



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. 6478-22

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 limitations 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 9 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 service 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)/mental health condition (MHC) (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 an advisory opinion (AO) from a qualified mental health professional. Although you were provided the opportunity to respond to this AO, you chose not to do so.

You enlisted in the United States Navy and commenced a period of service on 20 November 2000. You acknowledged pre-service drug use on your enlistment application. On 9 August 2005, you received non-judicial punishment (NJP) for violation of Uniform Code of Military Justice (UCMJ) Article 112(a), for wrongful use of a controlled substance. You did not appeal this NJP.

After your NJP, you were notified of the initiation of administrative separation processing based on misconduct due to drug abuse and your rights in connection therewith. You waived your right to consult qualified counsel and your right to present your case at an administrative board.

On 29 August 2005, you received a separation physical wherein you denied mental health symptoms and reported that you were “in good health.” Subsequently, on 3 October 2005, you were discharged with an Other Than Honorable (OTH) characterization of service by reason of Misconduct – Drug Abuse and issued an RE-4 reentry code.

The Board carefully considered all potentially mitigating and/or extenuating 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: (a) your desire to upgrade your characterization of service, (b) your assertion that you were suffering from mental health concerns that were exacerbated by your military service, and (c) your contention that you resorted to illegal drugs due to the pain you were experiencing due to your medical procedures. For purposes of clemency and equity consideration, the Board noted you provided medical documentation, evidence of post-discharge accomplishments, and advocacy letters in support of your petition.

In your petition, you contend that you incurred mental health concerns during military service, which might have mitigated your discharge character of service. You explained that due to multiple injuries and surgeries, you endured pain that caused you to use illegal substances while in service.

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 31 October 2022. The Ph.D. noted in pertinent part:

The Petitioner contends that due to multiple injuries and surgeries, he endured pain that led to use of illegal substances while in service. As evidence, he submitted a summary letter of findings from the VA which granted him service connection for Adjustment Disorder with Mixed Anxiety and Depressed Mood, and Alcohol Abuse. He submitted records from Tripler Army Medical Center indicating that he received orthopedic surgery to repair medial and lateral meniscal tears in October 2002, otolaryngology for a mandibular fracture in December 2002, and bilateral lipectomy in November 2004. He submitted two letters from therapists dated 2017 and 2018 both indicating that he had been seen for substance abuse counseling. Finally, he submitted a letter from a peer with whom he served while in service. 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. The Department of Veterans Affairs has granted the Petitioner service-connected Adjustment Disorder which may be accurate, however this diagnosis cannot be determined at this time without additional records. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., active duty medical records, 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 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 the potentially mitigating factors were insufficient to warrant relief. Specifically, the Board felt that your misconduct, as evidenced by your NJP, outweighed these mitigating factors. 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 mental health concerns and their possible adverse impact on your service. The Board considered the seriousness of your misconduct and the fact that it involved a drug offense. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command. The Board determined that illegal drug use is contrary to the Navy core values and policy, renders such Sailor unfit for duty, and poses an unnecessary risk to the safety of fellow shipmates.

In making this determination, the Board concurred with the advisory opinion that there was no convincing evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or mitigated the misconduct that formed the basis of your discharge. The Board noted that you were being prescribed medication for pain management associated with your medical procedures and, therefore, you did not have to resort to the use of illegal drugs for pain management. Although the Department of Veterans Affairs has granted a rating for service-connected Adjustment Disorder, the Board determined the connection between this diagnosis and the underlying misconduct cannot be determined without additional treatment records. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board noted that your medical examination upon separation noted no psychiatric or neurologic conditions or symptoms, and deemed you to be "in good health." The Board found that your active duty 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 otherwise not be held accountable for your actions. As a result, the Board determined your conduct constituted a significant departure from that expected of a Sailor and continues to warrant an OTH characterization of service.

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. While the Board commends your post-discharge accomplishments, 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,

1/23/2023

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Executive Director

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