



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

Docket No: 4063-21

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 statute of limitations was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 8 October 2021. 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, to include the Kurta Memo, the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). Additionally, the Board also considered an advisory opinion (AO) furnished by a qualified mental health provider.

You enlisted in the Navy on 20 July 2005. Your pre-enlistment physical examination on 1 June 2005 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. Specifically, on your medical history you expressly denied and answered "no" in response to questions relating to: (a) depression or excessive worry; (b) ever being evaluated or treated for a mental condition; (c) ever being a patient in any type of hospital; (d) have you consulted or been treated by clinics or physicians within the past 5 years for other than minor illnesses; and (e) received counseling of any type. You also denied ever taking medication, drugs, or any substance to improved attention, behavior, or physical performance on your pre-screen medical history report.

Your record reflects that you received enlistment waivers in June 2005 for: (a) previous physical violence/disorderly conduct; (b) a non-minor misdemeanor DWI conviction; (c) public intoxication; and (d) a waiver of physical standards for excessive refraction. On 21 July 2005 you received a "Page 13" counseling warning for fraudulent induction because you failed to disclose basic enlistment eligibility information, namely, being cited for public intoxication in San Antonio, Texas in June 2005 and paying a fine. Following the completion of initial recruit training, on 18 November 2005 you reported for duty on board the
in [REDACTED]

On 4 May 2006 you received non-judicial punishment (NJP) for unauthorized absence (UA). You did not appeal your NJP. On 11 July 2006 at approximately 0900 you were determined to be drunk on duty after being administered a breathalyzer test.

On 17 July 2006 you were notified that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. You elected in writing to waive your rights to consult with counsel and to request an administrative separation board. In the interim, your commanding officer (CO) recommended that you be separated with an other than honorable (OTH) characterization of service. In his separation endorsement, your CO stated:

SR [REDACTED] has placed discredit upon himself and upon the United States Navy. He has a complete disregard for authority. He proved this by reporting to Executive Officers Inquiry drunk. I recommend SR [REDACTED] be processed for separation by reason of Commission of a Serious Offense for...[f]ailure to obey an order, and...[d]runk on [d]uty. SR [REDACTED] actions constitute a severe departure from good order and discipline.

Ultimately, on 2 August 2006 you were discharged from the Navy for misconduct with an OTH characterization of service and assigned an RE-4 reentry code.

As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 13 September 2021. The Ph.D. initially observed that you acknowledged, in your BCNR personal statement, that you did not disclose prior mental health treatment (therapy and medication). The Ph.D. also observed that you provided two letters from your civilian provider (dated 2003 and 2007), both of which stated Petitioner you treatment for ADHD and a depressive disorder in September of 2002. The Ph.D. determined that you purposefully did not disclose mental health treatment prior to enlistment and purportedly stopped taking prescribed medication (Paxil and Adderall) in order to gain entry in to the USN. The Ph.D. concluded that such actions unfortunately resulted in difficulty adjusting to military life and subsequent misconduct. The Ph.D. concluded by opining that although your mental health condition may mitigate your UA, it did not mitigate your nondisclosure of a pre-enlistment mental health treatment.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to your contentions that: (a) your alcohol offenses and brig time were excessive and outside the maximum punishments; (b) the punishments you received were a miscarriage of justice, especially the OTH discharge; (c) your offenses were not of a willful and persistent manner; (d) in spite of the overall outcome, prior to your first offense your service was honest, faithful, and meritorious; and (e) your recruiter suggested to you not to disclose your pre-service mental health treatment. However, given the totality of the circumstances, the Board determined that your request does not merit relief.

In accordance with the Kurta, Hagel, and Wilkie Memos, 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 you were appropriately separated with an OTH for misconduct and that you also clearly had multiple disqualifying mental health issues upon entry into the Navy. The Board also concluded, contrary to the AO, that there was no nexus between any mental health conditions and/or 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 fraudulent entry discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. The Board also concluded that you did not provide convincing evidence to corroborate your contention that your recruiter suggested that you intentionally conceal your medical history on your enlistment application. Moreover, the Board concluded that even if your misconduct was somehow attributable to any mental health conditions, the severity of your misconduct outweighed any and all mitigation offered by such mental health conditions. Additionally, the Board determined that you had a legal, moral, and ethical obligation to remain truthful on your enlistment paperwork. Had you properly and fully disclosed your pre-service mental health conditions, treatment, and medication, you would have been disqualified from enlisting. The Board determined the record clearly reflected that your misconduct and your lack of disclosure about your mental health history were intentional and demonstrated you were unfit for further service. The Board further determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not be held accountable for your actions

The Board determined that your Navy service records and DD Form 214 maintained by the Department of the Navy (DoN) contain no known errors. Moreover, the Board noted that a fraudulent enlistment occurs when there has been deliberate material misrepresentation, including the omission or concealment of facts which, if known at the time, would have reasonably been expected to preclude, postpone, or otherwise affect a Sailor's eligibility for enlistment. The Board concluded that you clearly intentionally and willfully failed to disclose your disqualifying pre-service mental health issues as part of your pre-enlistment medical documentation and application.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or

years. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board determined that characterization under other than honorable (OTH) conditions 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 Sailor.

Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. Moreover, the Board noted that VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only. Such VA eligibility determinations, disability ratings, and/or discharge classifications are not binding on the Department of the Navy and have absolutely no bearing on previous active duty service discharge characterizations. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities.

The Board carefully considered any matters submitted regarding your post-service conduct, accomplishments, and ongoing medical issues, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that given the totality of the circumstances your request does not merit relief. 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 misconduct and fraudulent entry in the Navy clearly merited your receipt of an OTH, and that such characterization was proper and in compliance with all Department of the Navy directives and policy at the time of your discharge.

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,

10/22/2021

Executive Director