



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: 7660-21
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 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 25 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. Although you were afforded an opportunity to submit an AO rebuttal, you did not do so.

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 enlisted in the Navy and commenced a period of active duty on 6 June 2002. Your pre-enlistment physical on 29 May 2002 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 30 August 2002, your command issued you a "Page 13" counseling warning (Page 13). The Page 13 documented your refusal to participate in the PASS program. 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 30 September 2002, your command issued you another Page 13 warning. The Page 13 documented your deficiencies in performance and/or conduct including: your refusal to train, your refusal to swim qualify, your refusal to perform any physical training, and your refusal to participate in the CBR confidence chamber. 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 8 October 2002, your leadership team completed a Recruit Evaluation Report (REP) documenting your refusal to train on several events. The REP specifically noted:

SN has repeatedly refused to train; he does not want to get swim qualified, do any PT test, complete confidence chamber at FFTU or pass bootcamp. RDC recommends RAB with ELS. SR [S] has been given every chance to obtain the necessary help and skills to successfully complete boot camp. He has willfully and intentionally refused to train, stating that he didn't see the "relevance" of numerous TRNG exerc. He has refused PASS, quit at it, and rejected everything and everyone connected to the Navy. He has done this deliberately since DOT 1-2. I recmd RAB with the ultimate end of CO's Mast. In addition I recmd an OTH discharge (or equivalent) if applicable.

On 15 October 2002, your command provided you notice that you were being administratively processed for an entry level separation (ELS) by reason of entry level performance and conduct. You elected in writing to waive your rights to consult with counsel, submit a written statement to the separation authority, and General Court-Martial Convening Authority review of your discharge. Ultimately, on 28 October 2002, you were discharged from the Navy with an uncharacterized ELS discharge given your brief length of service and assigned an RE-4 reentry code. In this regard, you were assigned the correct characterization and reentry code based on your factual situation at the time as you were still within your first 180 days of continuous military service and had not yet completed initial recruit training.

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 17 February 2022. The Ph.D. noted that your in-service records do not contain evidence of any mental health diagnoses or psychological/behavioral changes indicating any mental health conditions. The Ph.D. also noted that you did not provide any clarifying information about your purported mental health condition. The Ph.D. concluded by opining that the preponderance of available objective evidence failed to establish you suffered from a mental health condition on active duty that would have either contributed to the circumstances of your ELS, or mitigated your misconduct.

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) the underlying basis of your separation was procedurally and substantively defective at the time of your discharge, (b) the adverse action was unfair based on equity considerations, (c) the discharge is inequitable now, and (d) you had no other issues or misconduct in basic training besides failing a swim test. 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 behavior and misconduct that formed the basis of your discharge. As a result, the Board concluded that your overall substandard performance at boot camp was not due to mental health-related symptoms. Moreover, 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 14 December 2021 to specifically provide additional documentary material. Even if the Board assumed that your behavior and misconduct was somehow attributable to any mental health conditions, the Board concluded that the severity of your refusal to train far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your behavior was willful and intentional and demonstrated you were unfit for further Navy service.

The Board also determined that your contentions were baseless, entirely without merit, and demonstrated a fundamental lack of understanding concerning the Navy's administrative separation process. The Board concluded that your behavior and conduct in basic training was a *prima facie* case for an ELS due to well documented substandard performance and conduct. The Board further concluded your record while in basic training was consistently hallmarked by disobedience, malingering, a lack of motivation, and insubordination. You failed to meet basic Navy core values and displayed a total lack of character. 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 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. Moreover, the Board noted that separations initiated within the first 180 days of continuous active duty will be described as ELS except when an honorable discharge is approved by the Secretary of the Navy in cases involving unusual circumstances not applicable in your case. 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 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 case clearly merited your receipt of an ELS, and that such characterization and reentry code were proper and in compliance with all DoN 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,

4/1/2022

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Executive Director

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