



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: 5226-21
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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 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 20 December 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 considered a 29 October 2021 advisory opinion (AO) furnished by a qualified mental health provider, your 23 November 2021 response to the AO, as well the review of your response by the preparer of the AO.

The Board determined that your 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.

You enlisted in the Navy and commenced a period of active duty on 26 September 1989. In your enlistment documentation, you failed to disclose your civilian conviction record, which included convictions for wrongfully possessing and using a controlled substance, and theft by

misrepresentation. While at recruit training, on 6 October 1989, your accession urinalysis tested positive for the wrongful use of marijuana. On 12 February 1990, you received nonjudicial punishment for two different periods of unauthorized absence. On 13 June 1990, you received nonjudicial punishment for being derelict in the performance of your duties. On 18 June 1990, you were notified of the initiation of administrative separation processing based on commission of a serious offense and defective enlistment, and your rights in connection therewith. You waived your right to an administrative board. On 20 June 1990, your commanding officer recommended that you be discharged with an other than honorable characterization of service, and on 28 June 1990, you were so discharged. In 2010, you filed a petition with this Board seeking to upgrade your discharge characterization, citing your youth as a factor in your misconduct. On 29 June 2011, this Board denied your petition.

The Board carefully considered all potentially mitigating factors in your petition to determine whether the interests of justice warrant relief in your case including in accordance with the Wilkie Memo. You contend in your petition that your discharge is related to your mental health condition/PTSD, which serves to mitigate your misconduct. You further state that your offenses, such as your short periods of unauthorized absence, were minor. You also state that you believe there was an error in your enlistment pertaining to your civilian conviction, and that your enlistment was not defective, because your pre-service civilian conviction was actually dismissed, and that you disclosed your use of marijuana prior to entry and your recruiter told you not to worry about the marijuana use.

In connection with your assertion that you suffered from a mental health condition, the Board requested, and reviewed, the AO. In preparing the AO, the mental health provider reviewed your service record as well as your petition and the matters that you submitted. According to the AO:

There is no evidence in the Petitioner's limited service record that he was diagnosed with a mental health condition in service. There are no post-discharge records denoting a mental health diagnosis, although there is evidence that he had an impairing mental health condition in June 2019. Additional information (e.g., the complete VA Compensation and Pension (C&P) exam or post-service treatment records describing the Petitioner's mental health diagnosis and its specific link to his misconduct) are required to render an alternate opinion. Should he choose to submit additional records, they will be considered in the context of his claims.

The AO concluded, "it is my considered medical opinion that there is insufficient evidence that the Petitioner incurred PTSD or another mental health condition during military service, and there is insufficient evidence that his misconduct should be attributed to a mental health condition."

In response to the AO, you provided post-service medical records describing that you experienced trauma and that you have a history of depression, and you suggest that you may have been experiencing these symptoms during military service. The mental health provider also reviewed these materials, and explained that you submitted new but not material information, including a personal statement regarding your drug use and a letter of support from a Veterans

Service Officer attesting to your serious mental illness and opining that drug use may have been to unknowingly treat unrecognized delusions. However, the mental health provider opined that given the your pre-service alcohol possession arrest, it seems as likely as not that your drug use was related to a continuation of pre-service behavior. Accordingly, the mental health provider concurred with original AO.

Based upon its review, the Board concluded the potentially mitigating factors that you raised were insufficient to warrant relief. With respect to your contention relating to a mental health condition, the Board concurred with the findings of the AO. The Board acknowledged your position that you have addressed mental health challenges, but it was unable to find a nexus between that and your naval service. Thus, in light of your receipt of nonjudicial punishment on two occasions, as well as the finding of the AO that found no mental health condition that could mitigate your misconduct, the Board determined that your request does not merit relief.

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,

1/10/2022

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Executive Director

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