



**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. 5942-22  
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 2 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). Additionally, the Board also considered an advisory opinion (AO) furnished by a qualified mental health provider. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the Navy and entered active duty on 2 November 2004. Your pre-enlistment physical examination, on 10 November 2003, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 12 February 2005, you reported for duty on board the █ in █.

On 2 August 2005, you received non-judicial punishment (NJP) for disorderly conduct. You did not appeal your NJP. On the same day your command issued you a "Page 13" counseling sheet (Page 13) documenting your NJP. The Page 13 expressly warned you that any further

deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative separation.

On 27 July 2006, a Navy Drug Screening Laboratory message indicated you tested positive for the opiate Oxymorphone above the established testing cut-off level. On 27 March 2007, you were convicted at a Summary Court-Martial (SCM) for the wrongful use of a controlled substance. You were sentenced to a reduction in rank to the lowest enlisted paygrade, forfeitures of pay, and confinement. The Convening Authority approved the SCM sentence.

On 30 March 2007, you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse, and misconduct due to a pattern of misconduct. You waived your right to consult with military counsel but elected your right to request an administrative separation board (Adsep Board).

On 31 May 2007, an Adsep Board convened in your case on board the █. Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined that you committed the misconduct as charged. Subsequent to the misconduct finding, the Adsep Board members unanimously recommended that you be separated from the Navy with an Other Than Honorable (OTH) conditions characterization of service. Ultimately, on 13 July 2007, you were separated from the Navy for drug abuse with an OTH discharge characterization and assigned an RE-4 reentry code.

On 4 April 2008, the Naval Discharge Review Board denied your application for a discharge upgrade.

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 were diagnosed with PTSD after your discharge, (b) post-service you resorted to drugs because you felt like a failure to your family and country, (c) you were discharged because you took a pill from your expired Navy prescription, and (d) it took five months before your command received your lab results, and another fourteen months before you were discharged. For purposes of clemency and equity consideration, the Board noted you provided an advocacy letter and medical records but no supporting documentation describing post-service accomplishments.

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 initial AO dated 14 October 2022. The Ph.D. stated in pertinent part:

There is no evidence that the Petitioner was diagnosed with a mental health condition (PTSD) in service. Throughout his processing he never exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition other than substance abuse. His post-service records indicate a diagnosis of PTSD, however there is no mention contained therein regarding the

etiology of his PTSD diagnosis. Psychiatric progress note dated 5 December 2011 from █ VAMC indicates that he had just been treated on an inpatient basis for 21 days for opioid withdrawal. This same note indicates that the Petitioner stated that his opioid addiction started at the age of 14 when he was given morphine following a knee injury. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. 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 mental health condition (PTSD) that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. In accordance with the Kurta, Hagel, 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 nexus between any mental health conditions and/or related symptoms and your drug-related 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. The Board also concluded that although you have a post-discharge PTSD diagnosis, your service records contemporaneous to your service lacked sufficient evidence to establish a nexus between your mental health conditions/symptoms and your active duty misconduct. As a result, even under the liberal consideration standard the Board concluded that your opiate use was not due to mental health-related conditions or symptoms. 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 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 your opiate use from an expired prescription was prohibited. The Board noted that Department of the Navy policy indicated that prescription drugs are inappropriately used when they are used: (a) outside of their intended purpose, (b) beyond their prescribed dates, (c) in excess of their prescribed dosing regimen, or (d) when a service member uses another individual's prescription.

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 illegal prescription drug abuse by a Sailor is contrary to Navy core values and policy, renders such Sailors unfit for duty, and could pose an unnecessary risk to the safety of their fellow Sailors. The Board noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. 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. 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 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 did not find evidence of an error or injustice that warrants granting you the relief you requested or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. 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,

1/25/2023

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Executive Director

Signed by: █