



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

█  
Docket No: 2859-22

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 26 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). Additionally, the Board also considered the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the Navy and entered active duty on 24 August 1999. Your pre-enlistment medical examination, on 10 February 1999, and self-reported medical history noted no psychiatric or neurologic conditions or symptoms. On 8 April 2000, you reported for duty on board the █, █.

On 3 July 2002, you received non-judicial punishment (NJP) for the wrongful use of a controlled substance. 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 drug abuse. Ultimately, on 8 November 2002, you were discharged from the Navy for misconduct with an Other Than Honorable (OTH) characterization of service and assigned an RE-4 reentry code.

Unfortunately, some of the administrative separation (Adsep) and disciplinary documents are not in your record. However, the Board relied on a presumption of regularity to support the official actions of public officers, and given the narrative reason for separation and corresponding separation and reentry codes as stated on your Certificate of Release or Discharge from Active Duty (DD Form 214), the Board presumed that you were properly processed and discharged from the Navy due to drug-related misconduct following some form of disciplinary action and subsequently waiving your right to an Adsep board. The Board also noted that in blocks 25 through 28 of your DD Form 214 it states "MILPERSMAN 1910-146," "HKK," "RE-4," and "Misconduct - Drug Abuse," respectively. Such DD Form 214 notations collectively refer to an Adsep involving a drug offense with an Adsep board waiver.

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, you desire for a discharge upgrade and contentions that: (a) you believe that you weren't given a fair opportunity or decision, (b) you were not able to do any treatment or given the opportunity for treatment, (c) your ship was one of the first involved in the OEF campaign, (d) you are requesting a discharge due to unfair timing and not being given an opportunity for treatment, (e) you proved to be an outstanding Sailor that risked your life on the █ during the "Yemen" and "New York" bombings, (f) you earned multiple award on board the █ showing great character, and (g) your OTH was an unfair judgment in character. For purposes of clemency consideration, the Board noted you provided supporting documentation describing post-service accomplishments but no advocacy letters.

As part of the Board review process, the BCNR Physician Advisor who is a medical doctor and Fellow of the American Psychiatric Association (MD), reviewed your contentions and the available records and issued an AO dated 6 July 2022. The MD stated in pertinent part:

Petitioner's available in-service personnel and medical records did not contain a diagnosis of PTSD, TBI, or other mental health conditions, nor did it contain a record of psychological symptoms or behavioral changes indicative of a diagnosable mental health condition or of behaviors attributable to a PTSD or TBI. Throughout his counselings, disciplinary, and administrative processing, there were no concerns raised of any issues warranting referral to mental health or substance abuse resources. Additional information, such as post-service treatment

records describing the Petitioner's mental health diagnosis and its specific link to his misconduct, would assist in the review of his application for relief. Should the Petitioner choose to submit additional records, they will be reviewed in context of his claims.

The MD concluded, "[b]ased on the available evidence, it is my clinical opinion that there is insufficient objective evidence to support Petitioner's contention of PTSD or TBI attributable to military service. There is insufficient evidence to support Petitioner's contention that his in-service misconduct could be attributed to PTSD or TBI."

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 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 convincing evidence that you suffered from any type of mental health condition or TBI while on active duty, or that any such mental health condition or TBI was related to or mitigated 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 symptoms. Moreover, the Board observed that you did not submit any clinical documentation or treatment records to support your mental health claims despite a request from BCNR on 25 April 2022 to specifically provide additional documentary material. The Board determined the record clearly reflected that your active duty 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 otherwise not be held accountable for your actions.

Additionally, 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 record was otherwise so meritorious as to deserve a discharge upgrade. The Board noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. 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. Moreover, 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 or employment opportunities. Lastly, the Board determined that illegal drug use by a Sailor is contrary to Navy core values and policy, renders such Sailors unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. As a result, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration

standard for mental health conditions, the Board concluded that your serious misconduct clearly merited your receipt of an OTH. While the Board commends your post-discharge accomplishments, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of error or injustice exists to warrant 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.

Sincerely,

8/31/2022

