



**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: 7346-21  
Ref: Signature Date



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 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 12 August 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, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you did not choose to do so.

You originally enlisted in the Navy 7 May 1990. Your service records indicated that you reenlisted on 3 May 1994.

On 22 May 1996, you received non-judicial punishment for failing to obey a lawful order by not wearing a seat belt while operating a motor vehicle and for the destruction of government

property when you destroyed a government vehicle by driving it into a ditch. In this accident, you sustained an eye injury/head trauma.

On 21 January 1998, the Secretary of the Navy directed your temporary disability retirement at a thirty percent rating, due in part, to the eye injury you suffered in April 1996 when you crashed the government vehicle. The Secretary approved your release from active duty effective 22 February 1998. However, an ongoing NCIS investigation into your involvement with a theft from a Navy Exchange warehouse effectively negated any potential disability retirement because Navy directives required that misconduct-related matters take absolute precedence over medical retirements.

On 13 February 1998, pursuant to your guilty pleas, you were convicted at a Special Court-Martial (SPCM) of conspiracy to commit larceny, larceny of approximately \$17,808.32 in goods from a Navy Exchange warehouse, and housebreaking. You received as punishment six months of confinement, 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). Upon the completion of appellate review in your case, on 15 September 1999, you were discharged from the Navy with a BCD and assigned an RE-4 reentry code.

On 11 September 2020, this Board denied your initial petition for relief. With your petition you proffered several contentions but did not assert any traumatic brain injury (TBI) or mental health issues.

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) your good conduct turned south following your 1996 car accident, (b) at a 1997 Medical Board you endorsed frequent headaches and anxiety, (c) the Board should consider your TBI as mitigating for your abrupt change in personality, (d) your TBI and abrupt personality change suggested you acted uncharacteristically and impulsive and without clear consideration of consequences, (e) the Wilkie Memo states relief is generally more appropriate for nonviolent offenses, and (f) you have only had one post-service arrest, your job history is stable, and you have proven to be an honorable citizen. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

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 27 June 2022. The Ph.D. noted in pertinent part:

While Petitioner's available in-service personnel and medical records did not contain a formal diagnosis of PTSD, TBI, or other mental health conditions, there is evidence of a car crash in April 1996 and a disability determination by a Medical Board of 30% disability. He did have an extended period of successful Naval service prior to the car accident and it is possible that his "abrasive

personality” changes occurred following a TBI. It is more difficult to attribute conspiracy to commit a pre-meditated theft of government equipment to a TBI. While the outcome of the theft showed poor judgment, as the group was apprehended, the Petitioner’s trial testimony demonstrated the event was not coerced or impulsive. Additional information, such as post-service treatment records describing the Petitioner’s mental health diagnosis and its specific link to his misconduct, would aid in generating an alternate opinion.

The Ph.D. concluded, “[b]ased on the available evidence, it is my clinical opinion that there is some evidence that Petitioner may have sustained a TBI during military service. There is insufficient evidence that his misconduct could be attributed to TBI.”

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your SPCM, outweighed these mitigating factors. 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 purported TBI or mental health conditions and/or their related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such TBI and/or mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, even under the liberal consideration standard for mental health conditions the Board concluded that your misconduct was not due to TBI or mental health-related conditions or symptoms. Even if the Board assumed that your misconduct was somehow attributable to any TBI or 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 unequivocally determined the record clearly reflected that your misconduct was willful and intentional and demonstrated you were unfit for further service. Additionally, the Board concluded that the specific misconduct you committed was not the type of misconduct that would be excused or mitigated by mental health conditions even with liberal consideration. 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 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 declined to summarily upgrade a discharge solely for the purpose of facilitating certain veterans’ benefits, 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, 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 involving conspiracy and theft from a Navy Exchange facility, and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. Even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an error or injustice exists to warrant upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. Accordingly, given the totality of the circumstances, the Board determined that 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,

8/16/2022

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Executive Director

Signed by: █