



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

■  
Docket No: 2879-22  
5067-21  
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.

Because your application was submitted with new evidence not previously considered, the Board found it in the interest of justice to review your application. Your current request has been carefully examined by a three-member panel of the Board, sitting in executive session on 12 September 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, 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). As part of the Board's review, the Board considered an Advisory Opinion (AO) from Commander, Navy Personnel Command (BUPERS-00J) dated 5 May 2022 and your response to the AO.

This Board previously approved a change to your characterization of service to Honorable, in December 2021, based on evidence that an injustice existed in your record due to the expungement of your civilian conviction.

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 receive time lost to be credited for pay purposes

for the year you were incarcerated pending civil charges. In addition, you seek back pay for the remaining years of your commitment at the time of your discharge from the Navy or back pay for a projected 20-year career.

Based on your assertions, the Board considered the AO. The AO stated in pertinent part:

In this case, Petitioner's discharge was lawful. Petitioner does not provide sufficient evidence demonstrating a material error or injustice with respect to the Navy's actions in his case. The Navy did not administer Petitioner's trial—a █ state district court did. The basis of Petitioner's administrative separation was his civil conviction. In 2004, Petitioner knowingly and voluntarily waived the right to an administrative separation board, at which he could have independently made the case for his retention. This was his opportunity to demonstrate as to why he should not have been separated and to facilitate the creation of a factual record. Petitioner presents no allegations or evidence that the Navy failed to follow the required procedures in processing Petitioner's administrative separation. Even if the interests of justice were to require Petitioner receive back pay, it is unclear what the measure of damages would be because it involves extrapolating what his career would have been if he chose to remain in since 2003, whether he would have promoted, how long his career would have been, et cetera. This is an impossible task.

The AO concluded, "Petitioner's proper avenues for redress, if any, would be pursuing civil actions against his accusers and seeking any form of restitution available from the State of █, and if there is none, filing a civil rights suit against the State of █ in accordance with 42 U.S.C. 1983. The Navy has removed an obstacle to the Petitioner gaining future employment by upgrading his characterization of service to Honorable. The Navy is not the appropriate source for further redress of wrongs done to Petitioner."

In response to the AO, you provided an additional arguments for relief and requesting the additional relief addressed previously.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board concurred with the AO that your proper avenues for redress, if any, would be pursuing civil actions against your accusers and seeking any form of restitution available from the State of █. The Board found no error or injustice with the Navy's decision to administratively separate you based, at the time, on a valid civilian conviction. In the Board's opinion, any injustice that existed in your record was adequately addressed with the Board's previous decision to upgrade your characterization of service. Ultimately, the Board determined it was not in the interests of justice to pay you for active duty service not performed; especially due to the fact the Navy had no role in your criminal conviction and the subsequent expungement. Therefore, after applying liberal consideration, the Board did not find evidence of an error or injustice that warrants relief in the form of granting your request for back pay or service credit. 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,

9/26/2022

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Executive Director

Signed by: █