

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

> Docket No. 6625-23 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 your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 2 November 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 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo).

A review of your record shows that you enlisted in the Navy and commenced a period of active duty on 8 July 1986. On 7 February 1989, you commenced a period of unauthorized absence, which ended when you were apprehended by military authorities on 2 August 1989.

Unfortunately, the documents pertinent to your administrative separation are not in your official military personnel file (OMPF). Notwithstanding, the Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Your Certificate of Release or Discharge from Active Duty (DD Form 214), reveals that you were separated from the Navy on 31 October 1989 with an Other Than Honorable (OTH) characterization of service, your narrative reason for separation is "Separation in Lieu of Trial by Court Martial," your separation code is "KFS," and your reenlistment code is "RE-4."

Based on the information contained on your Certificate of Release or Discharge from Active Duty (DD Form 214), it appears that you submitted a voluntary written request for an OTH discharge for separation in lieu of trial (SILT) by court-martial. In the absence of evidence to contrary, it is presumed that prior to submitting this voluntary discharge request, you would have conferred with a qualified military lawyer, been advised of your rights, and warned of the probable adverse consequences of accepting such a discharge. As part of this discharge request, you would have acknowledged that your characterization of service upon discharge would be an OTH.

In 1994, you filed an application with the Navy Discharge Review Board (NDRB) seeking to have his discharge characterization upgraded. You asserted before the NDRB that your discharge should be upgraded due to extenuating circumstances relating to the shooting death of your friend. On 21 November 1994, the NDRB found that there was no impropriety in your discharge and it denied your requested relief.

In your petition, you have requested that your discharge characterization be upgraded to General (Under Honorable Conditions) and that you be awarded a service connected disability retirement. In support of your request, you contend that in January 1988, you were involved in a hydraulic fluid spill and had to be removed from the space. You state that thereafter you were involved in the shooting of an 18-year-old and you went on a period of unauthorized absence to help the family after the shooting. You provided medical records that you contend support your position. Additionally, the Board noted you checked the "PTSD" and "Other Mental Health" boxes on your application but chose not to provide supporting evidence of your claims.

The Board carefully reviewed your petition and the material that you provided in support of your petition, and disagreed with your rationale for relief. In reaching its decision, 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 that 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 particular, the Board observed the lack of any evidence that you had any unfitting condition while on active duty. In fact, the proximate reason for your discharge was your request to be discharged in lieu of facing a court-martial. In its review of the entirety of your service record and the material that you provided, the Board determined there was insufficient evidence that you had any unfitting condition, while you were on active duty, that warranted a referred to a medical evaluation board for further review by the Physical Evaluation Board or your placement on the disability retirement list. Finally, the Board determined that you were ineligible for disability processing based on your misconduct based discharge that resulted in an OTH.

Regarding your request for a discharge upgrade, the Board found that there was insufficient evidence to support relief. 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 and previously discussed contentions. After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your SILT discharge, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. The Board also noted that the misconduct that led to your request to be discharged in lieu of trial by courtmartial was substantial and, more likely than not, would have resulted in a punitive discharge and extensive punishment at a court-martial. Therefore, the Board determined that you already received a large measure of clemency when the convening authority agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and likely punitive discharge. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. While the Board carefully considered the evidence you submitted in mitigation, 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 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.

The Board also noted that you requested "service connected disability benefits" in your petition. As described above, the Department of the Navy administers the Disability Evaluation System in order to evaluate service members who demonstrate unfitting conditions while they are on active duty. By contrast, the Department of Veterans' Affairs (VA) administers a program for compensation and pension, as well as other benefits, the eligibility for which is tied to the establishment of service connection and is manifestation-based without a requirement that unfitness for military duty be demonstrated. Should you choose to contact the VA, information may be obtained from their website at www.va.gov. The Board also noted that the State of West Virginia has a Veterans' agency, the **Department** without Internet access may obtain additional information from a local library. Please note that the VA and any state agency are entirely different organizations from this Board and the Department of the Navy, and they make their own eligibility decisions.

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,



