



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. 7261-22
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 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 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 24 July 1995. Your pre-enlistment physical examination, on 23 June 1995, and self-reported medical history both noted no psychiatric or

neurologic conditions or symptoms. You disclosed pre-service marijuana use on your enlistment application.

On 19 January 1996, you received non-judicial punishment (NJP) for: (a) insubordinate conduct toward a Chief Petty Officer (E-7), (b) two separate specifications of failing to obey a lawful order, (c) breach of the peace, (d) wrongfully using provoking speech/words, (e) drunk and disorderly conduct, and (f) wrongfully using another Sailor's military ID with an intent to deceive. You did not appeal your NJP.

On 15 March 1997, you were involved in a motor vehicle accident (MVA) while you were the front seat passenger. You sustained in the MVA, inter alia, a left foot Lisfranc injury, a right closed humeral fracture, a right elbow contusion, and a left knee contusion. A command preliminary inquiry into the circumstances surrounding the MVA indicated that you were not wearing your seat belt at the time of the accident.

On 12 April 1999, a Navy Drug Screening Laboratory message reported you tested positive for marijuana (THC) at a level above the Department of Defense testing cutoff. On 23 April 1999, you received NJP for the wrongful use of a controlled substance (marijuana). You denied voluntarily consuming any type of controlled substance. You appealed your NJP, but higher authority denied your appeal.

On 28 April 1999, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense, and misconduct due to drug abuse. You consulted with counsel and elected your right to present your case to an administrative separation board (Adsep Board).

On 27 July 1999, Adsep Board convened to hear your case on board the █
█ At the Adsep Board you were represented by a Navy Judge Advocate, and you testified under oath. Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined that you committed the misconduct as charged. Subsequent to the unanimous misconduct finding, the Adsep Board members unanimously recommended that you be separated from the naval service with an Other Than Honorable (OTH) conditions characterization of service. In the interim, on 25 August 1999, your medical board/physical evaluation board (PEB) proceedings were terminated due to your administrative separation processing for misconduct. Your separation physical examination, on 13 October 1999, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. Ultimately, on 26 October 1999, you were discharged from the Navy for misconduct with an OTH characterization of service and assigned an RE-4 reentry code.

On 30 January 2002, the Naval Discharge Review Board (NDRB) denied your initial application for discharge upgrade relief. The NDRB determined that your discharge was proper as issued and no change was warranted. You did not raise any mental health concerns or contentions with your NDRB application.

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: (a) the Navy and Department of Veterans Affairs (VA) made you addicted to pain killers, and now the State of Minnesota is prescribing you medical marijuana, (b) you now suffer from epilepsy as a result of your TBI, (c) your depression has also been a major problem since your pain killer usage, (d) you have multiple VA-rated service-connected disabilities, and (e) you were being processed for a possible medical separation prior to your administrative discharge for misconduct. For purposes of clemency and equity consideration, the Board considered the 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 October 2022. The Ph.D. stated in pertinent part:

There is evidence in the service record that she incurred a head injury in military service. Post-service, the VA has granted service connection for a medical condition that may have developed from the head injury. The VA has also granted service connection for a mental health condition incurred during military service. Unfortunately, available records are not sufficiently detailed to establish a nexus with her misconduct, particularly as her first NJP occurred prior to the MVA and she denied any substance use during military service. Additional records (e.g., complete VA mental health records, including Compensation and Pension examination details, describing the Petitioner's diagnosis, symptoms, and their specific link to her misconduct) may aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is evidence of TBI that may be attributed to military service. There is post-service evidence of another mental health condition that may be attributed to military service. There is insufficient evidence of a diagnosis of PTSD. There is insufficient evidence her misconduct could be attributed to TBI or another mental health condition."

In response to the AO, you submitted additional information regarding the circumstances of your case.

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 of any nexus between any TBI or mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such TBI or mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to a TBI and/or mental health-related conditions or symptoms. The Board also noted that the majority of your charged misconduct

occurred before your MVA. Moreover, 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 cumulative misconduct outweighed any and all mitigation offered by such mental health conditions. The Board determined the record reflected that your 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 not be held accountable for your actions.

The Board noted that discharge processing for misconduct, whether done administratively or as a result of a court-martial, would take absolute precedence over the PEB process. The Board also noted that following your MVA, you obviously did not suffer from any occupational impairment due to a TBI as your enlisted performance evaluations remained consistently favorable.

The Board concluded that some of your requested relief involving VA disability ratings, effective dates, and service-connection determinations were beyond the statutory authority of the Board to correct and were denied in their entirety. The Board noted that VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only and cannot be modified by the BCNR. Moreover, the Board also noted that such VA eligibility determinations, disability ratings, and/or discharge classifications are not binding on the Board.

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 concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board determined that illegal drug use by a Sailor is contrary to Navy core values and policy, renders such Sailors unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. The Board determined that characterization under OTH conditions 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. Moreover, 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 misconduct and disregard for good order in discipline clearly merited your receipt of an OTH. 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

[REDACTED]

Executive Director

Signed by: [REDACTED]