



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: 5451-22
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 4 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). Additionally, the Board also considered the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You enlisted in the Navy and entered active duty on 16 June 1999. Your pre-enlistment physical examination, on 24 February 1999, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. As part of your enlistment application you disclosed pre-service marijuana use, and convictions for drug possession and criminal mischief.

On 17 December 1999, you reported for duty on board the ██████████ in ██████████
██████████ On 18 January 2001, you reported for duty on board the ██████████
██████████.

On 11 May 2001, you received non-judicial punishment (NJP) for two separate specifications of unauthorized absence (UA), and three separate specifications of disobeying a superior commissioned officer. You did not appeal your NJP. On the same day, your command issued you a "Page 13" counseling warning (Page 13) documenting your NJP misconduct. The Page 13 expressly warned you that any further deficiencies in performance and/or conduct may result in disciplinary action and in processing for administrative separation. You did not elect to submit a Page 13 rebuttal statement.

On 5 July 2001, you commenced another period of UA that terminated after six days on 11 July 2001. On 17 July 2001 you commenced another UA that terminated after three days on 20 July 2001. On 20 July 2001 you commenced another UA that terminated after three days on 23 July 2001.

On 21 August 2001, you underwent a psychiatric evaluation at Naval Hospital ██████████, ██████████. You were diagnosed with both an antisocial personality disorder and a borderline personality disorder. The Medical Officer (MO) determined that you did not have a ratable disability, and that you were competent to handle your personal and financial affairs. The MO stated the following in their evaluation/recommendation:

This service member has been clinically determined to be unsuitable for continued service based upon a DSM IV Axis II diagnosis of Personality Disorders that is sufficiently severe as to preclude satisfactory performance of duty. There is no cure for his personality disorders. No amount of training or leadership will reverse these conditions. Continued emotional difficulties are highly likely. In addition, this service member has shown a pattern of imminently dangerous behavior in the form of unauthorized absences and impulsivity, and, therefore, is considered to be potentially dangerous to himself and others in the military as long as he is retained. Therefore, expeditious administrative separation is recommended.

On 14 September 2001, you commenced another UA. On 13 October 2001, your command declared you to be a deserter. Your UA terminated after 139 days, on 31 January 2002, with your surrender to military authorities.

On 31 January 2002, you were notified of administrative separation proceedings by reason of misconduct due to the commission of a serious offense. You expressly waived your rights in writing to both consult with counsel, and to present your case to an administrative separation

board. In the interim, your separation physical examination, on 31 January 2002, and self-reported medical history both did not note any neurologic or psychiatric conditions or symptoms. Ultimately, on 8 March 2002, you were separated from the Navy for misconduct with an Other Than Honorable (OTH) characterization 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, your desire for a discharge upgrade and changes to your narrative reason for separation, separation code, and reentry code. In addition, you contend that: (a) you suffered from depression and other behavioral health problems at the time of discharge which should have been considered, (b) the discharge was procedurally and substantively defective, (c) the discharge action was unfair at the time, (d) the OTH is inequitable now, and (e) clemency was never shown. For purposes of clemency and equity consideration, the Board noted you provided a legal brief and Department of Veterans Affairs documentation but no supporting documentation describing post-service accomplishments or advocacy letters.

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 28 September 2022. The Ph.D. stated in pertinent part:

Petitioner was appropriately referred for psychological evaluation and properly evaluated during his enlistment. His personality disorder diagnoses were based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed by the mental health clinician. A personality disorder diagnosis is pre-existing to military service by definition, and indicates lifelong characterological traits unsuitable for military service. Unfortunately, he has provided no medical evidence to support his claims of PTSD or another mental health condition. His misconduct appears to be consistent with his diagnosed personality disorders, rather than evidence of PTSD or another mental health condition incurred in or exacerbated by military service. 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 Ph.D. concluded, "it is my considered clinical opinion there is insufficient evidence of a diagnosis of PTSD or another mental health condition that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD or another mental health condition, other than his diagnosed personality disorders."

After thorough 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 concurred with the AO and concluded that there was no convincing

evidence that you suffered from any type of unfitting mental health condition while on active duty, or that any such mental health condition was related to or 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, the Board observed that you did not submit any clinical documentation or treatment records to support your mental health claims despite a request from BCNR on 27 July 2022 to specifically provide additional documentary material. 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 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 concurred with the AO and determined that personality disorders are characterized by a longstanding pattern of unhealthy behaviors, dysfunctional relationships, and maladaptive thinking patterns. The Board also determined that personality disorders are not conditions considered unfitting or disabling, but render service members unsuitable for military service and consideration for administrative separation. Accordingly, the Board concluded that your personality disorder was a non-disabling disorder of character and behavior, and that it should not be considered a mitigating factor in your misconduct because it did not impair your ability to be accountable for your actions or behaviors. The Board also determined the record clearly reflected that your misconduct was intentional and demonstrated you were unfit for further service.

The Board concluded that your separation proceedings were legally and factually sufficient, and that your cumulative misconduct represented a prima facie case for an administrative separation by reason of misconduct due to either a pattern of misconduct, or misconduct due to the commission of a serious offense. The Board also concluded that your counsel's legal arguments in favor of relief lacked merit and were not persuasive.

Additionally, 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. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board determined that characterization under OTH conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. The simple fact remains is that you left the Navy while you were still contractually obligated to serve and you went into a UA status multiple times without any legal justification or excuse. Lastly, 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 serious misconduct clearly merited your receipt of an OTH characterization and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge. 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/separation code/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,

11/17/2022

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Executive Director

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