



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: 5612-21
Ref: Signature Date

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Dear █:

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 18 March 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, 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 the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you did not do so.

You enlisted in the Navy on 20 June 1991. Your pre-enlistment medical examination on 6 June 1991 and self-reported medical history noted both no psychiatric or neurologic conditions or symptoms.

On 22 October 1993 you received non-judicial punishment (NJP) for carrying a concealed weapon with a box of ammunition in your car. The weapon contained a loaded clip. There is no indication in your available service records that you appealed your NJP.

You were subsequently notified that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. Based on information in your service record, you waived your right to present your case to an administrative separation board. In the interim, your separation physical on 2 November 1993 and self-reported medical history both indicated no neurologic or psychiatric conditions or symptoms. Your commanding officer recommended your separation with an other than honorable conditions (OTH) characterization of service for the commission of a serious offense. On 4 November 1993 the Separation Authority approved and directed your OTH discharge. Ultimately, on 12 November 1993 you were discharged from the Navy for misconduct with an OTH characterization of service and assigned an RE-4 reentry code.

On 26 June 2013 the Board for Correction of Naval Records (BCNR) denied your first petition for relief. The BCNR concluded your mitigating factors were insufficient to warrant an upgrade given the seriousness of your offense.

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 3 February 2022. The Ph.D. initially noted that although you contended you were diagnosed with mental health conditions, you did not provide clarifying information about any diagnosis and/or symptoms. The Ph.D. noted that your service record did not contain evidence of a mental health condition diagnosis or reported psychological symptoms/behavioral changes indicative of a diagnosable unfitting mental health condition. The Ph.D. concluded by opining that the evidence failed to establish you suffered from a mental health condition on active duty, or that your misconduct was mitigated by 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) someone else had the gun and you never had a gun; (b) you couldn't get a lawyer to help you; and (c) while you were on pre-mast restriction your command came to your rack at 0400 hours and had you sign a paper not knowing it was a rights waiver. 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 convincing evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. Moreover, the Board observed that you did not submit any clinical documentation or treatment records to support your PTSD/mental health claims despite a request from BCNR on 6 April 2021 to specifically provide additional documentary material. The Board determined the record clearly reflected that your active duty misconduct was intentional and willful 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.

The Board concluded that you did not provide convincing evidence to substantiate or corroborate any of your evidentiary or due process contentions. If you believed you did not commit your NJP offenses, you could have provided exculpatory evidence at your NJP hearing, and you also had the absolute right to appeal your NJP to higher authority and subsequently provide new and/or additional evidence to refute the government's case. Instead, the Board determined that you were presumably found guilty of your charged NJP offense because you were indeed guilty, and the Board was not willing to re-litigate well-settled facts from over twenty-eight years ago that are no longer in dispute absent any reliable evidence to the contrary.

Additionally, 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 noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. The Board determined that characterization under 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. 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 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 for mental health conditions, the Board concluded that your 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,

3/24/2022

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Executive Director

Signed by: █