



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: 779-22
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 Board waived the statute of limitation 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 17 June 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 the 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 to 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). The Board also considered the advisory opinion (AO) of a qualified mental health provider, which was previously provided to you. You were afforded an opportunity to submit a rebuttal but did not.

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

You enlisted in the Navy with pre-service drug use and began a period of active service, on 3 September 1998, after receiving a waiver for non-minor misdemeanors of assault and criminal trespass. You served without incident until 12 April 2000, when a Naval Drug Lab message reported your urinalysis positive for metabolites of marijuana use. On 2 May 2000, you accepted

nonjudicial punishment (NJP) for violations of Article 112a due to wrongful use and possession of marijuana, Article 121 due to wrongful appropriation of a handbag, Article 123 for forgery of a check drafted to yourself and signed as the owner of the handbag/checking account. You were found guilty of the listed offenses and notified of processing for administrative separation for misconduct due to drug abuse and commission of a serious offense. The forwarded recommendation for your discharge under Other Than Honorable (OTH) conditions noted that you were “a self-confessed habitual drug user” dating back to your teen years and that you had no conviction to stop further use. Following approval of your separation by the Commander, Naval Air Forces, US Atlantic Fleet, you were discharged on 26 May 2000 under OTH conditions. In your separation physical, you expressed concerns for depression and excessive worry which, upon further examination, you identified in relation to your pending separation proceedings.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo. These included, but were not limited to, your desire to upgrade your discharge and correct the offenses identified in your service records, as well as your contentions that your drug use resulted from self-medication following a traumatic incident during which a group of fellow sailors threatened or attempted to throw you overboard, that you never used drugs while aboard the military installation, that you were merely negligent in returning the handbag but had no intent to keep it, and that you only “playfully” wrote out the check before tossing it in the trash. You also assert that the investigation of these allegations includes a statement from the owner of the handbag which confirms your contentions; however, you did not provide these records for review. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments, or advocacy letters.

Because you contend a mental health condition, the Board also considered the AO, which noted in pertinent part:

Among the available records, there is no evidence that the Petitioner was diagnosed with a mental health condition during military service. Throughout his military processing, there were no concerns raised of a mental health condition that required evaluation. Unfortunately, he has provided no medical evidence in support of his claims. His current statements are temporally remote from military service and inconsistent with his service record. As he denies participation in the misconduct, it is not possible to establish a nexus with a purported mental health condition. Additional records (e.g., post-service medical records describing the Petitioner’s diagnosis, symptoms, and their specific link to his misconduct) are required to render an alternate opinion.

The AO concluded, “[b]ased on the available evidence, it is my clinical opinion that there is insufficient evidence of a mental health condition that could be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition.

Based upon this review, the Board concluded these 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 included a drug offense. The Board also considered the fact you entered the Navy with a drug waiver and that you showed no desire to stop your drug use. The Board gave significant weight to the contemporaneous facts detailed in the formal recommendation of your commanding officer, which reflect that your in-service drug use was habitual and pre-dated your entry into active service. The Board found this information inconsistent with your contention that you began self-medicating after a traumatic in-service experience. Additionally, the Board observed that your command relied on a criminal investigation in the findings of guilt for your NJP offenses and that you accepted NJP without any record of appeal; as such and absent evidence to the contrary or in support of your claims, the Board found your contentions regarding the facts and nature of the offenses unpersuasive. Finally, the Board concurred with the AO that there is insufficient evidence that your misconduct could be attributed to a mental health condition. Regardless, the Board also relied on the policy guidance outlined above which specifies that premeditated misconduct such as fraud and wrongful appropriation would not normally be mitigated by a mental health condition even if such evidence were available for reconsideration. 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. With respect to your post-discharge behavior, the Board favorably noted that you have submitted proof of obtaining U.S. citizenship since your discharge, however, after applying liberal consideration, 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.

If you seek consideration of records maintained by other activities, you would need to coordinate with the responsible authority for the release of such records. Contact information for requesting NCIS records is available at <https://www.ncis.navy.mil/Resources/FOIA/>. You may submit a request for service health records to the Department of Veterans Affairs at <https://www.va.gov>.

You are entitled to have the Board reconsider its decision upon the 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 is attached 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,

7/5/2022

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Executive Director

Signed by: █