



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: 5769-22

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 reconsideration application on 6 January 2023. 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 originally enlisted in the Navy and entered active duty on 14 August 1980. Your pre-enlistment medical examination, on 12 August 1980, and self-reported medical history both

noted no psychiatric or neurologic conditions or symptoms. On 1 August 1985, you were honorably discharged for the purpose of an immediate reenlistment.

On 21 December 1987, you commenced a period of unauthorized absence (UA). Your UA terminated on or about 1 April 1988 when you were involved in a car accident near your original home of record where you sustained serious injuries requiring your hospitalization in ██████████, ██████████.

On 9 June 1988, you were convicted at a Special Court-Martial (SPCM) for your long-term UA. You were sentenced to restriction for sixty days, forfeitures of pay, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the naval service with a Bad Conduct Discharge (BCD). In the interim, your separation physical examination, on 14 June 1988, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You expressly stated you were presently in good health and taking no medications on your medical history form. On 11 July 1988, the Convening Authority approved the SPCM sentence as adjudged, but suspended the restriction portion of the sentence. Upon the completion of appellate review in your case, on 12 August 1988, you were discharged from the Navy with a BCD 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 Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) your discharge was made with you not in your right mind due to your severe car accident, (b) you were UA at the time of your accident and have no excuse, (c) your attorney said your discharge would automatically upgrade to an Honorable discharge, and (d) you already have one honorable discharge, and you were a 4.0 Sailor and very good at your job. For purposes of clemency and equity consideration, the Board noted you provided personal statements 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 25 November 2022. The Ph.D. stated 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. Although there is evidence in his record supporting his claim of a serious car accident, when evaluated in service, it was determined that he was aware of his misconduct and responsible for his behavior. He has provided no medical evidence in support of his claims of a mental health condition. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms during military service or a nexus with his misconduct, as his misconduct preceded his accident. Additional

records (e.g., mental health records describing the Petitioner's 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 insufficient 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 submitted a statement that provided additional information regarding the circumstances of your case.

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 concluded that there was no convincing evidence you suffered from any type of mental health condition while on active duty, or that any such mental health conditions or symptoms were 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. The Board noted that your car accident occurred after you first went UA, thus making it factually impossible to establish a nexus between any purported mental health condition and your misconduct. The Board unequivocally determined the record clearly reflected that your misconduct was willful and intentional and demonstrated you were unfit for further service. The Board also concluded 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.

The Board determined that you did not provide any evidence to substantiate your claim about an automatic upgrade to your BCD. Moreover, 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. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard for mental health conditions, the Board concluded that your serious misconduct and disregard for good order and discipline clearly merited your receipt of a BCD.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. 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 for over three full months without any legal justification or excuse. Accordingly, the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. While the Board carefully considered any matters you submitted in mitigation, 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 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,

1/18/2023

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Executive Director

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