



**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: 7594-21  
 11866-11  
 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.

Because your application was submitted with new evidence not previously considered, the Board found it in the interest of justice to review your application. A three-member panel of the Board, sitting in executive session, considered your application on 5 October 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). The Board also considered the advisory opinion (AO) furnished by a qualified mental health professional and your response to the AO.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You previously applied to this Board for an upgrade to your characterization of service and were denied on 29 November 2012.

You enlisted in the Navy under the Active Mariner Program and agreed to serve your enlistment for a period of at least 36 months on active duty. On 15 February 1980, you began your period of active duty. On 2 November 1981, you agreed to extend your enlistment on active duty for a period of 24 months. On 20 December 1982, you tested positive for the wrongful use of cocaine during a unit sweep urinalysis but that positive test was determined to be inadmissible for non-judicial punishment (NJP). On 29 December 1983, you were admitted to the naval hospital for cocaine drug overdose, you were evaluated by a healthcare professional, found to be physiological drug dependent, and recommended for administrative separation. On 16 January 1984, you received non-judicial punishment (NJP) for two specifications of wrongful use of cocaine and wrongful use of marijuana. Following your NJP, you were notified that you were being recommended for administrative discharge from the Navy by reason of misconduct due to drug abuse. You were advised of, and elected your procedural right to consult with military counsel; however, you waived your right to present your case to an administrative discharge board (ADB). Your commanding officer (CO) then forwarded your administrative separation package to the separation authority (SA) recommending your administrative discharge from the Navy with an Other Than Honorable (OTH) characterization of service. The SA approved the recommendation for administrative discharge and directed your OTH discharge from the Navy. On 15 March 1984, you were discharged from the Navy with an OTH characterization of service by reason of misconduct due to drug abuse.

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 desire to upgrade your discharge character of service. The Board also considered your contentions that: 1) the motor vehicle accident you were involved in incurred a serious service connected disability of a severe concussion, fracture of your left scapula, serious back injury, and nerve damage that has left you with total permanent disability; 2) you served honorably and should have received an Honorable discharge, released from active duty, and transferred to the naval reserve; 3) the Department of Defense (DoD) is in breach of federal contract law, you never received a Certificate of Release or Discharge from Active Duty (DD Form 214) or DD Form 215 for your active duty service; and 4) your three years of active duty service was a perfect record. 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's review process, a qualified mental health professional reviewed your contentions and the available records and issued an AO dated 20 July 2022. The AO noted in pertinent part:

There is evidence in the Petitioner's service medical record that he sustained a traumatic brain injury (TBI) during military service. However, the Petitioner had successful service for more than three years following the motor vehicle accident (MVA), with no mention of medical treatment for continuing symptoms. There is no evidence in his service medical record that he retained residual symptoms of TBI at his separation and the Department of Veterans Affairs (VA) has found no clear evidence of TBI. Post-service, the VA has provided humanitarian treatment

for post-traumatic stress disorder (PTSD) and other mental health conditions that is temporally remote to his military service. Unfortunately, the evidence is conflicting regarding the traumatic precipitant and the varied reports raise doubt regarding the reliability of the diagnosis. In service, the Petitioner was diagnosed with alcohol and substance use disorder. Substance use and problematic alcohol use is incompatible with military readiness and discipline and there is no evidence he was unaware of his misconduct or not responsible for his behavior. The record indicates a long history of problematic alcohol use and substance use preceding military service and continuing following his separation. Additionally, he denied substance use during military service, but the record indicates positive urinalysis results on multiple occasions.

The AO concluded, “it is my considered clinical opinion that there is evidence of a mild TBI that may be attributed to military service. There is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence of another mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a TBI, PTSD, or another mental health condition, other than his in-service diagnosed substance use disorder.”

In response to the AO, you provided supporting documentation that supplied additional clarification of the circumstances of your case.

Based upon this review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJP, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it involved a drug offense. Further, the Board considered the likely negative effect your misconduct had on the good order and discipline of your command. The Board also determined that illegal drug use by a Sailor is contrary to Navy core values and policy, renders such Sailor unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. Additionally, the Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. Furthermore, the Board concurred with the AO and determined that while there is evidence of a mild TBI, and evidence of another mental health condition that may be attributed to military service, there is insufficient evidence of another mental health condition that may be attributed to military service and there is insufficient evidence that your misconduct could be attributed to a TBI, PTSD, or another mental health condition, other than your in-service diagnosed substance use disorder. As pointed out in the AO, there is no evidence in your service medical record that you retained residual symptoms of TBI at your separation, the VA has found no clear evidence of TBI, and there is no evidence you were unaware of your misconduct or not responsible for your behavior. Ultimately, the Board was not persuaded by your arguments and evidence. The Board found that your record reflected multiple incidents of misconduct that are serious in nature and properly formed the basis for administrative separation from the Navy with characterization of service lesser than Honorable. As a result, the Board concluded your conduct constituted a significant departure from that expected of a Sailor and continues to warrant an OTH characterization. While the Board

emphasized with your current medical condition, even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants 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.

Finally, with regard to your contention about your DD Form 214, the Board noted this contention is unrelated to your request for a discharge upgrade. Nevertheless, the Board also noted that your DD Form 214 reflects your initials and signature as evidence that you reviewed and concurred with the listings on the DD Form 214. Based on this evidence, the Board concluded you were issued a DD Form 214 upon your discharge; a copy of which is contained in your military record. In addition, the Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties by issuing you a DD Form 214. The Board noted you failed to provide any evidence to substantiate this contention.

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,

10/21/2022

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Executive Director

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