



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: 6133-22
Ref: Signature Date



Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 Board waived the statute of limitation 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 the 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 to 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) of a 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 the understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on evidence of record.

Prior to enlisting in the Navy, you were arrested for possession of marijuana, although you did not report pre-service drug use as part of your enlistment processing. After enlisting, you began a period of active duty on 31 January 2001. You deployed in support of Operation ENDURING FREEDOM from September of 2001 to March of 2002. From 25 - 28 June 2002, you were in an unauthorized absence (UA) status. At the time of your first nonjudicial punishment (NJP),

conducted on 2 July 2002, you were found guilty of a violation of Article 91, willful disobedience toward a chief petty officer, and four specifications of Article 86, failure to go, in addition to the UA. Your punishment included 45 days of restriction and extra duties, but you immediately went UA from 2 – 30 July 2002. Upon returning to military custody, you were subject to a second NJP for violations of Article 86, Article 134, due to breaking restriction, and Article 112a, for wrongful use of marijuana. Following this NJP, you were notified of administrative separation proceedings for misconduct due to drug abuse, and you elected to waive your right to consultation with legal counsel, your right to a hearing before an administrative separation board, and your right to submit a statement regarding the basis of your proposed separation. Commander, ██████████, approved your separation under Other Than Honorable (OTH) conditions and you were discharged on 18 September 2002.

You previously applied to the Naval Discharge Review Board (NDRB), contending that youth and immaturity were contributing factors to your misconduct. On 23 March 2016, the NDRB denied your request after determining your discharge was proper as issued.

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 to upgrade your discharge and your contentions that your mental health disabilities should be considered as mitigating in regard to your misconduct of being absent without leave and by self-medicating with marijuana. For purposes of clemency and equity consideration, the Board noted you provided a personal statement, legal brief, post-discharge medical records, and an advocacy letter from your spouse.

Because you contend that post-traumatic stress disorder (PTSD) or another mental health (MH) condition affected your discharge, the Board also considered the AO. The AO 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. Post-service, he has provided evidence of significant mental health concerns that onset following military service. He has provided evidence of a diagnosis of PTSD that is temporally remote to his military service and attributed to trauma incurred during his military service, but is noted to have onset after his military service. Unfortunately, it is difficult to attribute his in-service misconduct to symptoms of PTSD or another mental health condition, given medical records citing the onset of symptoms following military service, records raising doubt as to the reliability of his report, and his pre-enlistment history of marijuana use that appears to have continued in service.

The AO concluded, “it is my considered clinical opinion there is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD symptoms.

In response to the AO, you submitted rebuttal evidence from your legal counsel that argued against part of the conclusion reached in the AO.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included a drug offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. Additionally, the Board concurred with the AO that there is insufficient evidence your misconduct could be attributed to PTSD symptoms. The Board agreed with the AO regarding the medical evidence which substantiates that you have reported the timing of your symptoms as not beginning until after your discharge and, therefore, after your in-serviced misconduct. As explained in the AO, you submitted evidence of significant mental health concerns which onset following your military service. These diagnosed conditions, beginning in 2012 and continuing through 2021, include bipolar disorder with psychotic features, schizoaffective disorder, PTSD, cannabis use disorder, and narcissistic personality disorder. The AO observed that your diagnosis of PTSD is temporally remote from your military service and, more significantly, was noted to have onset *after* your discharge, with medical records from 2016 reflecting that your symptoms began 2 years previously (i.e., approximately 2014) following the anniversary of the 9/11 terrorist attacks. Therefore, although you contend your in-service marijuana use was due to self-medication, given the date of onset of symptoms and your pre-enlistment history of marijuana use, the Board concluded that your in-service drug abuse, more likely than not, a continuation of pre-service drug abuse and not related to a mental health condition. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. With respect to post-discharge character, the Board also observed that the letter from your spouse reflects significant and ongoing legal involvement, largely due to continued drug abuse. Based on these factors, 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 the 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 is attached 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,

12/22/2022

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Executive Director

Signed by █