



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: 2389-22
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 July 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 qualified mental health provider. Although you were provided an opportunity to submit additional documentary material for the Board's consideration following your receipt and review of the AO, you did not do so.

You enlisted in the Navy and commenced active duty on 10 February 2000. Your pre-enlistment physical examination, on 26 January 2000, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 29 March 2001, you reported for duty on board the █ in █, █.

On 6 August 2003, you commenced a period of unauthorized absence (UA) that ended after one day on 7 August 2003 with your surrender to military authorities. On 10 August 2003, you commenced another period of UA that terminated after thirty days, on 9 September 2003, with your surrender to military authorities.

On 10 September 2003, you received non-judicial punishment (NJP) for two separate specifications of UA and missing ship's movement while you were in a UA status. You did not appeal your NJP. That same day, your command issued you a "Page 13" counseling sheet (Page 13) documenting the misconduct adjudicated at NJP. 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 discharge. You did not submit a Page 13 rebuttal statement.

However, pursuant to your guilty pleas, on 18 September 2003 you were convicted at a Summary Court-Martial of six separate specifications of the willful disobedience of a superior commissioned officer, and for failing to obey a lawful order. As punishment you were sentenced to confinement for twenty-five days and forfeitures of pay.

On 3 November 2003, your command notified you that were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct and misconduct due to the commission of a serious offense. You waived your rights to consult with counsel, submit a written statement to the Separation Authority, and to request an administrative separation board. Ultimately, on 5 December 2003, you were discharged from the Navy for a pattern of misconduct with an under Other Than Honorable (OTH) conditions discharge characterization and assigned an RE-4 reentry code.

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) your many contributions and accomplishments as an exemplary Sailor over the course of your naval career should not be overshadowed by the isolated period at the very end of your career when your mental health issues negatively impacted your performance, (b) you were only 23 years old when the misconduct underlying your discharge occurred, and your behavior was caused, in part, by youthful indiscretion, (c) you have matured considerably since then, and accept responsibility for, and sincerely regret your actions leading to your discharge, (d) mental health issues were a mitigating factor for the misconduct leading to your OTH characterization of service, and under the Kurta Memorandum liberal consideration should be applied in review of such extenuating circumstances and in the Board's consideration of your request, and (e) the totality of your life circumstances, your wholly responsible post-service behavior, and the laudable goals you have set for your future warrant approval of your request on equitable grounds. For purposes of clemency consideration, the Board noted you provided an advocacy letter but no supporting documentation substantiating post-service accomplishments.

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 initial AO dated 12 May 2022. The Ph.D. stated in pertinent part:

Petitioner's OMPF did not contain evidence of a diagnosis of a mental health condition. In contrast, documentation provided by Petitioner (i.e., select service medical/mental health records) contained evidence of an in-service diagnosis of a mental health condition (Social Phobia), as well as substance use diagnoses (Alcohol and Nicotine Dependence). It is reasonable to attribute Petitioner's 2001 ARI to difficulty adjusting to military life/social phobia given he reported suicidal ideation in an attempt to be discharged from service (2000) and drinking as a means of "fitting-in" in his early teens which resulted in court ordered treatment. Petitioner was also diagnosed in-service with Social Phobia after the ARI and provided treatment. Although his UA occurred after his return from deployment, his PDHA indicated his were not clinically significant enough to warrant a referral to mental health. Petitioner's behavior prior to deployment is indicative of maladaptive coping (i.e., alcohol) when experiencing symptoms. It is reasonable to consider his UA as maladaptive coping with anxiety. Petitioner's purported depressive symptoms described in service did not meet the criteria for a depressive disorder. His misconduct (failure to appear for muster and failure to obey an order) occurred after his negative performance evaluation, and are described similarly to his difficulty with the SARD instructor; and are likely related to his passive-aggressive behavioral traits rather than maladaptive coping skills of a MHC.

The Ph.D. concluded, "[b]ased on the available evidence, it is my clinical opinion Petitioner's diagnosed MHC can be attributed to his military service. Additionally, some Petitioner's misconduct can be attributed to his MHC."

In accordance with the Hagel, Kurta, 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, notwithstanding the AO, that there was no nexus between any mental health conditions and/or their related symptoms and the majority of your misconduct, and the Board determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated most of the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, 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 determined the record reflected that your misconduct was intentional and willful 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 not be held accountable for your actions.

The Board was aware 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 was 2.33 in conduct. Navy regulations in place at the time of

your discharge required a minimum trait average of 2.50 in conduct (proper military behavior), for a fully Honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your pattern of serious misconduct which justified your OTH characterization of discharge.

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. The Board did not believe that your active duty service was otherwise so meritorious as to deserve a discharge upgrade. The Board determined that characterization under OTH conditions 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 declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational, employment, or military enlistment opportunities. As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your serious misconduct clearly merited your receipt of an OTH. The Board carefully considered your declaration and all matters submitted regarding your character, post-service conduct, and personal/professional accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that there is insufficient evidence of an error or injustice that warrants upgrading your characterization of service, changing your narrative reason for separation, changing your separation code, or granting clemency in your case. 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.

Sincerely,

7/20/2022

