



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: 6180-22
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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, which was previously provided to you. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

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.

You enlisted in the Navy and began a period of active duty on 17 July 2002, with a pre-service history of reported marijuana use. After your first year of service, you received nonjudicial punishment (NJP) for violation of Article 134 due to disorderly conduct and drunkenness. You were counseled regarding retention, with warnings that further misconduct could result in an adverse administrative discharge. You subsequently served without further misconduct until

your second NJP, on 3 March 2006, for violation of Article 112a due to wrongful use and possession of a controlled substance – specifically, morphine. Subsequently, you were notified of administrative separation processing for misconduct due to drug abuse and pattern of misconduct. After waiving consultation with counsel and your right to an administrative board hearing, you were recommended for your separation under Other Than Honorable (OTH) conditions. In the separation package, it documents you “admitted to obtaining prescription pain killers believed to be morphine from a shipment” and “admitted to ingesting” it. As a result, your separation was approved and you were discharged on 7 April 2006 with an OTH.

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 contentions that you suffered from mental health (MH) issues during your military service, to include an unsuccessful suicide attempt, but that you were not aware of your condition until after your discharge. You also assert that you were questioned by Naval Criminal Investigative Service (NCIS) regarding allegations of another service member selling drugs, which you claim to have denied, stating that NCIS continued interrogating you until you agreed to sign their paperwork. The Board presumed this description of events to contend that you signed a coerced confession. For purposes of clemency and equity consideration, the Board noted you provided a personal statement, an advocacy letter, and medical records.

Because you contend that post-traumatic stress disorder (PTSD) or another MH condition affected your discharge, the Board also considered the AO. The AO stated in pertinent part:

There is no evidence that the Petitioner was diagnosed with a mental health condition in military service or that he exhibited any psychological symptoms or behavioral changes indicative of a mental health condition. He provided a claim for disability as completed by his treating psychiatrist at Legacy Healing Center dated June 2022. The psychiatrist indicated that the Petitioner, “is being monitored by our medical and clinical staff. Patient is being treated for PTSD, GAD (Generalized Anxiety Disorder), MDD (Major Depressive Disorder), and Alcohol Use Disorder.” Unfortunately, this record is temporally remote from service as well as lacking sufficient detail to establish clinical symptoms or provide a nexus with his misconduct in 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 AO 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 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. 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 that your misconduct could be attributed to a mental health condition. Regarding your contention of a coerced confession, the Board noted that you did not demand trial by court-martial or a hearing before an administrative board, either of which would have afforded you with representation by legal counsel at no cost with an opportunity to dispute the validity of the confession documented in your service record. To this extent, and in light of the presumptive weight given to statements against interest, the Board found no evidence to support this allegation. 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. While the Board considered your post-discharge good character and assertions regarding your terminally ill spouse, 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: █