



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

█
Docket No. 7043-22
Ref: Signature Date



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 27 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, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

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 enlisted in the Navy and entered active duty on 28 August 1989. Your pre-enlistment medical examination, on 21 July 1989, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 15 August 1989, as part of your enlistment application, you acknowledged and signed the "Drug and Alcohol Abuse Statement of Understanding."

On 21 December 1989, you received non-judicial punishment (NJP) for assault, breach of peace, disrespect toward a superior commissioned officer, disorderly conduct and drunkenness, and provoking speech towards a female Sailor. You did not appeal your NJP. On the same day, your command issued you a "Page 13" counseling warning (Page 13) documenting your NJP misconduct. The Page 13 expressly advised you that any further deficiencies in performance and/or conduct will result in disciplinary action and in processing for administrative discharge.

On 18 May 1990, you received NJP for an unauthorized absence (UA) lasting three days. You did not appeal your NJP. Your command issued you another Page 13 advising you that any further deficiencies in performance and/or conduct will result in disciplinary action and in processing for administrative discharge.

On 22 June 1990, you received NJP for five separate specification of UA, and for the incapacitation for performance of duties through prior indulgence in intoxicating liquor or drug. You did not appeal your NJP. On 10 August 1990, you received NJP for an assault upon a warrant, noncommissioned or petty officer.

On 10 August 1990, your command notified you that were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct, and for fraudulent enlistment into the naval service for failing to disclose your full arrest/conviction record. You waived your rights to consult with counsel and to request an administrative separation board. In the interim, on 24 August 1990, neither your separation physical examination, nor your self-reported medical history noted any psychiatric or neurologic conditions or symptoms. You expressly stated you were presently in excellent health and taking no medications on your medical history form.

While pending separation, on 12 October 1990, you were convicted at a Special Court-Martial (SPCM) for three separate UA specifications, assault of military security officer in the execution of his duties, two specifications of willful disobedience of a superior commissioned officer, breaking restriction, and drunk and disorderly conduct. You were sentenced to confinement for six months, forfeitures of pay, and a discharge from the naval service with a Bad Conduct Discharge (BCD).

On 22 October 1990, the Separation Authority directed your command to cancel your administrative separation processing due to your SPCM conviction. On 17 December 1990, the Convening Authority approved the SPCM sentence as adjudged, but suspended any confinement in excess of sixty days. Upon the completion of appellate review in your case, on 2 December 1991, 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 to remove derogatory materials from your record and upgrade your discharge characterization. You contend that: (a) you were not provided mental health support prior to your discharge, and (b) your adverse mental health on active duty lead to your discharge. For purposes of clemency and equity consideration, the Board noted you did not provide 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 5 December 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 behavioral evidence of a problematic alcohol use behavior prior to service that continued in service. Problematic alcohol use is incompatible with military readiness and discipline and the evidence indicates he was aware of his misconduct and deemed responsible for his behavior. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct, particularly given his history of substance use in service. Additional records (e.g., post-service 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 diagnosis 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."

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. Moreover, the Board observed that you did not submit any clinical documentation or treatment records to support your mental health claims despite a request from BCNR on 26 September to specifically provide additional documentary material. 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 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. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. 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. 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. 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,

2/15/2023

█

Executive Director

Signed by: █