



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

█
Docket No: 4604-22

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

You enlisted in the Navy and entered active duty on 15 July 1998. Your pre-enlistment medical examination, on 16 January 1998, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 18 December 1998, you reported for duty on board the █ (█) in █, █.

In 2001, you were convicted at a General Court-Martial (GCM) of attempting to commit a crime, conspiracy to commit a criminal offense, and making a false official statement. As part of your punishment you were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Navy with a Bad Conduct Discharge (BCD). After the Convening Authority approved your sentence, you were placed on involuntary appellate leave awaiting your

punitive discharge. Following the completion of post-trial appellate review process in your case, your punitive discharge was ordered executed and you were ultimately discharged from the Navy, in absentia, with a BCD on 26 June 2002.

The court martial documentation is not in your service record. However, the Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to rebut the presumption, to include evidence submitted by the Petitioner, the Board presumed that you were properly discharged from the Navy with a BCD for your GCM offenses.

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 desire for a discharge upgrade and contentions that: (a) prior to your GCM you had no previous disciplinary action taken against you, (b) you witnessed the death of a good friend on board the aircraft carrier and it had a traumatic effect on you, but you did not seek assistance, (c) you do not deny your complicity in your crimes and take full responsibility for them, and (d) at the time of your GCM you were unaware at the time you were suffering from undiagnosed PTSD. 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 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 29 July 2022. The Ph.D. stated in pertinent part:

There is no evidence Petitioner was diagnosed with a mental health condition during his service. In contrast, Petitioner provided documentation of his post-service diagnosis of PTSD related to his military service. Unfortunately, there is no information regarding Petitioner's misconduct, other than noted on his DD214 he was convicted via court-martial. Additionally, Petitioner's statement is insufficiently detailed regarding in-service symptoms experienced and how those symptoms are related to his misconduct. It would be speculative to try to attribute Petitioner's misconduct to PTSD particularly since there is no information about the misconduct.

The Ph.D. concluded, "[b]ased on the available evidence, it is my considered clinical opinion, there is post-service evidence of PTSD that can be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD."

In response to the AO, you provided a statement that further explained the circumstances of your case.

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 GCM, 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 there was no nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the GCM misconduct forming the basis of your discharge. The Board observed that your available active duty records did not contain evidence of a mental health diagnosis. The Board noted that although you have a post-service PTSD diagnosis, active duty records contemporaneous to your service and any post-service clinical records submitted lacked sufficient evidence to establish a nexus between your mental health conditions/symptoms and your in-service misconduct. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. Even if the Board assumed that 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. The Board determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. Moreover, the Board concluded that the specific misconduct you committed involving conspiracy to commit a crime and making a false official statement were not the types of offenses that would be excused by mental health conditions even with liberal consideration. The Board also noted that the evidence of record did not demonstrate you were not mentally responsible for your conduct or that you should not be held accountable for your actions.

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. Additionally, 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 even under the liberal consideration standard for mental health conditions, the Board concluded that your serious misconduct and disregard for good order and discipline clearly merited your receipt of a BCD.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. You were properly convicted at a GCM of serious misconduct and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. The Board carefully considered any matters submitted regarding your character, post-service conduct, and personal/professional accomplishments, however, 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



Docket No: 4604-22

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,

9/14/2022

