

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

> Docket No: 2175-22 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 24 August 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). The Board also considered an advisory opinion (AO) from a qualified mental health professional dated 27 June 2022. Although you were provided an opportunity to comment on the AO, you chose not to do so.

You entered active duty with the Navy on 17 November 1986. On 23 March 1987, you received non-judicial punishment (NJP) for wrongfully possessing another Sailor's ID card. On 10 September 1987, civil authorities convicted you of auto theft and you were sentenced to time served. On 22 October 1987, you received an additional NJP for being in an unauthorized absence (UA) status for 26 days and missing ship's movement. Subsequently, you were notified of pending administrative separation action by reason of misconduct due to commission of a serious offence. After electing to waive your rights, your commanding officer (CO) forwarded your package to the separation authority (SA) recommending your discharge by reason of misconduct due to commission of a serious offence, with an Other Than Honorable (OTH) characterization of service. The SA approved the recommendation and, on 27 November 1987, you were so discharged.

You previously applied to this Board for a discharge upgrade but were denied on 24 March 2010, 30 April 2012, and 7 April 2015.

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 contention that you were suffering from a Traumatic Brain Injury (TBI) and other mental health conditions that mitigated your conduct. 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, a qualified mental health professional reviewed your request and provided the Board with an AO on 27 June 2022. The AO stated in pertinent part:

While Petitioner's available in-service personnel and medical records did not contain a formal diagnosis of PTSD, TBI, or other mental health conditions, there is evidence of a car crash in 1985, prior to his entry into Naval service. There is also post-service evidence of several mental health conditions. However, his preservice physical did not indicate the presence of any medical symptoms that would disqualify him from military service. Throughout his disciplinary processing, there were no concerns raised that would have warranted a referral for additional evaluation. As such, it is difficult to attribute his misconduct to TBI or a mental health condition. Additional information, such as post-service treatment records describing the Petitioner's mental health diagnosis and its specific link to his misconduct, would aid in generating an alternate opinion.

The AO concluded, "[b]ased on the available evidence, it is my clinical opinion that there is insufficient evidence that Petitioner may have sustained a TBI during military service. There is insufficient evidence that the circumstances surrounding his separation could be attributed to TBI or another mental health condition."

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined your misconduct, as evidenced by your two NJPs and civil conviction, outweighed the potential mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the likely negative effect it had on the good order and discipline of the command. Further, the Board took into consideration the discrediting nature your civil conviction likely had on the Navy. Finally, the Board concurred with AO that there is insufficient evidence that TBI or a mental health condition may be attributed to your military service or misconduct. 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. 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. 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.

