



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: 3055-22

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 your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 6 January 2023. 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, and applicable statutes, regulations, and policies, to include 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 determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You originally enlisted in the Marine Corps and entered active duty on 12 August 1977. However, on 23 September 1977, the Marine Corps administratively discharged you for unsuitability.

You subsequently enlisted in the Navy and entered active duty on 11 December 1979. Your pre-

enlistment physical examination, on 28 November 1979, and self-reported medical history both noted no neurologic or psychiatric conditions or symptoms.

On 18 June 1980, you received non-judicial punishment (NJP) for unauthorized absence (UA) that lasted sixteen (16) days. You did not appeal your NJP. On 17 July 1980, you received NJP for UA lasting five (5) days, and or insubordinate conduct. You did not appeal your NJP. On 8 October 1980, you received NJP for UA, insubordinate conduct, wrongfully communicating a threat, drinking in a restricted status, and for two separate specifications of failing to obey a lawful order. You did not appeal your NJP.

On 24 March 1981, your command issued you a "Page 13" counseling warning (Page 13). The Page 13 expressly advised you that any further misconduct on your part will result not only in disciplinary action, but may also include processing for administrative discharge by reason of misconduct due to a pattern of misconduct. You did not elect to submit a Page 13 rebuttal statement.

On 28 August 1981, you received NJP for possession of a controlled substance. On 8 December 1981, you received NJP for UA lasting six (6) days. You did not appeal either NJP.

On 8 September 1982, you were convicted at a Special Court-Martial (SPCM) of assaulting a senior petty officer. You were sentenced to confinement at hard labor for three months, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Navy with a Bad Conduct Discharge (BCD). On 3 November 1982, the Convening Authority approved the SPCM sentence as adjudged. On 5 November 1982 your separation physical examination deemed you medically qualified for separation from active duty. Upon the completion of SPCM appellate review in your case, on 15 July 1983, you were discharged from the Navy with a BCD 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 Wilkie Memo. These included, but were not limited to: (a) you suffered a severe injury, the prescribed medication clouded your judgment, and the military now has better policies for addressing drug use and chronic pain, (b) Navy Medical Officers did not advise you against mixing alcoholic beverages with your prescribed muscle relaxants/pain killers, (c) your assault while under the influence was your first violent offense, (d) you otherwise committed only minor and infrequent misconduct, (e) even after the incident, a Navy Medical Officer stated you were motivated and had good potential for continued service, (f) the evidence established you were experiencing severe impairments at the time of your misconduct, (g) you served your confinement sentence and decades of collateral consequences, and (h) that you be afforded clemency given your advanced age. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First and foremost, the Board determined your contentions were without merit

and unpersuasive. The Board was not persuaded with the suggestion that your violent misconduct should be somehow mitigated because, in part, Navy Medical Officers purportedly failed to warn you of the consequences of consuming alcohol while taking certain prescription painkillers and muscle relaxers. The Board also determined that the proper time to argue diminished capacity as either an affirmative defense or for extenuation/mitigation was at your SPCM. Notwithstanding, the Board determined these arguments were insufficient to mitigate your serious misconduct.

Further, 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. Moreover, the Board disagreed with counsel and determined that your non-SPCM misconduct was not minor in nature. In addition, the Board noted that all five of your NJPs occurred well before your August 1982 injury. Thus, the Board determined that your cumulative and egregious 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.

Additionally, the Board observed 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 in conduct was approximately 2.60. Navy regulations in place at the time of your discharge required a minimum trait average of 3.0 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.

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 veterans' 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. While the Board carefully considered all matters submitted in mitigation, to include your arguments of continued adverse collateral consequences, even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service, changing your narrative reason for separation, or granting relief as a matter of clemency or equity. 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,

1/17/2023

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Executive Director

Signed by: █