



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

█
Docket No. 508-22
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 3 February 2022. The names and votes of the members of the panel 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, to include the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hegel 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). 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, as well as all of your prior petitions with this Board, their attachments, which included the advisory opinion (AO) contained in Senior Medical Advisor CORB letter 1910 CORB: 002 of 20 November 2017 and Director CORB letter 1910 CORB: 001 of 21 November 2017 along with your response to the AOs.

A review of your record shows that you entered active duty with the Navy on 2 July 2003. You engaged in periods of unauthorized absence from 16 to 20 January 2004, 16 February 2004 to 15 March 2004, and 17 April 2004 to 25 April 2004. In connection with court-martial charges that had been brought against you, you underwent a pre-trial medical evaluation to determine whether you had the mental competency to stand trial or whether you lacked mental responsibility for any of the offenses charged. According to your medical evaluation, you were diagnosed with attention deficit hyperactivity disorder (ADHD), major depressive disorder, borderline personality disorder, and antisocial personality traits. You were deemed competent to stand trial

and found to not be criminally insane at the time of your misconduct. Thereafter, on 29 October 2004, you were convicted by a special court-martial for underage drinking, disrespect to a commissioned officer, disobeying a lawful order, three instances of assault, and disorderly conduct. As a result of your conviction, you were awarded an eight month period of confinement and a bad conduct discharge. On 3 November 2004, you were referred to a medical evaluation board. On 20 December 2004, you were released from confinement, released from active duty, and placed on appellate leave, pending judicial review of your bad conduct discharge. On 23 December 2004, your medical board was cancelled due to your pending discharge based on misconduct. On 18 December 2007, the appellate review of your discharge was completed, and you were discharge.

In 2014, you submitted an application for review of your discharge with the Naval Discharge Review Board (NDRB), in which you contended that you were not properly diagnosed while you were on active duty, which led to you not being prescribed the proper medications, which resulted in a deterioration of your conduct. You also contended that you were not competent to stand trial for your special court-martial. On 24 April 2014, the NDRB denied your application. You filed another application with the NDRB in 2017, contending that your misconduct should have been mitigated as a result of your undiagnosed PTSD, and that you should have been processed via a medical board. On 13 Aug 2018, the NDRB denied your application, finding that your discharge was proper and equitable.

This Board previously denied your request for an upgrade to your characterization of service in 2015. You subsequently filed a petition with this Board seeking to be placed on the disability retirement list and to have your discharge characterization upgraded. Your petition was denied in 2018 and you filed a request for reconsideration of your petition in 2019. On 2 January 2020, this Board denied your request for reconsideration, finding, in part, that the misconduct that you engaged in while on active duty, which resulted in your punitive discharge from the Navy, took precedence over disability processing under the Navy's dual processing rules.

The Board carefully considered your arguments in support of your current request that your discharge be upgraded and that your reason for discharge be changed to a service-incurred disability. In its review and consideration of your petition, the Board carefully evaluated all potentially mitigating factors set forth in your current petition to determine whether the interests of justice warrant relief in your case, including in accordance with the Kurta Memo, the Hagel Memo, and the Wilkie Memo. In your petition, you contend that you have been treated by a civilian physician for over 16 years for ADHD, bipolar disorder, major depression, and PTSD. You describe that you were mistreated while you were serving a period of confinement in a naval brig, and you contend that you witnessed the abuse of fellow Sailors at the hands of brig staff, among other events that you described in your petition. In addition, the Board carefully considered the medical documentation that you provided along with your petition.

In light of your assertion of claims that relate to mental health conditions, the Board referred to the 20 November 2017 AO, which was prepared in connection with your case before this Board in 2018. That AO comprehensively reviewed your medical history and it included a summary of its contents dated 21 November 2017. According to the AO summary, in part:

The evidence did not support the applicant's petition. [REDACTED] received a Bad Conduct Discharge on 18 December 2007. The evidence indicated although a Medical Board was considered by the treating psychiatrist, it was not submitted because the applicant was concurrently undergoing legal proceedings related to his discharge. However, had submission to the PEB occurred, the likely result would have been a finding of FIT to Continue Naval Service. Additionally, the record does not indicate that either Major Depressive Disorder (MDD) or Post Traumatic Stress Disorder impaired the applicants were duty performance [impairing] prior to his legal charges. It was not until after being confined in the brig that he was first diagnosed with MDD. At that time he was also diagnosed with Borderline Personality Disorder and Antisocial Personality Traits, along with ADHD and Learning Disorder, which were, and remain, non-compensable by the DON PEB by regulation.

The applicant was diagnosed with Schizophrenia just prior to placement on Appellate Leave on 29 April 2005. However, the preponderance of evidence suggests the legal charges associated with the applicant's discharge are more consistent with the diagnoses of Conduct Disorder, Borderline Personality Disorder, or Antisocial Personality Traits. While not compensable by the DON PEB, these conditions are considered potentially mitigating but not exculpatory with respect to the accrued UCMJ violations. It is noted by regulation misconduct trumps unfitness.

Based upon its review, the Board determined the preponderance of the evidence does not support changing your narrative reason for separation. Specifically, the Board found that you were appropriately discharged for misconduct consistent with your special court-martial sentence. As noted in the AO, military disability regulations direct misconduct processing to supersede disability processing. Therefore, the Board determined your medical board was properly cancelled on 23 December 2004 due to your pending punitive discharge from the Navy. Therefore, the Board concluded you do not qualify for a disability discharge or retirement.

Regarding your request for an upgrade to your characterization of service, the Board also determined relief was not warranted based on an error or injustice. Despite applying liberal consideration, the Board determined that the preponderance of the evidence supports a finding that you were mentally responsible for the actions that formed the basis for your court-martial conviction and that you were appropriately awarded a bad conduct discharge due to the seriousness of your misconduct. In reaching its decision, the Board concurred with the previous finding of the AO and the pre-trial medical evaluation in your case. As such, they Board determined your arguments in mitigation were insufficient to overcome the misconduct you committed.

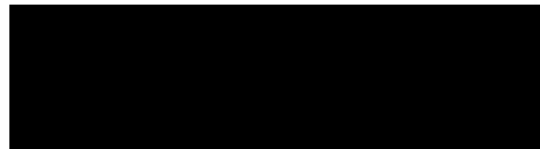
With respect to your request for clemency review of your discharge characterization, the Board fully considered your contentions including by applying the factors set forth in the Wilkie Memo. The Board expressed sympathy for the hardships that you contend you have faced, but the Board determined that you did not provide matters sufficient for it to grant you relief in the form of upgrading your discharge characterization. Specifically, the Board weighed the

seriousness of your misconduct that resulted in your special court-martial conviction and bad conduct discharge against the mitigation evidence you provided. Ultimately, the Board found the preponderance of the evidence supports your bad conduct discharge due to the egregious nature of your misconduct. Despite compelling evidence of post-discharge mental health and hardship issues, the Board was not persuaded that an upgrade was warranted in your case. Accordingly, the Board concluded your characterization of service remains appropriate based on the variety of serious misconduct that you engaged in while on active duty.

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,

2/8/2022

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Deputy Director

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