



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

█
Docket No. 9240-23
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 Board found it in the interest of justice to waive the statute of limitations and review your application. A three-member panel of the Board, sitting in executive session, considered your application on 4 December 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.

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 United States Navy and commenced a period of active duty on 13 September 1999. On 16 February 2005, you engaged in sexual relations with your then 16-year-old sister-in-law. On 7 March 2005, your record was flagged by the Navy Personnel Command, and your command was directed to investigate the allegations and take action if warranted. On 20 May 2005, as part of a pre-trial agreement (PTA), you pleaded guilty to violating █ Penal Code "02 PC 261.5(c) UNLAWFUL SEXUAL INTERCOURSE - MINOR MORE THAN 3 YRS YOUNGER." The court informed you that there would be "no petition for reduction to misdemeanor until 2 years of successful probation has been completed."

On 5 October 2005, you were notified that your command initiated administrative separation (ADSEP) processing by reason of misconduct – commission of a serious offense. After consulting

with qualified counsel, you waived your right to present your case at an ADSEP board. On 3 November 2005, your Commanding Officer recommended your retention, stating that you “accepted responsibility for [your] actions and continue to perform [your] duties in an exemplary manner.” Ultimately, the separation authority did not concur with your CO’s recommendation and separated you with an Other than Honorable (OTH) characterization of service due to misconduct and assigned a RE-4 reentry code.

You previously submitted a petition to this Board and were denied relief on 7 January 2010 and 13 November 2014. You also submitted petitions to the Naval Discharge Review Board and were granted relief on 14 June 2012, but denied further relief on 12 June 2023.

On 7 January 2010, this Board determined that you RE-4 “reentry code is correct, and you have not demonstrated that it would be in the interest of justice for the Board to assign a more favorable code as an exception to policy, there is no basis for granting your request.” The Board referred you to NDRB for review of your request as it related to your characterization of service and narrative reason for separation. On 14 June 2012, the NDRB concluded in pertinent part:

[B]ased on MILPERSMAN Article 1910-142, the victim did not meet the age requirement to be characterized as a child, and she was not related to him by blood or as a step child. The information developed from the █ DA's investigation was not taken into account by his FAP CRC, who used the allegations of incestuous child sexual abuse as the basis for discharge in its recommendation to NPC. Subsequently, NPC used this incorrect information to authorize the discharge. It is the NDRB's contention that had the CRC accurately characterized the victim by her age and taken into account the reduction of civilian charges based on new information as a result of the █ DA's investigation, the Applicant would most likely not have been discharged, considering that he had no previous adverse actions in his record of service. Additionally, on 18 August 2008, the █ Superior Court set aside the conviction and dismissed all charges against the Applicant. After a thorough review of the records, the Applicant's post-service documentation, supporting documents, facts, and circumstances unique to this case, and taking into consideration his testimony, the NDRB discerned an inequity in the discharge action. The NDRB voted to upgrade the Applicant's discharge to Honorable and to change the narrative reason for separation to Secretarial Authority.

Based on the identified errors, the NDRB changed your characterization of service and the narrative reason for separation. However, they did not have authority at the time to change your reentry code and this Board had already made an unfavorable determination on 7 January 2010. You submitted another request for a change to your reentry code to the BCNR, but were denied relief on 13 November 2014, the Board concluding that the potentially mitigating factors were “not sufficient to warrant relief in your case because of the seriousness of your misconduct.” You also submitted a request for a change to your reentry code to the NDRB, once they had authority to make such a change, but were denied relief on 12 June 2023, the Board concluding “the reenlistment code was proper and equitable given the Applicant's finding of guilt by civilian authorities for having sexual intercourse with a minor. Having charges dismissed or reduced after discharge has no bearing on the fact that at the time of his separation, enough evidence existed to support and warrant his reenlistment code.” Your current argument highlights that you did not

have “sexual intercourse” as misstated by the NDRB and that you did not commit adultery, as your misconduct fails to satisfy the legal requirement of that uncharged issue.

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 change to your reentry code and contention that had NPC not directed ADSEP based on the Family Advocacy Program Case Review Committee illegal finding of “intrafamilial child sexual abuse (incest),” you would not have been separated from the service. The Board considered your argument that the NDRB would have corrected the reentry code along with the other directed changes back in 2012, had they had the authority to do so at the time. For purposes of clemency and equity consideration, the Board considered the evidence you submitted in support of your application.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board did not find an error or injustice that warrants relief. The Board found that, based on your civilian criminal conviction, you were appropriately not recommended for reenlistment and assigned a RE-4 re-entry code. In making this finding, the Board noted that you admitted to the charge and pleaded guilty to the misconduct. The Board’s conclusion was not changed by the fact that charges were later dismissed. The Board highlighted that your admission alone is sufficient evidence of your misconduct and supports the RE-4 reentry code. Therefore, 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 recommended that you contact a recruiter and request a reenlistment code waiver, based on the arguments raised in this application, if you desire to reenlist in the armed forces.

You are entitled to have the Board reconsider its decision upon submission of supporting evidence, as described above, which will require you to complete and submit a new DD Form 149. Supporting evidence (i.e. 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,

12/7/2023

█