



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

█
Docket No. 7377-22
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 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 13 February 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 an opportunity to respond to the AO, 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 United States Navy and commenced a period of service on 14 November 2007. On 25 August 2008, you began a period of unauthorized absence (UA) from your command, and remained absent until 11 November 2008. On 23 December 2008, you were found guilty at Summary Court Martial (SCM) of violating Uniform Code of Military Justice (UCMJ) Article 85,

for desertion, and Article 87, for missing ship's movement, and Article 107, for making a false official statement. On 19 March 2009, you began a second period of UA from your command, and remained absent until 9 April 2009. On 28 May 2009, you were found guilty at Special Court-Martial (SPCM), for violating UCMJ Article 86, for the period of UA, and Article 121, for eleven counts of larceny. You were awarded 210 days of confinement, forfeitures or pay, and a Bad Conduct Discharge (suspended for 6 months).

On 3 June 2009, your command informed you that you were being processed for administrative separation by reason of misconduct due to your commission of a serious offense. You waived your right to representation by qualified counsel and your right to present your case at an administrative separation (ADSEP) board. On 15 June 2009, you were discharged from the Navy by reason of misconduct, commission of a serious offense, with an OTH characterization of service and assigned an RE- 4 reenlistment 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 and reenlistment code, (b) your contention that you were harassed as a result of your sexual orientation, and (c) the impact of such harassment on your conduct. For purposes of clemency and equity consideration, the Board noted that you did not provide documentation related to your post-service accomplishments or character letters.

In your petition, you contend that you were harassed due to your sexual orientation and that the charges of misconduct were due to retaliation after you reported the discriminatory treatment. 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 15 December 2022. The Ph.D. noted in pertinent part:

There is no evidence that she was diagnosed with a mental health condition in military service, or that she exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Although a harassing environment can lead to mental health symptoms, she has provided no medical evidence in support of her claims. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms during military service or a nexus with her misconduct. It is also difficult to attribute extended UA, a false statement, and repeated larceny to a mental health condition following harassment. Additional records (e.g., active duty or post-service mental health records 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 insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence her misconduct could be attributed to a mental health condition from a harassing environment."

After thorough review, the Board concluded that the potentially mitigating factors were insufficient to warrant relief. Specifically, the Board felt that your misconduct, as evidenced by your significant periods of UA and your charges of larceny, 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, your contentions about harassment, and the possible adverse impact of that harassment on your service. The Board considered the seriousness of your misconduct and the fact that you went UA repeatedly, missed ship's movement, and committed larceny. 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 your misconduct was contrary to the Navy core values and policy and likely had a detrimental impact on mission readiness.

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 agreed that although a harassing environment can lead to mental health symptoms, you have provided no medical evidence in support of assertion that the harassment caused your misconduct. Specifically, the Board felt that the eleven counts of larceny was inconsistent with symptomology following harassment.

The Board also highlighted that throughout the disciplinary process, there is no evidence that you raised the issue of harassment based on sexual orientation or reported any mental health symptoms resulting from such harassment. Not only did you have the opportunity to argue your case at SPCM with the assistance of qualified counsel, you waived your opportunity to raise such matters at an administrative separation board. After review of your record and all matters contained in your request for relief, the Board concluded that your misconduct was not due to mental health-related symptoms suffered as the result of harassment. 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.

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. Therefore, 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,

2/21/2023

█

Executive Director

█