



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: 5588-22

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 21 October 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 an advisory opinion (AO) furnished by qualified mental health provider and your response to the AO.

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 December 2008. Your pre-enlistment physical examination, on 7 May 2008, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 7 May 2008, you signed and acknowledged the “Enlisted Statement of Understanding” regarding the Navy drug and alcohol policy as stated on the “United States Navy Illicit Behavior Screening Certificate.” On 6 September 2009, you reported for duty on board the ██████████ in ██████████ ██████████

On 6 January 2012, you received non-judicial punishment (NJP) for failing to obey a lawful order or regulation prohibiting the use or possession of “Spice.” As part of your punishment you were reduced in rank to paygrade E-2. You did not appeal your NJP.

Following your NJP, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. Based on information obtained from your service record, you waived your right to request an administrative separation board. In the interim, your separation physical examination, on 10 February 2012, determined you were physically qualified for separation. Ultimately, on 2 April 2012, you were discharged from the Navy for misconduct with an under Other Than Honorable (OTH) characterization of service and assigned an RE-4 reentry code.

On 22 May 2013, the Naval Discharge Review Board denied your initial application for discharge upgrade relief.

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) your OTH discharge was grossly inappropriate considering the ineffective assistance of counsel received and your exemplary post-service citizenship and character, (b) you had an extremely difficult childhood being a victim of physical abuse by your father and being raised by a single mother, (c) your career got off to a promising start, but in December 2011 you suffered a serious finger injury on board the ██████████, (d) after being accused of wrongdoing you depression worsened, (e) you were never afforded a defense counsel and no one ever explained to you your rights to consult with a defense counsel, (f) post-discharge, you struggled with your mental health and experienced personal tragedies, (g) the command provided ineffective assistance of counsel, and (h) your punishment is disproportionate and an injustice based on your honorable service and honorable post-service conduct. 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 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 15 September 2022. The Ph.D. stated in pertinent part:

During military service, the Petitioner was diagnosed with a mental health condition (depression). However, there is no evidence that his misconduct could

be attributed to his mental health condition, as he claims he was wrongly accused and did not engage in misconduct. Additional records (e.g., complete post-service mental health records describing the Petitioner's mental health diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is evidence of a mental health condition that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to a mental health condition."

In response to the AO, you provided additional arguments from your legal counsel.

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 or credible 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, the Board noted that it would be hard for a mental health condition to mitigate misconduct you deny occurring. 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 pattern of 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 troubled by your different versions of the story surrounding your Spice possession on the day Spice was found in your TPU room. The Board also concluded that any contentions regarding the ineffective assistance of counsel were not persuasive and without merit. The Board noted that Navy administrative separation notification and election of rights documents are standard, pre-printed Navy form documents and the substantive provisions are not editable by individual commands. Both documents note that you had the right to consult with counsel regarding the proposed separation prior to electing or waiving your rights. You had to affirmatively opt in/opt out in writing if you did/did not want to speak to qualified counsel, respectively. If you did not consult with counsel, it was because you specifically elected not to, and the Board noted that if you had elected to, the Navy legal office in ██████████ was conveniently located within walking distance of where TPU was situated on base. Additionally, if you truly believed your procedural or substantive rights were violated at NJP, you could have easily appealed the NJP to the next superior in the chain of command in order to adjudicate your appeal and address your due process concerns.

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 concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board determined that characterization under OTH conditions 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. 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 receipt of an OTH. The Board carefully considered any matters submitted regarding your character, post-service conduct, and personal/professional accomplishments, however, 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 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,

10/26/2022

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Executive Director
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