



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: 1388-19

Ref: Signature Date

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Dear █

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. After careful and conscientious consideration of the entire record, the Board for Correction of Naval Records (Board) found the evidence submitted was 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 application on 26 March 2020. The names and votes of the members of the panel 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, two Advisory Opinions (AO) from qualified mental health providers and your materials submitted in rebuttal to the AO, and applicable statutes, regulations and policies.

You reenlisted in the Navy on 21 April 2007. Prior to reenlisting, on 4 November 2004, you went to non-judicial punishment (NJP) for failing to obey a lawful order. On 8 January 2009, you were voluntarily admitted to a civilian hospital for inpatient psychiatric treatment. Relevant hospital records note that you were discovered to have been molesting your 14-year old stepdaughter for several years between the ages of 5 and 12, and that you were feeling guilty and attempted suicide. You were initially diagnosed with major depressive disorder with psychotic features and discharged on 20 January 2009. Upon your discharge, you were placed in pre-trial confinement to await charges of rape, sodomy, and indecent acts involving your stepdaughter. On 15 December 2009, pursuant to your guilty pleas, you were convicted at a General Court Martial (GCM) of sodomy with a child under 12 and indecent acts with a female under the age of 16. As punishment, you received confinement for fourteen (14) years and a discharge from the Navy with a Dishonorable Discharge (DD). Following the completion of the post-trial appellate review process in your case, your punitive discharge was ordered executed and on 13 September 2011, you were discharged from the Navy with a Dishonorable Discharge (DD).

Your contentions that you suffered from multiple mental health issues and bipolar disorder was fully and carefully considered by the Board in light of the Secretary of Defense's 3 September 2014 memorandum, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requested by Veterans Claiming Post Traumatic Stress Disorder," the 25 August 2017 memorandum, "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment," and the 25 July 2018 memorandum, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations."

Navy mental health providers (MHP) also reviewed your request for correction and provided the Board with AOs dated 4 September 2019 and 17 December 2019. The first MHP observed that you were determined to be competent to stand trial and there was no information in the record to the contrary that you were not competent to sign your enlistment extension. The MHP noted that you were diagnosed with bipolar disorder during military service but opined that there was insufficient evidence to attribute your misconduct to a mental health condition suffered during military service. The second MHP determined that although your diagnosis of major depression with psychotic features (which was later diagnostically clarified to bipolar disorder with psychotic features) did indeed occur during your military service, there still remained insufficient information to attribute your misconduct to your mental health condition. The MHP concluded by opining that there was insufficient evidence to attribute your misconduct to any service-connected mental health condition.

The Board carefully weighed all potentially mitigating factors, such your contentions that included, but were not limited to: (a) in late 2008 and early 2009 you suffered episodes of mental instability where you signed an enlistment extension while lacking mental competence which voids the extension of the contract automatically, (b) in January of 2009 you were hospitalized at [REDACTED] mental facility for 12 days, where you were diagnosed with a major depressive disorder and prescribed Prozac/Abilify/Ambien, (c) you suffered an injury on the job in 2006 where you were put on administrative duties and removed from the flight deck until your deployment was over, (d) that right after the accident, you started having episodes of confusion where you misunderstood instructions, (e) the government RCM 706 mental evaluation on 1 October 2009 is not admissible and out of jurisdiction because your defense attorney was not present, and (f) all the evidence that proved you were not fit for trial was suppressed. The Board, however, concluded that these factors and contentions were not sufficient to upgrade your discharge or grant any other relief in your case.

In accordance with the published guidance, the Board gave liberal and special consideration to your record of service and your contentions about any traumatic or stressful events and any mental health conditions you experienced and their possible adverse impact on your service. However, the Board concluded that there was insufficient evidence: (a) to support a nexus between any mental health conditions and/or mental health-related symptoms and your GCM

child sexual abuse offenses, or (b) to support the argument that any such mental health conditions or symptoms mitigated the misconduct that formed the basis of your court-martial and DD. Even under the liberal consideration standard, the Board concluded that your GCM misconduct was not due to mental health issues or mental health-related symptoms. The Board also determined that even assuming arguendo your crimes were somehow linked to any mental health concerns, the Board concluded that your GCM offenses were intentional, premeditated criminal conduct and would not be mitigated by any mental health conditions. The Board further concluded that your mental health symptoms did not prevent you from understanding right from wrong and determined, consistent with the Rules for Courts-Martial (RCM), that a mental condition not amounting to a lack of mental responsibility does not constitute a defense. Moreover, the Board found that at no time did you establish by clear and convincing evidence that you were not mentally responsible at the time of your alleged offenses (as required by RCM 916(k)(1)-(3)). Thus, the Board concluded that at all relevant times you possessed the requisite mental capacity and mental responsibility to both stand trial and extend your enlistment contract, and that any such suggestion or argument to the contrary is without merit and not persuasive. Lastly, during the pre-trial RCM 706 inquiry into your mental capacity and responsibility, the Board noted that this type of medical inquiry is not conducted with counsel present for either the defense or prosecution, and that the lack of counsel present does not invalidate the inquiry or its findings. Accordingly, the Board determined that there was no probable material error or injustice in your conviction or your discharge, and that your predatory sexual misconduct with a minor merited your receipt of a DD.

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 unanimously concluded that, despite your contentions, this is not a case warranting clemency. During both your GCM trial and the GCM post-trial appellate review process, no substantive, evidentiary, or procedural defects were discovered with your conviction. Had any actual defects existed, or if your mental health issues rendered you mentally incompetent to stand trial or lacking the mental responsibility for your charged offenses, either the trial court or the three-judge appellate court on review would have concluded as such and ordered the appropriate relief. The fact remains that you were properly convicted at a GCM of egregious sexual misconduct, and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your DD.

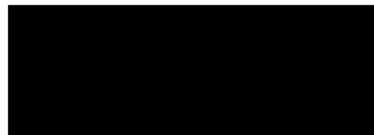
Additionally, the Board reviewed your application under the recent guidance provided in the Under Secretary of Defense's memorandum dated 25 July 2018 entitled, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations" (USD Memo). The purpose of the USD Memo is to ease the process for veterans seeking redress and assist Boards for Correction of Military/Naval Records "in determining whether relief is warranted on the basis of equity, injustice, or clemency." The USD Memo noted that "increasing attention is being paid to...the circumstances under which citizens should be considered for second chances and the restoration of rights forfeited," and that "BCM/NRs have the authority to upgrade discharges or correct military records to ensure fundamental fairness." The USD Memo sets clear standards and

principles to guide BCM/NRs in application of their equitable relief authority, and further explains that boards shall consider a number of factors to determine whether to grant relief. However, even in light of the USD Memo, the Board still concluded that, given the totality of the circumstances, your request does not merit relief.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon the 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,

4/17/2020

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Executive Director

Signed by

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