



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: 2958-22

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 23 May 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 that was drafted in response to your first petition in 2021, which was previously provided to you in late October 2021 for review and comment. Although you were afforded an opportunity to submit an AO rebuttal, you did not do so.

You enlisted in the Navy and commenced a period of active duty on 1 June 1993. On 14 October 1993, you reported for duty on board the █ in █, █.

On 25 January 1994, you received non-judicial punishment (NJP) for the larceny of a wristwatch from a fellow shipmate. You did not appeal your NJP. On the same day your command issued you a "Page 13" warning (Page 13) documenting your NJP. The Page 13 expressly warned you that any further deficiencies in your performance and/or conduct may result in disciplinary action and processing for administrative separation.

However, on 12 May 1994, you were convicted at a Special Court-Martial (SPCM) of two separate specifications of violating a lawful general regulation for wrongfully possessing weapons on board the █, and three separate specifications of larceny. Your larceny charges involved the theft of various personal and uniform items from your shipmates. You received as punishment confinement for three months, forfeitures of pay, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Navy with a Bad Conduct Discharge (BCD). In the interim, on 7 July 1994, your separation physical examination and self-reported medical history noted no neurologic or psychiatric conditions or symptoms. Upon the completion of appellate review in your case, on 9 June 1995, you were discharged from the Navy with a BCD and assigned an RE-4 reentry code. On 21 August 2008, the Naval Discharge Review Board determined your discharge was proper as issued and no change was warranted. This Board denied your previous request for an upgrade on 17 December 2021.

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 AO dated 26 October 2021. The Ph.D. noted in pertinent part:

There is no evidence in the Petitioner's limited service records that he was diagnosed with or suffering from a mental health condition. Unfortunately, the Petitioner submitted no additional medical records listing a mental health diagnosis. Additional information, such as post-service treatment records describing the Petitioner's mental health diagnosis and its specific link to his misconduct, are required to render an alternate opinion. Should the Petitioner choose to submit additional records, they will be reviewed in context of his claims.

The Ph.D. concluded, "[b]ased on the current available evidence, it is my considered medical opinion that there is insufficient evidence that the Petitioner may have incurred a mental health condition during military service, and there is insufficient evidence that his misconduct could be attributed to a mental health condition."

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to your sole contention that there was in error

during your post-trial appeals process. However, given the totality of the circumstances, the Board determined that your request does not merit relief.

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 you suffered from any type of mental health condition while on active duty, or that any such mental health conditions or symptoms were 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.

The Board determined that your specific contention about post-trial discrepancies was baseless and entirely without merit. The document you took issue with was the Appellate Rights Statement (ARS) you signed and was submitted as an appellate exhibit at your SPCM sentencing hearing. The ARS is a multi-page legal document that spells out your post-trial appellate rights and describes the review process of the SPCM record. You signed and dated your ARS. As an addendum to the ARS, a Special Power of Attorney (SPOA) is included where you appoint an appellate defense counsel of record. You properly signed the SPOA and it was witnessed by two individuals. It was only in the notarization block where the name of your defense counsel appeared instead of you. At the bottom of the notarization block the defense counsel's name and signature did properly appear as the notary executing the document. The Board determined that any typographical error on the ARS/SPOA was harmless. As previously mentioned, this document was tendered to the Military Judge (MJ) at your SPCM. Had the MJ determined any errors on such documents were substantive, the MJ would have ordered a new ARS/SPOA executed. Moreover, no procedural, substantive, or evidentiary issues were raised during the appellate review process. As a result, the Board determined your argument of a discrepancy in your appeals process was simply not persuasive.

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. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and concluded that your misconduct and disregard for good order and discipline clearly merited your BCD. In the end, the Board concluded that you received the correct discharge characterization based on the totality of the circumstances, and that such action was in accordance with all Department of the Navy directives and policy at the time of your discharge.

The Board unequivocally did not believe that your record was otherwise so meritorious to deserve an upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board



also determined that your misconduct constituted a significant departure from the conduct expected of a Sailor, and that the record clearly reflected your misconduct was intentional and willful and demonstrated you were unfit for further service. Moreover, the Board noted that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not otherwise be held accountable for your actions. The Board carefully considered any matters submitted regarding your character, post-service conduct, and personal/professional accomplishments. However, the Board did not find evidence to support a finding of an error, injustice, or clemency that warrants upgrading your characterization of service. As a result, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that given the totality of the circumstances 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,

6/13/2022

