



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

█
Docket No. 9560-23
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 application on its merits. A three-member panel of the Board, sitting in executive session, considered your reconsideration application on 1 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 the 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).

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 took your oath of office and commissioned as an Ensign in the U.S. Navy Reserve (USNR) following completion of the NROTC program and graduation from █ University in May 1987. You eventually promoted to the grade/rank of Lieutenant Commander (O-4) on 16 October 2001.

On or about February 23, 2006, you were arrested by the █ Police Department in █, █ for the felony offense of online solicitation of a minor to arouse/gratify, which

allegedly occurred on October 25, 2005. You attempted to meet with what you expected to be a fourteen year old child, but were arrested as part of a sting operation.

As of June 2007, you had completed twenty (20) years of satisfactory USNR service towards retirement. You previously submitted a voluntary retirement request, which the Navy held in abeyance pending the outcome of your ██████████ criminal matter and any related Navy “show cause” proceedings.

On July 26, 2007, you pleaded guilty to online solicitation of a minor. As part of your conviction and guilty plea, the State of ██████████ waived/dropped Count II of your indictment. You were sentenced to be placed on community supervision for five years under the terms of a deferred adjudication agreement.

Following your conviction, on 29 August 2007, you submitted a statement to the Show Cause Authority (PERS-834 or SCA) requesting that you be allowed to retire at the rank of Lieutenant Commander (O-4). On 4 September 2007, your command forwarded a final Civil Action Report to the SCA that included your statement along with an NCIS report. Your command recommended to the SCA that you must show cause as to why you should be allowed to retire from the U.S. Navy at the rank of Lieutenant Commander (O-4).

On 16 November 2007, PERS-834 initiated administrative action requiring you to show cause for retention in the naval service before a Board of Inquiry (BOI) based on your documented misconduct and substandard performance of duty. In response, on 27 November 2007, you elected in writing to appear before a BOI.

On 9 April 2008, a BOI convened in your case. At the BOI, you were represented by counsel. Following the presentation of evidence and witness testimony, the BOI members unanimously determined by a preponderance of the evidence that you committed certain misconduct under the Uniform Code of Military Justice (UCMJ) related to the misconduct that formed the basis of your civilian conviction. Subsequent to the misconduct finding, the BOI members unanimously determined that you failed to conform to prescribed standards of military department, and recommended that you be separated from the naval service with a General (Under Honorable Conditions) (GEN) characterization of service. The BOI members unanimously recommended that you be retired at your current paygrade of O-4.

On 5 October 2009, the Chief of Naval Operations for Manpower, Personnel, Training and Education – N1 (CNO) recommended to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN(M&RA)) that you be separated for misconduct with a GEN characterization of service. However, the CNO disagreed with the BOI recommendation that you be retired at your current paygrade, and recommended that you be retired at the lower paygrade of Lieutenant (O-3). The CNO determined that your conduct represented a significant departure from what was expected of an O-4 in the U.S. Navy, and that your overall record was not otherwise so meritorious as to show satisfactory service in such grade. As a result, the CNO determined that your retirement in the reduced paygrade of O-3 was warranted and not legally objectionable.

On 9 October 2009, ASN(M&RA) approved CNO's recommendation to retire you in a reduced paygrade of O-3. Ultimately, effective 9 October 2009, you were discharged from the Navy for unacceptable conduct with a GEN characterization of service and retired at the lower paygrade of O-3 in a "former member" status, rather than as a retired officer.

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 with changes to your record to reflect a retirement at paygrade O-4 as a retired officer, awards, and removal of derogatory materials from your record. You contend that: (a) the ██████████ penal statute under which you were convicted was declared unconstitutional subsequent to your conviction, (b) on 5 July 2022 the ██████████ trial court granted you habeas relief and ordered that your conviction be set aside and your costs corrected, (c) on 12 July 2022 the Court dismissed your case, (d) on 24 October 2022 the Court expunged any and all records and files related to your arrest and prohibited the use, release, or dissemination of such records, (e) your record should reflect retirement in good standing as though no legal proceedings or investigations had occurred with full honorable characterization of service and corresponding military privileges and benefits, and (f) your discharge was inequitable due to the facts that the legal proceedings and criminal charges upon which it was based were proven to be unconstitutional. For purposes of clemency and equity consideration, the Board considered the entirety of the evidence you provided in support of your application.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Regarding your discharge and retirement upgrade request, the Board unequivocally determined that your discharge from the Navy with a GEN characterization at the retirement grade of O-3 was warranted. The Board determined that your substantiated misconduct involving minor children clearly demonstrated you had minimal potential to contribute positively to the Navy as an officer responsible for the care and well-being of enlisted Sailors. Thus, the Board found that your GEN separation and retirement at paygrade O-3 to be appropriate under the totality of the circumstances.

The Board determined that ██████████' disposition of your criminal matter was not persuasive and that any mitigation/clemency-based arguments based on the subsequent ██████████ dismissal and expungement were without merit. The Board noted that your separation and retirement downgrade was not based on violating ██████████ law, rather the Board noted the misconduct forming the basis of your BOI were instead UCMJ violations. The Board determined that any final resolution of your state law charges, years after the fact, was inconsequential to your Navy administrative proceedings. The Board noted that the record reflected you engaged in certain predatory conduct online, and that your underlying offenses and conduct are not mitigated by virtue of a state court ruling. The Board concluded that the Navy administratively processed you for your substantiated misconduct - actions and egregious misconduct that independently could have easily formed the basis of Navy disciplinary proceedings prior to your BOI without any deference to ██████████ state authorities at the time.

Additionally, the Board did not believe that your record was otherwise so meritorious as to deserve a paygrade upgrade and/or to make any conforming changes to your DD Form 214 and permit you to retire as an O-4 with higher corresponding benefits and retired officer status. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board determined that characterization under Other Than Honorable conditions or GEN conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a commissioned officer. The Board also determined that the record clearly reflected your misconduct was deliberate and willful and indicated you were unfit for further service. Moreover, the Board noted that the evidence of record did not demonstrate you were not mentally responsible for your conduct or that you should not otherwise be held accountable for your actions.

As a result, the Board concluded significant negative aspects of your service outweigh the positive aspects and continues to warrant a GEN characterization and your current retirement status. Based on this finding, the Board found no basis to grant your request to remove any derogatory materials from your record or consider you for any awards. Finally, 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.

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,

12/6/2023

