



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

█
Docket No. 1984-23

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.

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 reconsideration application on 27 October 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 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). Additionally, the Board also considered an advisory opinion (AO) furnished by qualified mental health provider, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

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.

You enlisted in the U.S. Navy and began a period of active duty service on 21 May 2001. Your

pre-enlistment physical examination, on 30 April 2001, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms.

On 25 February 2003, pursuant to your guilty pleas you were convicted at a Special Court-Martial (SPCM) of carnal knowledge with a child under the age of sixteen (16) years old. You were sentenced to confinement for eleven (11) months, forfeitures of pay, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Navy with a Bad Conduct Discharge (BCD). On 11 August 2003, the Convening Authority (CA) approved the SPCM sentence as adjudged. On 25 May 2004, the ██████████ affirmed the SPCM findings and sentence as approved by the CA. Ultimately, upon the completion of appellate review in your SPCM case, on 5 November 2004, you were discharged from the Navy with a BCD and assigned an RE-4 reentry code.

On 20 October 2011, the Naval Discharge Review Board denied your initial upgrade application.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) you have been a registered sex offender in ██████████ for a little over twenty (20) years and relief would be equitable in the sense that the registration requirement and all of its attendant consequences have been carried out, (b) you were diagnosed with ADHD at the age of 10 or 11, and as such, prior to your discharge you suffered from impulsive and manic episodes, (c) while on active duty you consumed alcohol heavily and such consumption increased following your discharge that doctors would later opine was an attempt to self-medicate, (d) when you had intercourse with a thirteen (13) year old you had no ideal you were violating the law; you did not know anything about the legal age of consent or statutory rape, and (e) at such time you were experiencing symptoms of mania and inebriation. For purposes of clemency and equity consideration, the Board considered the entirety of the evidence you provided in support of your application.

As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 18 September 2023. The Ph.D. stated in pertinent part:

The Petitioner submitted post-service incarceration records from ██████████ County Jail, ██████████ Sheriff's Department and the ██████████ Department of Corrections and Rehabilitation from 2018-2019 where he met with various psychologists after verbalizing suicidal ideation. He was diagnosed with Adjustment Disorder with disturbance of conduct, Alcohol Use Disorder, Stimulant Use Disorder, Schizoaffective Disorder- Bipolar Type, PTSD, and methamphetamine use. The Petitioner stated in his personal statement that he "suffered from 'impulsive and manic episodes' while serving in the military." He submitted transcripts from his Court Martial and NCIS investigation as well as post-service accomplishments. There is no evidence that the Petitioner was

diagnosed with a mental health condition or suffered from PTSD while in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He submitted evidence of post-service diagnoses obtained while incarcerated, however the etiology or rationale thereof was not provided. His personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. In accordance with the Hagel, Kurta, and Wilkie Memos, the Board gave liberal and special consideration to your record of service and your contentions about any traumatic or stressful events you experienced and their possible adverse impact on your service. However, the Board concluded that there was no convincing evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record reflected that your misconduct was intentional and willful and demonstrated you were unfit for further service. The Board also determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not be held accountable for your actions.

The Board noted that you pleaded guilty to your carnal knowledge offense with a thirteen (13) year old female military dependent. The Board further noted that a plea of guilty is the strongest form of proof known to the law. Based upon your pleas of guilty alone and without receiving any evidence in the case, a court-martial can find you guilty of the offenses to which you pleaded guilty. The Board noted that during a SPCM guilty plea such as yours, the Military Judge (MJ) will only accept your guilty plea once they were satisfied that you fully understood the meaning and effect of your guilty plea, and only after determining that your plea was made voluntarily, of your own free will, and with full knowledge of its meaning and effect. On the record, the MJ would have also had you state on the record that discussed every aspect of your case including the evidence against you and possible defenses and motions in detail with your lawyer, and that you were satisfied with your counsel's advice. Further, the MJ would have also had you state on the record that you were pleading guilty because you felt in your own mind that you were guilty. Moreover, the Uniform Code of Military Justice states that during the appellate review process, the appellate court may affirm only such findings of guilty and the sentence or such part or

amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In other words, the appellate court has a duty to conduct a legal and factual sufficiency review of the case. If any errors or improprieties had occurred at any stage in your case, the appellate court surely would have concluded as such and ordered the appropriate relief. However, no due process, substantive, evidentiary, or procedural defects were identified in your case.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this was not a case warranting any clemency as you were properly convicted at a SPCM of serious misconduct involving a thirteen (13) year old child. As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your misconduct and disregard for good order and discipline clearly merited your discharge. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos 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 or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Lastly, the Board denied your request to remove any requirement that you be required as a sex offender because the Board is simply not empowered to provide such tailored relief. Moreover, the Board noted that your sex offender registry requirement was a collateral consequence of your conviction separate and distinct from the SPCM process, and was a creature of statute and policy that the BCNR cannot modify or rescind.

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,

11/1/2023

