



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. 7259-22
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 20 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 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 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 5 February 1998. Your pre-enlistment

physical examination, on 22 January 1998, and self-reported medical history both noted no neurologic or psychiatric conditions or symptoms. As part of your enlistment application, you disclosed pre-service marijuana use and received an enlistment waiver for a petty larceny offense.

On 23 July 1998, you received non-judicial punishment (NJP) for two separate specifications of unauthorized absence (UA), one of which was five days in duration. You did not appeal your NJP. On the same day, your command issued you a "Page 13" counseling warning (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 discharge. You did not submit a Page 13 rebuttal statement.

On 8 April 1999, you were convicted in General District Court (Traffic Division), ██████████ ██████████ for a concealed weapon charge. On 1 November 1999 you were convicted in General District Court (Traffic Division), ██████████ ██████████ for carrying a concealed weapon.

On 7 September 2000, you were convicted in Juvenile and Domestic Relations Court, ██████████ ██████████ for violating a protective order, and for the destruction of property. On 21 November 2000, you were convicted in Juvenile and Domestic Relations Court, ██████████ ██████████ for misdemeanor assault and battery involving a family member.

On 21 March 2001, your command issued you a Page 13 documenting your failure to conform to local, state, federal laws, and military rules and regulations. 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 discharge. You did not submit a Page 13 rebuttal statement

Subsequently, on 1 May 2001 you were convicted at a Summary Court-Martial (SCM) of failing to obey a lawful general regulation, making a false official statement with intent to deceive, and the larceny of U.S. currency. You were sentenced to confinement for thirty days, a reduction in rank to the lowest enlisted paygrade (E-1), and forfeitures of pay.

On 23 May 2001, your command notified you that were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense, misconduct due to a pattern of misconduct, misconduct due to a civil conviction, and for the convenience of the government due to other physical and mental conditions. You consulted with counsel and waived your right to request an administrative separation board. You previously had agreed to waive your administrative separation board in exchange for your SCM charges being adjudicated at that level in lieu of at a Special Court-Martial. Ultimately, on 28 June 2001, you were discharged from the Navy for misconduct with an under Other Than Honorable (OTH) conditions discharge and assigned an RE-4 reentry code.

Post-discharge, you applied to this Board for a discharge upgrade. The Board denied your initial application on 9 July 2021.

The Board carefully considered all potentially mitigating factors to determine whether the

interests of justice warranted relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) you experienced trauma while in the military, and your discharge was the result of behavioral issues and you should be given liberal consideration, (b) your discharge was unfair at the time and remains so now, (c) you were never afforded the right to a separation board, (d) you were not afforded legal counsel or the opportunity to present before a separation board, (e) the fundamental reason for the discharge was substantially deficient, (f) you served two and one half years in prison, (g) the command did not have the proper authority to administratively separate you, (h) the OTH discharge does not serve a further purpose, (i) the events that took place are no longer relevant to you and you have since lived in as responsible manner as you could, (j) there is no valid equitable purpose in leaving the OTH discharge in place, and (k) you have sought to lead a successful life since being involuntarily separated. For purposes of clemency and equity consideration, the Board considered the mitigation evidence you submitted in support of your application.

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 28 November 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. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. Post-service, civilian providers have diagnosed PTSD that has been attributed to military service. Unfortunately, available records are not sufficiently detailed to establish a nexus with his misconduct, as it is unclear how his misconduct, such as larceny and a false statement, could be attributed to unrecognized symptoms of PTSD. 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 post-service evidence of PTSD that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD."

In response to the AO, you submitted a memorandum of arguments disagreeing with the AO.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First and foremost, the Board determined that there were no substantive, procedural, or due process errors that prejudiced you with your administrative separation board. The Board determined the record was clear that, on 23 May 2001, the administrative separation processing notice clearly provided you: (a) with the right to consult with counsel, (b) with the right to request an administrative separation board, and (c) to have representation at such board by qualified counsel. You elected (in writing) to consult with counsel, but you waived your rights to request an administrative separation board and to legal representation at such board

when you signed and dated your election of rights form on 23 May 2001. Additionally, the Board unequivocally concluded that, at all times, your command had the requisite authority to separate you based on your cumulative active duty misconduct. The Board also noted that discharge processing for misconduct, whether done administratively or as a result of a court-martial, would take absolute precedence over any disability and/or physical evaluation board (PEB) process.

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 nexus between any mental health conditions and/or related symptoms and your 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. As a result, even under the liberal consideration standard the Board concluded that your misconduct 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. Moreover, the Board concluded that your intentional misconduct including theft, making a false official statement, violating a protective order, assault and battery, and carrying a concealed weapon were not the types of misconduct that would be excused or mitigated by mental health conditions even with liberal consideration. 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.

Additionally, 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 determined that characterization under OTH conditions is generally warranted for misconduct and 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. Lastly, 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. 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 serious misconduct clearly merited your receipt of an OTH characterization and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge. While the Board carefully considered the evidence you submitted in mitigation, 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,

1/30/2023

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Executive Director

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