



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: 4556-22
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 21 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). The Board also considered the advisory opinion (AO) furnished by a qualified mental health professional and your response to the AO.

You enlisted in the Navy and began a period of active duty on 21 July 1994. On 1 March 1997, you were arrested by civilian authorities for allegedly committing the offense of rape in the second degree. On 19 April 1997, you were arrested by civilian authorities for driving under the influence (DUI). You were subsequently evaluated by the Counseling and Assistance Center (CAAC) which recommended you for Level II (Intensive Outpatient) treatment after noting that you appeared to be dependent of alcohol, you demonstrated poor judgement in your drinking behavior, and your potential for further alcohol difficulties was high unless you modified your selected behaviors. However, on 24 April 1997, you were convicted by civilian authorities of DUI and for fourth degree assault on 30 April 1997. On 20 June 1997 and 23 June 1997, you received non-judicial punishment (NJP) for two periods of unauthorized absence (UA), in

violation of Article 86, Uniform Code of Military Justice (UCMJ) and failure to obey an order or regulation, in violation of Article 92, UCMJ.

Unfortunately, the documents pertinent to your administrative separation are not in your official military personnel file (OMPF). Notwithstanding, the Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Based on the information contained on your Certificate of Release or Discharge from Active Duty (DD Form 214), you were separated from the Navy, on 11 July 1997, with an "Other Than Honorable (OTH)" characterization of service, your narrative reason for separation is "Misconduct," your separation code is "HKQ," and your reenlistment code is "RE-4."

Post-discharge, you petitioned the Naval Discharge Review Board (NDRB) for an upgrade to your characterization of service. The NDRB denied your request on 4 November 2010 after determining your discharge was proper as issued.

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 upgrade your discharge character of service and change your narrative reason for separation and separation code. The Board also considered your contentions that: (1) you were administratively discharged due to an accusation of which you state you did not commit, but accepted a plea bargain in accordance with your lawyer's advice because he stated that no matter what the outcome would be you was being "kicked" out of the Navy; (2) after your deployment and being in a hostile environment, you incurred severe post-traumatic stress disorder (PTSD), depression and anxiety; and (3) you deserve an upgrade of your characterization of service due to you actually going into a hostile environment for your country unlike people you know who did drugs, went AWOL, and other kinds of things just to get out of going. For purposes of clemency consideration, the Board noted you provided advocacy letters but no supporting documentation describing post-service accomplishments.

As part of the Board's review, a qualified mental health professional reviewed your request and provided the Board with an AO on 29 July 2022. The AO noted in pertinent part:

There is no evidence Petitioner was diagnosed with a mental health condition during his service, other than Alcohol Dependence. He was referred for Level II treatment and to FSC for counseling. He acknowledged the UA and denied the rape/assault charges. Petitioner presented evidence of post-discharge diagnoses of PTSD, major depressive disorder (MDD), and generalized anxiety disorder (GAD) related to his military service. Evidence presented does not indicate Petitioner's UA or failure to obey were related to his alcohol misuse. His arrests for civilian DUIs are related to his alcohol use. Substance use is a typical maladaptive coping skills person's resort to after experiencing a trauma; however, there is no evidence Petitioner was unaware of his misconduct or not responsible for his behavior. Additionally, the rape/assault charges would not be attributable to PTSD. 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 AO concluded, "it is my considered clinical opinion, there is post-service evidence of a diagnosis of PTSD, MDD, and GAD that can be attributed to military service. There is insufficient evidence that all of his misconduct could be attributed to PTSD or another mental health condition (MHC)."

In response to the AO, you provided a rebuttal statement that supplied additional clarification of the circumstances of your case.

Based upon this review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your two civilian convictions and two NJPs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct along with the discrediting effect your misconduct had on the Navy and concluded your misconduct showed a complete disregard for military authority and regulations. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command. Additionally, the Board concurred with the AO and determined that while there is post-service evidence of a diagnosis of PTSD, MDD, and GAD that can be attributed to military service, there is insufficient evidence that all of your misconduct could be attributed to PTSD or another MHC. As pointed out in the AO, there is no evidence you were unaware of your misconduct or not responsible for your behavior. Finally, 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 your conduct constituted a significant departure from that expected of a Sailor and continues to warrant an OTH characterization. While the Board empathized with your current medical condition, considered your advocacy letters, and commended your post-discharge good character, after applying liberal consideration, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service, changing your narrative reason for separation, modifying your separation code, or granting clemency in your case. Accordingly, given the totality of the circumstances, the Board determined 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,

10/6/2022

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Executive Director

Signed by █