



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: 5706-21

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 17 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 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 a rebuttal, you did not do so.

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 on 1 June 1993. On 14 October 1993 you reported for duty on board the █.

On 25 January 1994 you received non-judicial punishment (NJP) for the larceny of a Casio wristwatch from a fellow shipmate. You did not appeal your NJP. On the same day your command issued you a "Page 13" warning (Page 13) documenting your NJP. The Page 13 expressly warned you that any further deficiencies in your performance and/or conduct may result in disciplinary action and processing for administrative separation.

However, on 12 May 1994 you were convicted at a Special Court-Martial (SPCM) of two separate specifications of violating a lawful general regulation for wrongfully possessing weapons on board the ██████████, and three separate specifications of larceny. Your larceny charges involved the theft of various personal and uniform items from your shipmates. You received as punishment confinement for three months, forfeitures of pay, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Navy with a Bad Conduct Discharge (BCD). In the interim, on 7 July 1994 your separation physical examination and self-reported medical history noted no neurologic or psychiatric conditions or symptoms. Upon the completion of appellate review in your case, on 9 June 1995 you were discharged from the Navy with a BCD and assigned an RE-4 reentry code.

On 21 August 2008 the Naval Discharge Review Board determined your discharge was proper as issued and no change was warranted. 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 26 October 2021. The Ph.D. noted that there was no evidence in your service records you were diagnosed with or suffering from a mental health condition on active duty. The Ph.D. also noted that you did not submit any additional medical records listing a mental health diagnosis. The Ph.D. concluded by opining that there was insufficient evidence you incurred a mental health condition on active duty, and there was 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 Hagel, Kurta, and Wilkie Memos. These included, but were not limited to your contentions that: (a) in today's society this type of crime is minor and you would receive probation with a fine without jail time if you didn't have any prior convictions; (b) you have exemplary post-service conduct including twelve years and nine months of employment at the California Department of Corrections and Rehabilitation; and (c) your SPCM sentence was a bit excessive for someone that did not have any previous major violations. 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 you suffered from any type of mental health condition while on active duty, or that any such mental health conditions or symptoms were 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 mental health claims despite a request from BCNR on 22 September 2021 to specifically provide additional documentary material. The Board determined the record clearly reflected that your active duty misconduct was willful and intentional and demonstrated you were unfit for further service. The Board also concluded 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 determined that your SPCM sentence was not too harsh or disproportionate under the circumstances. Prior to your SPCM, you were found guilty of larceny from a shipmate in January 1994 and specifically warned in writing of the adverse consequences of further misconduct. Notwithstanding such warning, you continued to commit additional misconduct. The Board also recognized that the civilian and military justice systems are completely different in their administration of punishment. While the theft of personal property in civilian life may not be serious in some circumstances, in the military it is a very serious offense, especially when it is done on board a ship and the theft is from fellow shipmates. The Board also noted that your pattern of misconduct included the possession of multiple unlawful dangerous weapons on board a ship, and that at your May 1994 SPCM you were technically no longer a first offender given your January 1994 NJP for larceny.

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. Additionally, absent a material error or injustice, the Board generally will not summarily upgrade a discharge solely for the purpose of facilitating VA benefits, medical care, or enhancing educational or employment opportunities. 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 serious misconduct and disregard for good order and discipline clearly merited your receipt of a BCD.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. You were properly convicted at a SPCM of serious misconduct, and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. The Board carefully considered any matters submitted regarding your admirable 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.

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, _____

1/11/2022

[REDACTED]

Executive Director

[REDACTED]