



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: 7210-21

Ref: Signature Date



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.

A three-member panel of the Board, sitting in executive session, considered your reconsideration application on 21 January 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 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (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.

You enlisted in the Navy on 28 October 1999. Your pre-enlistment physical examination on 9 September 1999 and self-reported medical history noted no neurologic or psychiatric conditions or symptoms. On 12 April 2000 you reported for duty on board the █ in █. On 22 April 2000 you were admitted to an Army medical facility and diagnosed with an adjustment disorder with depressed mood and alcohol abuse.

On 1 May 2000 you commenced a period of unauthorized absence (UA) that terminated after 530 days with your arrest in █ on 13 October 2001. Following your return to

military control, on 23 October 2001 you voluntarily submitted a written request for an administrative discharge in lieu of trial by court-martial for your lengthy UA. Prior to submitting this voluntary discharge request you would have conferred with a qualified military lawyer, at which time you were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. You expressly understood and acknowledged that if you received an other than honorable conditions (OTH) characterization of service it would deprive you of virtually all veterans' benefits based on your current period of service. As a result of this course of action, you were spared the stigma of a court-martial conviction for your long-term UA, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge. In the interim, at your separation physical on 24 October 2001 the examining Medical Officer did not note any psychiatric or neurologic conditions or symptoms and found you medically qualified for separation. Ultimately, on 14 November 2001 you were separated from the Navy with an OTH discharge and assigned an RE-4 reentry code.

On 13 June 2013 the Naval Discharge Review Board (NDRB) denied you relief. The NDRB determined your discharge was proper as issued and no change was warranted. The NDRB also found your discharge characterization was equitable as well. You did not raise any mental health issues or concerns with your NDRB application.

On 9 April 2015 the NDRB denied you relief a second time. You contended, *inter alia*, that you did not receive appropriate representation, you did not receive proper basic training, a doctor gave you orders for "R&R" but instead your command gave you extra duties, your mental health issues warrant mitigation, and your post-service conduct warrants an upgrade. However, the NDRB found the characterization of your discharge was equitable. Specifically, the NDRB did not consider the circumstances surrounding your stated condition or diagnosis to be of sufficient nature to excuse your misconduct. The NDRB reasoned that though you may have felt you're your adjustment disorder, depression, substance abuse, and "PTSD like" symptoms were the underlying cause of your misconduct, the NDRB determined that the record reflected willful misconduct demonstrating you were unfit for further service. Additionally, the NDRB concluded the evidence of record did not show that your medical conditions were sufficient mitigating factors to excuse your conduct or accountability concerning your actions. After an exhaustive review, the NDRB determined that your "PTSD like" symptoms and your other medical conditions did not mitigate your misconduct.

On 2 May 2016 the Board denied you relief for a second time. You had contended, to include, but not limited to, that your misconduct was the result of PTSD. The Board determined that the seriousness of your misconduct outweighed any mitigation offered by the PTSD.

On 21 August 2017 the Board denied you relief for a third time. You had contended, to include, but not limited to, that your misconduct was the result of PTSD. The Advisory Opinion rendered for this petition concluded that while you suffered from an adjustment disorder, there was insufficient evidence to support your contention you had service-connected PTSD. The Medical Officer drafting the AO also opined that most sailors would not consider helping a struggling peer with his gas mask or assisting with suicide watch to be traumatic events. The Board

determined that although you may currently have PSTD-like symptoms, you did not suffer from PTSD-like symptoms prior to the event leading to your discharge.

As part of the Board review process for your current petition, 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 4 January 2022. The Ph.D. initially observed that your in-service medical records showed, upon return from your first UA, you reported suicidal ideation, was evaluated, and hospitalized, and that you were diagnosed with an adjustment disorder with depressed mood and recommended for administrative separation. The Ph.D. noted that your service record contained evidence of a mental health diagnosis and reported psychological symptoms/behavioral changes indicative of a mental health condition. The Ph.D. also noted that you provided evidence of post-discharge mental health treatment and that two post-discharge providers opined your misconduct was attributable to your mental health symptoms. The Ph.D. concluded by opining that there was sufficient evidence you exhibited behaviors associated with a mental health condition on active duty and your misconduct may be mitigated by your 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) you were suffering from pre-service mental health issues that were aggravated on active duty, which in turn brought on PTSD; (b) post-discharge you have been diagnosed with PTSD/obsessive-compulsive disorder (OCD); (c) your misconduct was not serious or premeditated and was a symptom of your mental illness; and (d) when you went UA you were diagnosed with severe depression/mood disorders which is closely related to PTSD and exacerbated by OCD. 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 nearly thirteen months of service. However, the Board determined contrary to the AO that there was no nexus between any mental health conditions and/or mental health-related symptoms and your misconduct, and thus the Board concluded that your misconduct was not due to mental health-related symptoms. Moreover, even if the Board assumed that your long-term UA was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far 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. 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.

Moreover, the Board noted that a fraudulent enlistment occurs when there has been deliberate material misrepresentation, including the omission or concealment of facts which, if known at the time, would have reasonably been expected to preclude, postpone, or otherwise affect a

Sailor's eligibility for enlistment. The Board determined that you had a legal, moral, and ethical obligation to remain truthful on your enlistment paperwork. The Board concluded that you clearly deliberately and willfully failed to disclose your disqualifying pre-service mental health issues as part of your pre-enlistment medical documentation and application. Had you properly and fully disclosed your pre-service mental health issues to include OCD, the Board determined that you likely would have been disqualified from enlisting, or at a minimum required a BUMED medical waiver to enlist. The Board concluded the record clearly reflected that your lack of disclosure about your mental health history was intentional and demonstrated you were unfit for further service.

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 determined that characterization under OTH conditions is generally warranted for misconduct and 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. The simple fact remains is that you left the Navy while you were still contractually obligated to serve and you went into a UA status for over seventeen (17) months without any legal justification or excuse. 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, and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge.

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,

2/3/2022

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Executive Director

Signed by: █