



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

██████████
Docket No: 5019-22
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 14 November 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 12 December 2002. That same day you were given an Administrative Counseling (Page 13), putting you on notice of you fraudulent enlistment due to your failure to disclose pre-service marijuana use. At this time, you acknowledged the Navy's Zero Tolerance Policy concerning drug use. You were advised that any further deficiencies in your performance and/or conduct may result in disciplinary action and processing for administrative separation.

On 20 May 2003, you had a one day period of unauthorized absence (UA) from your appointed place of duty. On 26 January 2004, you received Non-judicial Punishment (NJP) for violating

Uniform Code of Military Justice (UCMJ) Article 86 (UA), Article 92 (Failure to obey lawful order), and Article 107 (False official statement). You were awarded restriction and extra duties, as well as 30 days correctional custody. That same day you were given an Administrative Counseling (Page 13) addressing the deficiencies in your performance and conduct, and again advising you that further deficiencies may result in disciplinary action or administrative separation. On 21 April 2004, you were awarded your second NJP for violating UCMJ Article 86 for an 8-day period of UA and Article 112(a) for wrongful use of a controlled substance. You did not appeal either NJP.

Immediately after your last NJP, you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse and pattern of misconduct. You waived your right to consult with qualified counsel and your right to present your case at an administrative separation board. On 4 June 2004, 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 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 discharge character of service, (b) the impact your job had on your mental health, and (c) your contention that you were misled about the duties you would be performing upon entry into the naval service. For purposes of clemency and equity consideration, the Board noted the post-service medical diagnosis dated 10 May 2022.

As part of the Board's review process, a qualified mental health professional reviewed your contentions and the available records and issued an AO, which was provided to you on 2 September 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. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. 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 insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD."

In response to the AO, you provided a letter from your associate dated 19 October 2022. He argued that the mental health professional who issued the AO was biased and should not be allowed to render an opinion because they did not have your entire medical service record, never served with you, and did not observe or evaluate you.

After thorough 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 NJPs and periods of UA, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact that it involved a drug offense. The Board found the drug offense particularly troubling, as you were already counseled about your fraudulent enlistment for failure to disclose pre-service drug use and acknowledged the Navy's Zero Tolerance Policy. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command. The Board determined that illegal drug use is contrary to the Navy core values and policy, renders such Sailor unfit for duty, and poses an unnecessary risk to the safety of fellow shipmates. Further, the Board concurred with the AO that there is no evidence that you were treated or diagnosed with a mental health condition while in military service, or that you exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Regardless, the Board felt that even with post-service evidence of a mental health condition, there is insufficient evidence that there is a nexus between your misconduct and the mental health condition since your misconduct began almost immediately after your enlistment and spanned your entire term of service. 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. 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 an upgraded characterization of service as a matter of clemency or equity. 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,

11/30/2022

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Executive Director

Signed by: █