



**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. 7492-22  
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 Board waived the statute of limitation 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 24 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 the 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 to 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). The Board also considered the advisory opinion (AO) of 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 the understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on evidence of record.

You enlisted in the Navy, after receiving moral waivers for pre-service arrest due to furnishing alcohol to minors and for pre-service marijuana use, and began a period of active duty on

20 May 1997. You reenlisted on 5 July 1999, and this period continuous of “Honorable” service is documented in your Certificate of Discharge or Release from Active Duty. You received nonjudicial punishment (NJP) on 5 February 2001 for a violation of the Uniform Code of Military Justice (UCMJ) under Article 92, for dereliction in the performance of your duties. Approximately 7 months later, you absented yourself without authority on 16 August 2001. Following your return from unauthorized absence (UA), a medical record entry on 28 August 2001 indicates that you expressed feeling depressed and stated that you were afraid to tell the Navy of potential homosexual feelings. Based on the nature of your discussions with medical personnel, you were referred to your Chaplain rather than to mental health. Additionally, you submitted to a routine urinalysis test following return from your UA which indicated a positive result for marijuana use. As a result, you were subject to a second NJP for your violation of Article 86 due to your period of UA and Article 112a for wrongful use of a controlled substance.

Subsequently, you were notified of processing for administrative separation by reason of misconduct due to drug abuse and commission of a serious offense. You elected to waive your right to consult legal counsel, your right to a hearing before an administrative board, and your right to submit a statement for consideration. The recommendation for your administrative separation under Other Than Honorable (OTH) conditions was approved by Commander ██████████, ██████████, and you were discharged on 30 October 2001.

You previously applied to the Naval Discharge Review Board (NDRB) in 2010, which considered your contentions that your post-discharge character from 2001 to 2010 merited consideration of an upgraded discharge. Although the NDRB found your evidence of post-discharge character insufficient to outweigh the severity of your misconduct, they noted that your continuous period of “Honorable” service from your first period of enlistment had been omitted from your Certificate of Release or Discharge from Active Duty (DD Form 214) and directed correction of that error. Accordingly, your record was corrected, on 18 July 2011, consistent with the NDRB’s finding of error.

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, your desire to upgrade your discharge and change your narrative reason for separation, as well as your contentions that you developed a mental health condition after years of harassment and ridicule from fellow sailors, your pleas for help from your command were ignored, your mental health concerns would be given more attention under current policies, you would have received screening to identify your mental health condition to determine its mitigating effect on the circumstances of your discharge, and you believe that your Middle-Eastern descent was adversely factored against you in determining the characterization of your service since your administrative separation processing occurred almost immediately after the 9 September 2001 terrorist attacks. For purposes of clemency and equity consideration, the Board noted you submitted evidence of personal and professional achievements.

Because you contend that a mental health (MH) condition affected the circumstances of your discharge, the Board also considered the AO. The AO 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. He has provided no medical evidence in support of his claims. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms during military service or a nexus with his misconduct, particularly given pre-service behavior that appears to have continued in service. Additional records (e.g., active duty or 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 AO 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 all of his misconduct could be attributed to a mental health condition."

In response to the AO, you submitted evidence in rebuttal that included a summary of a psychological assessment conducted by a licensed clinical psychologist. In remarking upon this rebuttal evidence, the AO observed that you were "apparently compelling" in your report of mistreatment during your military service. As a result, the AO favorably revised the original opinion to clarify that it was possible your UA could be considered avoidance behavior and that your substance use behavior could have been a return to pre-service behavior in the context of your experience of in-service stressors. Additionally, the AO advised it was possible your dereliction of duty resulted from an ineffective strategy to reduce stress by seeking a transfer. In light of post-service evidence from your civilian provider regarding mental health concerns attributed to your military service, the AO opined that your misconduct may be attributable to mental health concerns.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Additionally, in considering the AO, the Board noted that the AO limited its opinion to the "possibility" of nexus. Additionally, the Board noted discrepancies between the events documented within the report from your civilian mental health provider and your service records. First, the Board found no evidence to support your claim that you attempted to report experiencing abuse or maltreatment. As a result, under a presumption of regularity and absent evidence to the contrary, the Board concluded that your chain-of-command would have properly investigated and documented the findings of any such report of discrimination, harassment, or hazing. If you submitted any such claims, they would have been known and considered prior to the decision to proceed with your first NJP for dereliction of duty. With respect to the misconduct which formed the basis of your second NJP, the Board noted that your period of UA and substance use pre-dated the attacks of 11 September 2001 and found the account in the letter provided by your civilian psychologist insufficient in detail to determine the specific nature or cause of the harassment you purport to have suffered. More importantly, on this point, the Board specifically considered the initial mental health report following your return from UA, in which you put forward a claim that you were experiencing mental health issues and depression due to questioning concerning potential homosexuality, which is not mentioned in

