



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

█
Docket No: 5322-22

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 23 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). Additionally, the Board considered an advisory opinion (AO) from a qualified mental health provider that was drafted for your previous BCNR petition (NR20200005957) which was previously provided to you in late April 2021. Although you were provided an opportunity to submit an AO rebuttal at such time, you chose not to do so.

You enlisted in the Navy and entered active duty on 11 February 1989. Your pre-enlistment medical examination, on 7 December 1988, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 28 August 1989, you reported for duty on board the █ (█) in █, █.

On 22 February 1990, you received non-judicial punishment (NJP) for two separate specifications of unauthorized absence (UA) for being absent from your appointed place of duty. You did not appeal your first NJP. On 7 June 1990, you received NJP for two separate

specifications of UA lasting fifteen days and one day, respectively. As part of your punishment you served time in the correctional custody unit for thirty days. You did not appeal your second NJP. On the same day, your command issued you a "Page 13" retention warning (Page 13). The Page 13 noted your multiple absences and expressly warned you that any further deficiencies in your performance and/or conduct may result in disciplinary action and in the processing for administrative discharge. However, on 11 July 1991, you received NJP for five separate specifications of UA, making a false official statement, and making/uttering checks with insufficient funds totaling approximately \$1,125. You did not appeal your third NJP.

On 17 July 1991, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. You consulted with counsel and elected your right to present your case to an administrative separation board (Adsep Board).

On 9 August 1991, an Adsep Board convened to hear your case on board the █. At the Adsep Board, you were represented by a Navy Judge Advocate. Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined that you committed misconduct as charged. Subsequent to the unanimous misconduct finding, the Adsep Board members recommended that you be separated from the naval service with an Other Than Honorable (OTH) characterization of service. Ultimately, on 30 September 1991 you were discharged from the Navy for misconduct with an OTH characterization of service and assigned an RE-4 reentry code.

On 16 January 2003, the Naval Discharge Review Board determined that your OTH discharge was proper as issued and no change was warranted. On 19 October 2004, the BCNR denied your initial petition for relief. On 8 April 2019, the BCNR denied your second petition for relief. On 11 June 2021, the BCNR denied your third petition for relief that included the aforementioned AO.

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 for a discharge upgrade and contentions that: (a) you want your discharge upgraded so you can receive benefits and health care and a certificate of eligibility (COE) to get adequate housing for your family, (b) it has been over twenty years since your discharge and everyone deserves a second chance, (c) you had good service before you started to suffer from PTSD, and (d) you would like to give your family and yourself a real chance to be a part of some of the benefits you fought so hard to have in Desert Storm, and to receive some of the much needed professional help with your PTSD and other medical issues. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the review process, the BCNR Physician Advisor who is also a medical doctor (MD) and a Fellow of the American Psychiatric Association, reviewed your mental health contentions and the available records and issued an AO dated 16 April 2021. The Board noted that this AO was drafted for your previous BCNR petition. However, while you are claiming again you

suffered from PTSD on active duty on your current petition, the Board noted that you did not provide any new and/or material medical or clinical evidence whatsoever that was not already included in your previous petition. Accordingly, the Board reviewed the April 2021 AO. The MD stated in pertinent part:

Petitioner's in-service records did not contain evidence of a diagnosis of a mental health condition or psychological/behavioral changes, which may have indicated a mental health condition. Throughout his disciplinary actions, counselings, review boards, and administrative processing, there were no concerns noted which would have warranted referral to mental health resources. Although Petitioner provided evidence of a post-discharge diagnosis of PTSD, there was no report of specific traumatic events from military or wartime experiences. Notably, of his three misconducts, two occurred before his deployment to Operation Desert Storm and were not attributable to his contention of PTSD. During his ADRB, Petitioner stated his two misconduct UA's that were part of his charges during his 11 July 1991 NJP, were attributed to his leaving on previously approved leave without a leave control number, and on the other UA, he left because he was "stressing out" over being in a "financial bind." The lack of information on the actual traumatic events and onset and development of mental health symptoms made it difficult to identify a nexus with his in-service misconduct.

The MD concluded, "it is my considered medical opinion that though Petitioner carries a post-discharge diagnosis of PTSD, the preponderance of objective evidence fails to establish that Petitioner suffered from PTSD at the time of his military service, or that his in-service misconduct could be attributed to PTSD or other mental health conditions."

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. 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 that there was no convincing evidence of any 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 misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, 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 reflected that your 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 not be held accountable for your actions.

The Board was not persuaded by your contention that you are somehow being deprived of benefits you fought so hard to earn. The Board determined that eligibility for veterans' benefits is based, in part, on your characterization of service. The Board determined that your OTH discharge was procedurally, legally, and factually correct. The Board noted that with an OTH you are deprived of virtually all rights as a veteran, and that you may encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of the discharge received may have a bearing. The Board determined that the fact that an OTH comes with such adverse consequences is not a valid basis upon relief can be granted in your case.

The Board also noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded with the passage of time, or after a specified number of months or years. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of your conduct and/or performance in your last enlistment greatly outweighed any positive aspects of your military record. The Board determined that the basis for your separation was the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. Moreover, 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 that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. Even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an error or injustice exists to warrant 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 that your request does not merit relief.

You have now attempted to upgrade your discharge at the BCNR four separate times without success. 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,

10/4/2022

