



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: 7429-21

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.

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 4 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 the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. You were afforded an opportunity to submit an AO rebuttal, but you did not do so.

You enlisted in the Navy on 25 April 2000. Your pre-enlistment physical examination on 28 March 2000 and medical history both noted no psychiatric or neurologic conditions or symptoms.

On 10 September 2001 you received non-judicial punishment (NJP) for the willful damage to government property in your barracks room. You did not appeal your NJP. Your performance evaluation for the period ending 14 February 2002 highlighted your NJP and also documented

that your command received eight separate letters of indebtedness regarding debts you incurred. The evaluation noted that you were not forthcoming with your command and incurred additional indebtedness. The evaluation also noted that you showed no initiative to complete any qualifications within your work center, and that you needed constant supervision even with menial tasks. The evaluation rated you as “significant problems” and you were not recommended for retention.

On 23 April 2002 you received NJP for two separate specifications of failing to obey a lawful order in matters involving your personal financial responsibilities. You did not appeal your NJP. 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 in processing for administrative separation. On 4 June 2002 the suspended portion of your April NJP was vacated and ordered executed due to continuing misconduct.

On 12 June 2002 you received NJP for two specifications of conspiracy to commit larceny, and two specifications of larceny. You and another Sailor were caught in the act of stealing merchandise from the Navy Exchange on base, and then you were subsequently caught breaking into a NEX vending machine near your work center and stealing money from inside the machine. You did not appeal your NJP.

On 13 June 2002 your command notified you that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense, and misconduct due to a pattern of misconduct. You waived your rights to consult with counsel and to request an administrative separation board. Ultimately, on 22 July 2002 you were separated from the Navy for misconduct with an other than honorable conditions (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 23 December 2021. The Ph.D. initially observed that your in-service records did not contain evidence of a mental health diagnosis or psychological/behavioral changes indicating a mental health condition. The Ph.D. noted that the specific misconduct you committed would not typically be the result of a mental health condition. The Ph.D. concluded by opining that the evidence failed to establish you suffered from a mental health condition on active duty, or that your in-service 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) the circumstances leading to your discharge were a direct result of your declining mental health due to your Chief’s abuse of power directed towards you, and (b) it took you years to recognize the situations that occurred on active duty were not your fault. 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 that 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. 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 misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board concluded the record clearly reflected that your misconduct was willful and intentional and demonstrated you were unfit for further service. The Board also determined that you did not provide convincing evidence to corroborate or substantiate your contention of a hostile work environment due to an abuse of power. Moreover, the Board concluded that the criminal offenses of larceny and the conspiracy to commit larceny you committed would not 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.

Additionally, the Board observed 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 serious misconduct which further justified your OTH characterization of discharge. The Board also 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. 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,

3/9/2022

[REDACTED]

Executive Director

Signed by: [REDACTED]