



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: 6830-21

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 limitation 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 25 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 an advisory opinion (AO) furnished by a qualified mental health provider. You were afforded an opportunity to submit an AO rebuttal and you did not do so.

You enlisted in the Navy and commenced a period of active duty on 8 November 1983. Your pre-enlistment physical examination on 18 May 1983 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 11 May 1984, you reported for duty on board █ following graduation from Hospital Corps School.

On 6 February 1985, you received non-judicial punishment (NJP) for both the wrongful use and the wrongful possession of marijuana. You did not appeal your NJP. On the same day, your command issued you a "Page 13" counseling warning (Page 13) documenting your NJP. The Page 13 expressly warned you that any further deficiencies in performance and/or conduct may result in disciplinary action and processing for administrative separation.

On 7 February 1985, you underwent a psychiatric evaluation after being notified that you tested positive again for marijuana. You expressed to the Medical Officer (MO) that you were very anxious and worried over your future. The MO diagnosed you with an adjustment disorder with anxious mood.

On 13 February 1985, your drug abuse screening indicated that you were not psychologically or physically drug dependent. You admitted during the dependency screening that you used marijuana during a New Year's Eve party, but stated that you had not used drugs since that time. At a follow-up appointment for your situational anxiety, on 13 February 1985, the MO determined you to be fully responsible for your behavior.

However, on 13 February 1985, the suspended portion of your NJP was vacated and enforced due to continuing misconduct. The same day you received NJP a second time for both the wrongful use and the wrongful possession of marijuana. You did not appeal your NJP. Your commanding officer subsequently placed you on "urine surveillance" for six months.

On 6 May 1985, the █ Laboratory reported to your command that you tested positive for marijuana on two separate occasions in April 1985. Accordingly, on 9 May 1985, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with counsel and elected in writing to expressly waive your rights to submit statements on your own behalf and to request an administrative separation board. Ultimately, on 14 June 1985, you were discharged from the Navy for misconduct due to drug abuse 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 26 January 2022. The Ph.D. initially observed that your active duty records did not contain evidence of a mental health diagnosis or psychological/behavioral changes indicating a mental health condition until after your first NJP. The Ph.D. also observed that you did not provide any information regarding a post-discharge mental health condition. The Ph.D. concluded by opining that although you were diagnosed on active duty with an adjustment disorder, the preponderance of the available objective evidence failed to establish that your active duty misconduct could be 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: (a) it has been thirty-five years and you are

requesting an upgrade so you can use your VA benefits, (b) you were discharged in the 1980s without drug abuse rehabilitation treatment and you now suffer from substance abuse and mental health issues, and (c) you are homeless and unemployed. However, given the totality of the circumstances, the Board determined that your request does not merit relief.

In accordance with the Hagel, Kurta, 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 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 discharge. The Board determined that your anxiety issues were caused solely by your misconduct and its future ramifications on your career. Accordingly, the Board concluded that your 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 16 November 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 drug-related misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was intentional and demonstrated you were unfit for further service. The Board also noted 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 further 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 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,

4/1/2022

[REDACTED]

Executive Director

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