



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: 4714-22

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 24 October 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, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the Navy and began a period of active duty on 25 July 2001. On 6 February 2002, you received Non-judicial Punishment (NJP) for violating Uniform Code of Military Justice (UCMJ) Article 92 for underage drinking. On 2 August 2002, you were taken to your second NJP for violating UCMJ Article 92 (Failure to obey lawful order), Article 107 (False official statement), and Article 134 (Disorderly conduct). That same day you were given an Administrative Counseling (Page 13) addressing the deficiencies in your performance and conduct, and advising you that further deficiencies may result in disciplinary action or

administrative separation. On 12 October 2002, you were awarded your third NJP for violating UCMJ Article 86 for a one-day period of unauthorized absence (UA). You were again given a Page 13 counseling, putting you on notice that further misconduct could lead to your separation. On 9 January 2003, you received your fourth NJP as documented in your record on NAVPERS 1070/604. Shortly thereafter, on 13 February 2003, you again absented yourself from your command without authorization. On 18 June 2003, you received your fifth NJP for violating UCMJ Article 85 (Desertion). At that time, your End of Obligated Service Date was adjusted from 24 July 2005 to 13 November 2005 to account for your period of absence without leave. On 4 September 2003, you again went UA, this time for a period of 4 days. On 18 September 2003, you were found guilty at your sixth NJP for that period of UA and again received a Page 13 counseling.

On 19 October 2004, in accordance with MILPERSMAN 1910-106, you requested a separation in lieu of trial by court martial (SILT). You acknowledged your rights, waived your right to consult with counsel, and acknowledged that if your discharge was under Other than Honorable (OTH) conditions, you may be deprived of veteran's benefits and may encounter substantial prejudice in civilian life. Your commanding officer accepted your SILT request, directing your administrative discharge from the Navy with an OTH characterization of service. On 20 October 2004, you were discharged from the Navy by reason of "In Lieu of Trial by Court Martial" with an OTH characterization of service and an "RE-4" reenlistment 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 Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire to upgrade your discharge character of service and contentions that your mental health issues and prescribed medication affected your behavior. For purposes of clemency consideration, the Board noted the statement provided by your father, as well as the content of your service medical record and your post-service medical record.

As part of the Board's review process, a qualified mental health professional reviewed your contentions and the available records and issued an AO dated 16 August 2022. The AO noted in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Post-service, he has provided medical evidence of a diagnosis of Psychosis NOS. He has submitted anecdotal evidence regarding mental health symptoms that began prior to his separation from service, but after his misconduct. Unfortunately, the available evidence is not sufficiently detailed to establish a nexus with his misconduct, as it appears to have occurred prior to the development of clinical symptoms. 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 mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition.”

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 six NJPs and numerous periods of UA, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your repeated misconduct and its impact on the mission. Further, the Board concurred with the AO that although there is post-service evidence of a mental health condition that may be attributed to military service, there is insufficient evidence that there is a nexus between your misconduct and the mental health condition. Your misconduct began almost immediately after your enlistment and spanned your entire term of service. In addition, your SILT request does not mention mental health concerns or the impact of medication as a cause of your misconduct. The Board determined the record clearly reflected that your active duty 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 otherwise not be held accountable for your actions.

Furthermore, 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. Finally, the Board determined that you already received a large measure of clemency when the Navy agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and likely punitive discharge. 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. 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 or granting clemency in the form of an upgraded characterization of service. 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,

11/7/2022

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Executive Director

Signed by: █