



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

[REDACTED]
Docket No: 5563-19

Ref: Signature Date

[REDACTED]
Dear [REDACTED]

This letter is in reference to your reconsideration request dated 29 May 2019. You previously petitioned the Board for Correction of Naval Records (Board) and were advised that your application had been disapproved. Your case was reconsidered in accordance with Board procedures that conform to *Lipsman v. Sec'y of the Army*, 335 F. Supp. 2d 48 (D.D.C. 2004). After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 23 October 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 and personal statement, together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations and policies.

You enlisted in the Navy on 27 October 1976. On 11 August 1977 you commenced a period of unauthorized absence (UA) lasting two days. On 1 February 1978 you were referred to the Navy Physical Evaluation Board (PEB) for a fitness for duty determination following several months of medical treatment for chronic lumbosacral strain. On 26 May 1978, the PEB found you physically fit to perform the duties of your grade and specialty, and you were continued on active duty in a full duty status.

Following the PEB decision, on 19 June 1978 you commenced a period of UA lasting three days until 22 June 1978. On 7 July 1978 you commenced another period of UA. You remained in a UA status for 329 days until your arrest by civil authorities in [REDACTED] on 1 June 1979.

On 13 August 1979 you submitted a voluntary written request for a discharge under other than honorable (OTH) conditions in lieu of trial by court-martial for your two UA periods lasting 3 and 329 days, respectively. Prior to submitting this voluntary discharge request, you conferred with a qualified military lawyer, at which time you were advised of your rights and warned of the

probable adverse consequences of accepting such a discharge. As a result of this course of action, you were spared the stigma of a court-martial conviction for your long-term UA, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge.

In the interim, on 29 August 1979 a Medical Officer (MO) determined you possessed symptoms commensurate with passive-aggressive personality traits that existed prior to entry. The MO determined that you were mentally responsible at the time of both your UAs and examination, there was no evidence of psychosis or neurosis, and that further psychiatric evaluation and treatment was not deemed necessary. Ultimately, on 28 September 1979 you were separated from the Navy with an OTH characterization of service.

Your contention that you suffered from post-traumatic stress disorder (PTSD) was fully and carefully considered by the Board in light of the guidance provided by the Secretary of Defense's Memorandum, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requested by Veterans Claiming Post Traumatic Stress Disorder" of 3 September 2014, and the "Clarifying Guidance to Military Discharge Review Board 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" memorandum of 25 August 2017.

As part of the Board review process, the Board's Physician Advisor, who is a medical doctor and Fellow of the American Psychiatric Association (MD), reviewed your contentions and the available records, and issued an AO dated 17 September 2020. The MD observed that a review of your service records did not reveal any evidence that you exhibited any significant mental health symptoms or diagnosable mental health conditions during military service. The MD concluded by opining that although you have a post-discharge PTSD diagnosis, there is insufficient evidence that your PTSD was service-connected or that your misconduct could be attributed to PTSD or any mental health conditions.

The Board carefully weighed all potentially mitigating factors, such your contentions that included, but were not limited to: (a) the original BCNR decision was made without all of the evidence needed to be before the board, and (b) that you have been diagnosed with PTSD by two psychiatric doctors. Unfortunately, the Board determined these mitigating factors and contentions were not sufficient to warrant upgrading your discharge or granting any other relief in your case given your voluntary request for an OTH discharge in lieu of a trial by court-martial and the overall seriousness of your misconduct. 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 you experienced and their possible adverse impact on your service. However, the Board concluded that there was no nexus between any PTSD and/or PTSD-related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. Even under the liberal consideration standard, the Board concluded that your misconduct was not due to PTSD or PTSD-related symptoms. The Board noted that the evidence of record did not demonstrate that you were not responsible for your conduct or that you should not be held accountable for your actions.

Additionally, absent a material error or injustice, the Board generally will not summarily upgrade a discharge solely for the purpose of facilitating benefits from the Department of Veterans Affairs, or enhancing educational or employment opportunities. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your serious misconduct merited your receipt of an OTH discharge.

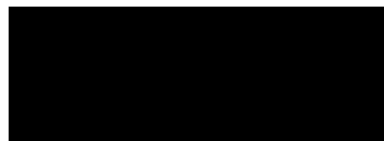
The Board also reviewed your application under the recent guidance provided in the Under Secretary of Defense's memorandum dated 25 July 2018 entitled, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations" (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 given the totality of the circumstances and your lengthy UA, your request does not merit relief.

It is regretted that the circumstances of your reconsideration petition 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 the absence of new matters for reconsideration, the decision of the Board is final, and your only recourse would be to seek relief at no cost to the Board from a court of appropriate jurisdiction.

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,

12/18/2020

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Executive Director

Signed by:

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