



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: 425-22

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 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 15 April 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. Although you were afforded an opportunity to submit an AO rebuttal, you did not do so.

You enlisted in the Navy and commenced active duty on 12 January 2010. Your pre-enlistment physical examination on 18 February 2009 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 9 June 2010, you reported for duty on board the █.

On 10 December 2010, you received non-judicial punishment (NJP) for the violation of a lawful general order prohibiting the wrongful use of "Spice." You did not appeal your NJP.

Following your NJP, you were notified that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. You waived your right to request a hearing before an administrative separation board. In the interim, your separation physical, on 28 April 2011, noted no psychiatric or neurologic conditions or symptoms. Ultimately, on 14 June 2011 you were discharged from the Navy for misconduct with an other than honorable conditions (OTH) characterization of service and assigned an RE-4 reentry code.

On 2 December 2019, the VA granted you a service-connection for treatment purposes only for depressive disorder, recurrent, moderate with unspecified anxiety disorder. 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 22 February 2022. The Ph.D. initially observed there was no evidence in your service record of a mental health diagnosis or psychological symptoms/behavioral changes indicative of an unfitting mental health condition. The Ph.D. noted that you did not contend your use of "Spice" was an attempt to self-medicate mental health symptoms and that you instead strongly denied such use. 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 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: (a) you were wrongly accused of drug use, (b) following the wrongful accusation you were singled out, targeted, isolated from everyone, and left to become severely depressed, (c) you were drug tested no less than fifteen prior times on active duty all with negative results, and (d) no contraband was found when your possessions were searched. 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 nexus between any mental health-related conditions or symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct forming the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or 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 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 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 in conduct was 2.0. 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,

4/27/2022

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Executive Director

Signed by: █