



**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: 3775-22

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 12 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 an advisory opinion (AO) furnished by qualified mental health provider and your response to the AO.

You enlisted in the Navy and commenced active duty on 2 July 2003. Your pre-enlistment physical examination, on 25 January 2003, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 27 October 2003, you reported for duty on board the █ in █

On 9 July 2004, you received non-judicial punishment (NJP) for conspiracy to commit assault and aggravated assault with the intent to commit grievous bodily harm. You did not appeal your NJP. You received a performance evaluation for the period ending 9 July 2004. Your overall

trait average was 2.17 (out of 5.0), and you received a 1.0 in military bearing/character. You were rated “significant problems” and not recommended for retention. The comments section of the evaluation specifically noted the following: “Member counseled for: Failure to report to work 17 April 2004, 30 May 2004, 05 June 2004, and 11 July 2004. Disrespect to a Petty Officer 21 May 2004. UA from appointed place of duty 24 March 2004 and 25 March 2004. Being found on the Flight Deck during flight operations with CD player 26 March 2004. Behavior is below acceptable standards.”

On 9 August 2005, you received NJP for a period of unauthorized absence (UA) that lasted twenty-six (26) days. You did not appeal your NJP.

On 23 August 2005, a Navy Drug Screening Laboratory message confirmed your urine sample tested positive for marijuana (THC) at a level of 102 ng/ml, well above the THC testing cutoff level of 15 ng/ml. On 26 August 2005, you received NJP for the wrongful use of a controlled substance (marijuana). You did not appeal your NJP.

Your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse, and misconduct due to the commission of serious offense. You waived your rights to consult with counsel, submit statements on your own behalf, and to request an administrative separation board. Ultimately, on 1 September 2005, you were discharged from the Navy for misconduct with an under Other Than Honorable (OTH) conditions characterization of service and assigned an RE-4 reentry code.

On 10 March 2011, the Naval Discharge Review Board (NDRB) denied your initial application for relief. The NDRB determined that your discharge was proper as issued and that no change was warranted.

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) the stress from dealing with losses of several close friend, issues with family back home, and feeling homesick/alone was more than you could bear, (b) you began to cry-out/act-out and started to have nightmares, insomnia, and was anxious all the time and not able to concentrate, (c) you were diagnosed on active duty with a mental health condition and prescribed Zoloft, (d) you have been diagnosed post-service with multiple mental health conditions, (e) several statements in the 21 July 2005 medical recommendation for your administrative separation were untrue because you were manic at the time of your interview and suffering from the side effects of your medication, (f) immediately after service you were hospitalized and treated for PTSD, and (g) you are asking for reconsideration so you can continue to receive the care that you need and regain your dignity. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

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 31 May 2022. The Ph.D. stated in pertinent part:

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During military service, the Petitioner was diagnosed with MDD and a personality disorder, indicating military service was not suitable for him. Although the history reported in the record is disputed, there is no evidence of error. The in-service diagnoses were based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed over several days of close observation. Post-service, he has been diagnosed with Schizoaffective Disorder and DDNOS. There is no evidence of a diagnosis of PTSD. While it is possible that his marijuana use and UA could have been attempts to seek assistance for his depression symptoms, it is difficult to consider how the assault charges are related to a depression diagnosis. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, “[b]ased on the available evidence, it is my clinical opinion that there is insufficient evidence of a diagnosis of PTSD. There is evidence of another mental health condition (depression) that may be attributed to military service. There is insufficient evidence that all of his misconduct could be attributed to PTSD or another mental health condition.”

Following your AO rebuttal submission, the Ph.D. modified the AO and concluded, “[b]ased on the available evidence, it is my clinical opinion that there is some post-service evidence of a diagnosis of PTSD that may be attributed to military service.”

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 NJPs, outweighed these mitigating factors. 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 that there was no convincing evidence of any nexus between any mental health conditions and/or related symptoms and some of your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated some of the misconduct that formed the basis of your discharge. As a result, the Board concluded that your most severe misconduct was not due to mental health-related conditions or symptoms. The Board unequivocally disagreed with any argument or suggestion that any information contained in the 21 July 2005 medical memorandum was false or misleading. Even if the Board assumed that some of 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. Moreover, the Board concluded that your conspiracy and aggravated assault-related misconduct would not be excused or mitigated by mental health conditions even with liberal consideration. 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 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 calculated from your available performance evaluations during your enlistment was 1.0 in conduct. Navy regulations in place at the time of your discharge required a minimum trait average of 2.0 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 serious misconduct which further 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 record was otherwise so meritorious as to deserve a discharge 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 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. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. 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. Even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an 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,

8/16/2022

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