



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

■
Docket No: 4961-22

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 limitations 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 5 December 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 service 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)/mental health condition (MHC) (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) from a qualified mental health professional, and your response dated 4 November 2022.

You enlisted in the United States Navy and commenced a period of active service on 16 July 1986. On 20 December 1987, you received non-judicial punishment (NJP) for violation of Uniform Code of Military Justice (UCMJ) Article 90, for disobeying a lawful command to attend functional skills classes. On 3 March 1988, you received your second NJP for violating UCMJ Article 92, after disobeying a lawful general order by operating a forklift without a government issued license. On 15 September 1988, you were found guilty at your third NJP, this time for violating UCMJ Article

91, for showing disrespect towards a Senior Petty Officer. You did not appeal any of the NJPs. You were given an Administrative Counseling (Page 13), putting you on notice that any further discrepancies in your performance or conduct could result in disciplinary action or administrative processing.

On 22 January 1989, you received your fourth NJP for violating UCMJ Article 123, four specifications, after issuing four checks which were returned by █ bank for lack of funds. You were again given a Page 13 counseling warning you of the potential ramifications of continued misconduct. On 13 February 1989, you received your fifth and final NJP for violating UCMJ Article 86, due to your unlawful absence from your appointed place of duty while restricted to men's muster on eight separate occasions. You did not appeal either of these NJPs.

On 13 February 1989, you were notified that you were being processed for an administrative discharge by reason of misconduct due to pattern of misconduct. You waived your right to consult with qualified counsel and your right to present your case at an administrative separation board. Ultimately, on 27 March 1989, you were discharged from the Navy for misconduct with an Other than Honorable (OTH) characterization of service and assigned an RE- 4 reentry code.

The Board carefully considered all potentially mitigating and/or extenuating 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) your desire to upgrade your characterization of service and change your narrative reason for separation and reentry code, (b) your contention that you suffered numerous traumatic incidents during your service, and (c) your contention that your misconduct was directly caused by symptoms of undiagnosed PTSD. For purposes of clemency and equity consideration, the Board noted you did provide documentation in support of your claim, to include a personal affidavit, timeline of events, portions of your service record, and in-service and post-service medical records.

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 5 October 2022. The Ph.D. noted in pertinent part:

There is no evidence 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 submitted evidence of a diagnosis of PTSD that is temporally remote to his military service. It is possible that some of his misconduct, including disrespectful behavior and UA could be associated with PTSD symptoms of irritability and avoidance. However, it is difficult to attribute operating a forklift without a license and forged checks to PTSD symptoms. It is plausible that he would not recall the specifics of his misconduct due to the passage of time, but it is difficult to attribute his acceptance of the NJPs to a determination to leave the ship, given his denial of symptoms during service. Additional records (e.g., complete records describing the Petitioner's diagnosis, symptoms, and their specific link to the circumstances of his separation) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence all of his misconduct could be attributed to PTSD."

In response to the AO, you submitted additional arguments in support of your application.

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. Specifically, the Board felt that your misconduct, as evidenced by your five NJPs, outweighed these mitigating factors. 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 the stressful and traumatic events occurring your life and their possible adverse impact on your service. The Board considered the seriousness of your misconduct and the fact that it involved repeated offenses of disrespect and insubordination. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command.

In making this determination, the Board concurred with the advisory opinion that while there is post-service evidence of PTSD symptomology that may be attributed to military service, there is insufficient evidence that all of your misconduct could be attributed to PTSD. The evidence you provided in support of a post-service diagnosis of PTSD is temporally remote to your military service. Even after considering the additional evidence you provided, the Board felt that while it is possible that some of your misconduct, including disrespectful behavior and UAs, could be associated with PTSD symptoms, they did not agree with your assessment that the remaining misconduct was also caused by PTSD symptoms. The Board felt that their assessment was further supported by the fact that you did not raise any PTSD related symptoms during your service either to a medical professional or during the administrative process. On the contrary, when you were notified that you were being processed for separation, you waived your right to consult with a qualified counsel, your right to submit a written statement, and your right to present your case in front of a board. You certified a complete understanding of the negative consequences of your actions and that characterization of service could be under Other than Honorable Conditions which might deprive you of virtually all veterans benefits.

The Board found 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. Finally, 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. 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 commends your post-discharge accomplishments, 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, changing your narrative reason for separation, changing your reentry code, or granting relief as a matter of clemency or equity. 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,

12/16/2022

█

Executive Director

Signed by █