



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

█
Docket No. 1820-24
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.

A three-member panel of the Board, sitting in executive session, considered your application on 16 July 2024. 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, and applicable statutes, regulations, and policies as well as the 8 April 2024 advisory opinion (AO) provided by the Navy Office of Legal Counsel (PERS-00J) and your response to the AO.

The Board determined that a 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.

The Board carefully considered your request to overturn the reversion to your permanent enlisted status and to correct your record to reflect continued service as a Limited Duty Officer (LDO/O-3E) until retirement. The Board considered your contention that, since the previous Board's decision, you petitioned the Naval Criminal Investigative Service (NCIS) for removal the titling of your name and NCIS determined that probable cause did not exist to believe that the underlying offense occurred or that you actually committed the offense. You also contend the previous Board indicated, "it is not an investigative body," but NCIS is and determined that a prudent and cautious person would not reasonably believe a crime was committed in this case. You further contend this determination undercuts the substance of the allegation that led to the

non-judicial punishment (NJP) and eventual reversion. You claim that, without a factual basis for the allegation, the reversion to your permanent enlisted status should be reversed and your record corrected.

The Board however, substantially concurred with the AO and determined there is no basis to grant relief. In this regard, the Board noted that the Board previously approved corrections to your record by removing your NJP and Punitive Letter of Reprimand (PLOR), and by changing your record to reflect continuous service on active duty in the grade E-8 until transfer to the Fleet Reserve.

In response to the AO, you assert that maintaining the presumption of regularity in the midst of extensive irregular actions taken against you is preposterous. You also request the Board rely upon NCIS's acknowledgment that the investigation does not contain probable cause to establish that an offense occurred, or that you committed an offense. You claim the success of the prior actions provides evidence of the litany of material errors and injustices you were subjected to throughout this process.

On 15 October 2019, the Board determined the basis for the NJP was supported by a preponderance of evidence that included an investigation, victim's statement, witness accounts of bite marks on the victim's face, and forensic evidence. That Board also determined that even without the NJP, the evidence was sufficient to support your detachment for cause, promotion withhold, reversion to your permanent enlisted grade, and denial of your reenlistment. However, upon review of the Board's decision, the Executive Director considered other factors regarding your NJP; specifically, that the ship was non-operational for over four years, and you did not live or work aboard the ship. The Executive Director determined your NJP was in error because you were improperly denied your right to demand trial by court-martial in lieu of NJP, as you were not attached to or embarked on a "vessel," as the ship was not operational. On 18 February 2020, the Assistant General Counsel (Manpower and Reserve Affairs) (AGC (M&RA)), approved the Executive Director's recommendation and directed the removal of your NJP and PLOR from your naval record. Pursuant to the Board's findings, the AGC (M&RA) granted no further corrective action.

On 25 January 2022, the Board considered your suit filed in the Court of Federal Claims alleging wrongful discharge from the Navy. The Board determined your reversion was in compliance with SECNAVINST 1920.6C. The Board found sufficient evidence that naval authorities evaluated the evidence and reached a reasonable conclusion based on that evidence. In this regard, you were found not guilty at NJP of the most serious charges, which strongly suggest that the evidence was carefully evaluated and weighed. Concerning your wrongful discharge, the Board determined that SECNAVINST 1920.6C negated your need to reenlist to attain the 20 years of active duty to qualify for transfer to the Fleet Reserve, because you had more than 18 years of active service at the time of your discharge, and you should not have been discharged after your reversion to your permanent enlisted status. On 11 April 2022, the Acting Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN (M&RA)), approved the Board's decision and directed the change to your record indicating continued service on active duty in the grade of E-8 until you were discharged for transfer to the Fleet Reserve and to issue a new DD

Form 214. Pursuant to the Board's findings, the Acting ASN (M&RA) granted no further corrective action.

The Board noted that NCIS approved the expungement of your name in the Defense Central Index of Investigation and National Crime Information Center Interstate Identification Index. The Board also noted the non-dispositive factors NCIS considered when making this decision. The Board, however, noted that NCIS does not specify whether their determination was based on the original charge of sexual assault or assault consummated by a battery and conduct unbecoming. Concerning the NCIS finding that "[p]robable cause does not exist [. . .]," the Board determined "probable cause" is a term used in criminal proceedings and is inapplicable to your reversion to enlisted status because it was an administrative process. Your reversion to enlisted status was pursuant to 10 U.S.C. § 8146 which authorizes the Secretary of the Navy to terminate any appointment made under this statute. Accordingly, The Board determined you were properly reverted to E-8 according to 10 U.S.C. § 8146 and SECNAVINST 1920.6C, and your selection for promotion to O-3E was administratively removed by operation of law.

Despite your denials and the corrections to your naval record, previous Boards, the AGC (M&RA), and the Acting ASN (M&RA) upheld your reversion to permanent enlisted status. The Board determined that your commanding officer acted within his discretionary authority and did not rely solely on the NCIS investigation when determining that you committed misconduct. Additional evidence included the fact that you had a physical confrontation behind closed doors with a subordinate enlisted female in the grade of E-3 (victim), the victim's statement that you bit her on the face, witness accounts of bite marks on the victim's face, and evidence of your saliva on her face.

The Board substantially concurred with the previous determinations that even without the NJP, the evidence was sufficient to support your detachment for cause, promotion withhold, and reversion to your permanent enlisted grade. Additionally, your reversion to permanent enlisted status was in compliance with SECNAVINST 1920.6C and the previous removal of your NJP does not invalidate your reversion, as it was based upon the aforementioned evidence of the misconduct. The Board thus concluded that there is no probable material error, substantive inaccuracy, or injustice warranting corrective action. 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.

In the absence of sufficient new evidence 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.

Sincerely,

8/5/2024

