



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: 4433-22

Ref: Signature Date

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

You originally enlisted in the Navy and entered active duty on 29 October 2001. On 29 October 2005, you extended your enlistment for twelve months.

On your performance evaluation for the period ending 15 June 2006, you received an overall trait average of 2.43 out of a possible 5.0, and received a mark of 1.0 in "military bearing/character." Your promotion recommendation was "Significant Problems" and you were not recommended for retention. The evaluation comments noted that you had a second alcohol-related incident and were a Level II alcohol treatment rehabilitation failure.

On 22 June 2006, you received non-judicial punishment (NJP) for the drunken operation of a vehicle (DUI) and unlawful entry. 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 the commission of a serious offense. You were processed using “notification procedures,” which meant that you were not entitled to request an administrative separation board, but the least favorable discharge characterization you could receive was no less than General (Under Honorable Conditions) (GEN). Ultimately, on 11 August 2006, you were discharged from the Navy for misconduct with a GEN characterization of service and assigned an RE-4 reentry code.

On 5 March 2009, the Naval Discharge Review Board (NDRB) denied your application for relief. The NDRB determined that your GEN discharge was proper as issued and 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) at the time of your discharge you were suffering from undiagnosed PTSD with a severe alcoholic and a TBI, (b) your untreated and undiagnosed mental health conditions were caused by two combat tours in Iraq and from participation in Hurricane Katrina disaster clean up, and (c) your undiagnosed symptoms of PTSD, TBI, and major depression impaired your judgment and thinking abilities. 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 medical doctor and Fellow of the American Psychiatric Association (MD), reviewed your contentions and the available records and issued an AO dated 5 July 2002. The MD stated in pertinent part:

Petitioner’s available in-service records did not contain a diagnosis of PTSD, TBI, or other mental health conditions, nor did it contain a record of the contended combat-related traumatic events, 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 was no evidence of concerns regarding any mental health issues warranting referral to mental health resources. Petitioner provided evidence of post-discharge diagnoses of PTSD, TBI, and Major Depression attributed to his military service. However, the provided post-discharge evidence did not explain or clarify the clinical history or psychological symptoms supporting a diagnosis of PTSD, TBI, or Major Depression, nor establish a nexus between his in-service misconduct and his post-discharge diagnoses. Additional information, such as in-service or 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, “[Based on the available evidence, it is my clinical opinion that there is evidence of post-discharge diagnoses of PTSD, TBI, and Major Depression attributed to his military service. However, there is insufficient evidence to support Petitioner’s contention that his in-service misconduct could be attributed to PTSD, TBI, or Major Depression.”

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant 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 nexus between any purported TBI, PTSD, or mental health conditions and/or their related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such TBI, PTSD, and/or mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, even under the liberal consideration standard for mental health conditions the Board concluded that your misconduct was not due to TBI, PTSD, or mental health-related conditions or symptoms. Even if the Board assumed that your misconduct was somehow attributable to any TBI, PTSD, or 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. The Board unequivocally determined the record clearly reflected that your misconduct was willful and intentional and demonstrated you were unfit for further service. The Board also concluded 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.

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 approximately 2.33 in conduct. Navy regulations in place at the time of your discharge required a minimum trait average of 2.5 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 cumulative 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. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board determined that characterization under GEN or other than honorable conditions (OTH) 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. 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. As a result, the Board determined that there was no impropriety or inequity in

your discharge, and even under the liberal consideration standard, the Board concluded that your serious misconduct clearly merited your receipt of a GEN and no higher. 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,

9/11/2022

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