully considered the evidence that you early in your Navy career you were hospitalized for mental health symptoms, and that you were diagnosed with Major Depressive Disorder and Anxiety upon your release from confinement. The Board's decision on your prior petition explained that it found no evidence that these conditions created any occupational impairment during your active duty service. Indeed, the Board observed that your hospitalization early in your career did not impact your ability to become commissioned as an ensign and become accepted to medical school. In addition, as noted by the prior Board, your medical school transcripts showed you performed well academically. Based on these facts, the prior Board found, and this Board affirms, that you were able to perform the duties of your office, grade, rank or rating despite the existence of any disability conditions that may have existed at the time. Further, the Board found insufficient evidence that you met any other the other criteria for a finding of unfitness. Therefore, in this Board's opinion, you did not qualify for referral to a medical board or placement on the disability retirement list. In addition, the fact the VA rated you for service connected disability conditions that were service connected to your time in the Navy did not persuade the Board these conditions were unfitting at the time of your discharge from the Navy, because eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based without a requirement that unfitness for military duty be demonstrated. Therefore, while the Board carefully considered the evidence you submitted, even in light of the Kurta Memo and reviewing the record liberally and holistically, the Board did not find evidence of an error or injustice that warrants granting you the relief you requested.

Finally, the Board considered your contention that your due process rights were violated because the prior Board changed your narrative discharge from Misconduct (Sexual Perversion) to Secretarial Authority. You argued that the Board should have solicited your input prior to granting this remedy and its actions were improper. However, separate and apart from your argument that you should have received a different remedy, the Board did not agree with your implied argument that you were somehow negatively affected by the Board's decision to change your narrative reason for separation to remove the stigma of a separation based sexual perversion. As a result, the Board determined it was in the interests of justice to maintain its decision to change your narrative reason for separation as Secretarial Authority. However, the Board noted that you may request the Board to change it back to the original narrative reason, if you feel the new narrative reason creates an injustice in your record. 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,

5/17/2023

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Deputy Director

Signed by: █