



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

■
Docket No: 5354-22
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 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 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, dated 13 September 2022, as well as your response, received 24 October 2022.

You enlisted in the Navy and began a period of active duty on 24 February 1986. On 17 December 1987, you received Non-judicial Punishment (NJP) for violating Uniform Code of Military Justice (UCMJ) Article 86, for a 3-day period of unauthorized absence (UA). You did not appeal this NJP.

On 14 January 1988, you were hospitalized for five days with fractures to your jaw, nasal bones, and teeth, with medical records noting a "history of loss of consciousness" following an injury during a Navy sponsored basketball game.

On 11 May 1988, you were taken to your second NJP for violating UCMJ Article 86, for a 17 minute period of UA. You did not appeal this NJP. On 31 May 1988, you began a significant period of UA, and were declared a deserter on 1 July 1988. On 23 June 1989, you were apprehended by civilian authorities for “theft by deceit, forgery, and receiving stolen property.” You were UA from your command for a period of 391 days, which was terminated by apprehension.

Upon return to military custody, you were medically evaluated on 26 June 1989 and denied mental health symptoms, but the medical professional noted multiple fractured teeth and recommended an oral surgery consult. On 27 June 1989, you were seen by the dental clinic and you disclosed painful joints, including your jaw, but denied any other symptoms on your dental health questionnaire.

On 31 July 1989, you were found guilty at Special Court Martial of violating UCMJ Article 86, for going UA from your command for a period of 391 days. You were represented by qualified military counsel throughout the course of your court martial. You did not raise any evidence of a mental health condition or a traumatic brain injury throughout the course of your trial. You were sentenced to 70 days confinement, reduction in rank to E-1, forfeitures of pay, and a Bad Conduct Discharge (BCD).

On 17 August 1989, you were examined by a medical professional as part of your service separation physical. You wrote “I’m in good health and taking no medication.” The physician noted “Had to fix jaw 1988, repaired and healed. Denies any medical problems.” Ultimately, after completion of the appellate review process, you were discharged from the Navy due to your conviction by Special Court Martial and given a BCD and 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, your desire for a discharge upgrade and contentions regarding: (a) the impact that your head trauma had on your behavior, (b) your overall service record, and (c) your assertion that you felt neglected by your command. For purposes of clemency and equity consideration, the Board noted the statement provided by your mother, as well as the content of your service medical record and the post-service medical records that you provided for review.

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 13 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. There is evidence of an injury to the face that could have resulted in residual TBI symptoms. Unfortunately, his personal statement is not sufficiently detailed to establish a nexus with his misconduct, as his first UA occurred prior to the injury and it is difficult to

attribute theft to PTSD or a TBI. 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 some evidence of TBI that may be attributed to military service. There is insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to TBI or PTSD."

The Board considered both of your response dated 24 October 2022, as well as the enclosed medical records that you provided in support of your claim. The AO reviewed the items submitted in rebuttal, to include medical records indicating a hospitalization for suicidal ideation in January 2011, with a discharge diagnosis of Depression Not Otherwise Specified (NOS). The medical records note that during the hospitalization, you reported feeling "like a failure, got injured at work in 2007 – back injury, knee injury with post-concussion syndrome back then." You also provided evidence of assessment and treatment of back injuries from 2007. After thorough review, the AO concluded that this additional medical evidence of a mental health condition is temporally remote to military service and appears unrelated. As such, the AO notes that the originally issued advisory opinion remains unchanged.

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 Special Court Martial conviction, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your repeated misconduct and its impact on the mission. The Board highlighted over half of your period of service, as reflected on your DD 214, was either in a UA status or while on appellate leave after your court martial conviction.

Further, the Board concurred with the AO that there is no evidence that you were 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. While there is evidence of an injury to the face that could have resulted in residual TBI symptoms, neither your personal statement nor the medical records establish a nexus between TBI symptoms and your misconduct. This is highlighted by the fact that your first UA occurred prior to the injury, and that theft by deceit, forgery, and receiving stolen property is not likely linked to symptomology of PTSD or a TBI. 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.

Finally, 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 your conduct constituted a significant departure from that expected of a Sailor and continues to warrant a BCD. 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,

12/16/2022

