



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: 4873-21

Ref: Signature Date

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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 19 January 2022. 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, an Advisory Opinion (AO) from a qualified mental health provider, 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. Although you were afforded an opportunity to submit an AO rebuttal, you did not do so.

You enlisted in the Navy on 30 March 2001. Your pre-enlistment physical examination on 26 April 2000 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 25 July 2001 you reported for duty on board the █
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On 20 November 2001 you commenced a period of unauthorized absence (UA) that terminated after twenty-two days on 12 December 2001. On 12 December 2001 you commenced a second

UA that terminated after two days on 14 December 2001. On 20 December 2001 you received non-judicial punishment (NJP) for your two UA periods. You did not appeal your NJP.

On 16 July 2002 you commenced a period of UA that terminated after forty-one (41) days on 26 August 2002. On 29 August 2002 you received NJP for UA and missing movement of your ship. On 29 August 2002 your command issued you a "Page 13" counseling warning (Page 13) documenting your UA and missing movement. The Page 13 expressly warned you that any further deficiencies in performance and/or conduct may result in disciplinary action and in processing for administrative separation.

However, on 30 August 2002 a Navy Drug Lab message indicated you tested positive for marijuana. On 13 September 2002 you received NJP for the wrongful use of a controlled substance. You did not appeal your NJP. On 14 September 2002 you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. On 19 September 2002 you waived your rights to consult with counsel, submit statements for consideration, and to request a hearing before an administrative separation board. Ultimately, on 8 October 2002 you were discharged from the Navy for misconduct with an other than honorable (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 29 October 2021. The Ph.D. initially observed there was no evidence in your available service record indicating you were diagnosed with a mental health condition. The Ph.D. noted you only provided limited post-service records indicating a possible PTSD diagnosis was service-connected, but that you did not provide any clarifying information about PTSD-related trauma. The Ph.D. concluded by opining that there was insufficient evidence you incurred PTSD or another unfitting mental health condition on active duty, and insufficient evidence that your misconduct could be attributed to a mental health condition.

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) you were simply put out of the military and sent home without proper treatment; (b) this caused great hardships and tribulations in your life; and (c) in recent months after seeing a PTSD counselor you learned that the circumstances surrounding your discharge were PTSD-related. 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 there was no nexus between any mental health-related conditions or 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. As a result, the Board concluded that your pattern of misconduct was not due to mental health-related conditions or symptoms. Moreover, the Board observed that you did not submit any clinical documentation or treatment records to support your mental health claims

despite a request from BCNR on 17 August 2021 to specifically provide additional documentary material. Even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board concluded the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. The Board also determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should otherwise not be held accountable for your actions.

Additionally, the Board noted that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average in conduct was 1.0. Navy regulations in place at the time of your discharge required a minimum trait average of 2.50 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your serious misconduct which further justified your OTH characterization of discharge. The Board also 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 OTH 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 Sailor. Lastly, absent a material error or injustice, the Board generally will not 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 and accomplishments, 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 serious misconduct clearly merited your receipt of an OTH.

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,

1/31/2022

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Executive Director

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