



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: 7111-21

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 18 February 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. Although you were afforded an opportunity to submit an AO rebuttal you did not do so.

You enlisted in the Navy on 7 September 2005. Your pre-enlistment physical examination on 13 January 2005 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 2 April 2006 you reported for duty on board the █
█ in █.

On 24 June 2006 you received non-judicial punishment (NJP) for failing to obey a lawful order by drinking underage, and for the destruction of military property (a telephone used in the "IC

gyro station”). You received the maximum punishment permitted at NJP. You did not appeal your NJP.

Following your NJP you were notified that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. Information in your service record indicated you waived your right to request an administrative separation board. Ultimately, on 6 October 2006 you were separated from the Navy for misconduct with an other than honorable (OTH) discharge characterization and assigned an RE-4 reentry code.

On 15 October 2009 the Naval Discharge Review Board (NDRB) denied your application for relief. The NDRB determined that your discharge was proper as issued and that 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 initial AO dated 11 January 2022. The Ph.D. initially noted that there was evidence considered by NDRB indicating you were evaluated and treated on active duty on several occasions for a history of depression and diagnosed with major depression, single episode, determined not to be mentally ill, and recommended for separation processing. The Ph.D. also noted that in addition to a depressive disorder diagnosis you were also diagnosed with a personality disorder rendering you incapable of serving in the Navy and recommended for expeditious separation processing. The Ph.D. noted, however, that you did not provide clarifying information about the trauma related to your PTSD. The Ph.D. also noted that there is no information in your service record implying you were not responsible for his conduct or not be held accountable for his actions. The Ph.D. also observed that although you state you have a service-connected disability from the VA, you did not provide any documentation to substantiate your claim or identify what service-connected condition you have. The Ph.D. concluded by opining that there was sufficient evidence you exhibited behaviors associated with a mental health condition on active duty, however, the preponderance of available objective evidence failed to establish 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 your contentions that: (a) you request a discharge upgrade or a medical discharge due to VA findings of PTSD/service-related depression and stress; (b) your discharge was given without taking into account mental health issues, stress, and undiagnosed service-related issues; and (c) your service and efforts on active duty were of honorable and dedicated service. 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 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 also concluded that although you possibly have a post-discharge VA service-connection for a depressive disorder, your records contemporaneous to your service lacked sufficient evidence to establish a nexus between your mental health conditions/symptoms and your in-service misconduct. As a result, even under the liberal consideration standard the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Additionally, 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 12 November 2021 to specifically provide additional documentary material. Moreover, the Board concluded that even if your misconduct was somehow attributable to any mental health conditions, the severity of your misconduct outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your 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 noted that it was not within their purview to grant a medical discharge per se. Notwithstanding, the Board determined that in cases where misconduct and medical issues are both potentially present, that discharge processing for misconduct takes precedence over any medical issues or concerns.

The Board was aware 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 was 1.0 in conduct. 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 misconduct which further justified your OTH characterization of discharge.

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 character, post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded 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 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,

2/28/2022

