



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

█
Docket No. 7645-22

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 3 March 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 responses 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 U.S. Navy and entered active duty on 13 November 2002. Your pre-enlistment physical examination, on 14 March 2002, and self-reported medical history both

noted no psychiatric or neurologic conditions or symptoms. On 29 July 2004, you reported for duty on board the █ in █.

On 12 October 2006, your “retention” physical examination and self-reported medical history both noted no neurologic or psychiatric conditions or symptoms, and did not note any head injuries or traumatic brain injuries (TBI). In November 2006, you extended your enlistment for twenty-four months.

On 14 January 2007, you were notified of administrative separation proceedings by reason of misconduct due to the commission of a serious offense. You were processed using “notification procedures,” which meant that you were not entitled to request an administrative separation board, but the least favorable discharge characterization you could receive was general (under honorable conditions) (GEN). In the interim, on 19 January 2007, you received non-judicial punishment (NJP) for the destruction of U.S. Government property when you willfully damaged certain property by repeatedly striking a propulsion lube oil sump and drain suction header with a hammer. You appealed your NJP, but higher authority denied the appeal.

On 20 February 2007, you elected in writing to consult with counsel, submit written rebuttal statements, and to request General Courts-Martial Convening Authority review of your separation. Ultimately, on 5 April 2007, you were discharged from the Navy for misconduct with a GEN characterization of service and assigned an RE-4 reentry code.

On 12 March 2009, the Naval Discharge Review Board (NDRB) denied your application for relief. The NDRB determined that your GEN discharge was proper as issued and no change was warranted.

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 reason for separation, along with your contentions that: (a) various recent memos and guidance clarify the liberal consideration guidance for veterans petitioning for discharge relief when the application is based in whole or in part on matters relating to mental health considerations, (b) the evidence shows you had a mental health condition and negative experiences on active duty, (c) you never received the proper psychiatric examination or the proper TBI screening prior to separation, (d) you requested an administrative separation board prior to your discharge but did not receive one, (e) you requested a personal appearance hearing with NDRB and did not receive one prior to their 2009 decision, (f) your discharge was based on one isolated incident over four years of service with no other infractions, (g) your faithful active duty service was filled with numerous significant contributions above and beyond the call of duty, (h) your mental health conditions rendered you incapable of quality service, (i) you were dealing with some severe family issues at the time and unable to manage or cope with the personal problems contributing to the mistake, (j) your infraction did not warrant the punishment and discharge you received, (k) exceptionally meritorious post-service conduct, (l) one single incident of misconduct is not indicative of your normal character, and (m) the negative events that impacted you while on active duty contributed to your mental health issues, which in turn

contributed to your lapse of good judgment. 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 18 January 2023. The Ph.D. stated in pertinent part:

There is no evidence in the available service records that he incurred a head injury in military service. Post-service, the Petitioner has claimed a head injury in 2004, but there is no evidence of on-going symptoms reported in service. VA has granted service connection for a mental health condition incurred during military service (insomnia). Unfortunately, available records are not sufficiently detailed to establish a nexus with his misconduct, particularly as he claims his misconduct was misconstrued. 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 his misconduct) may aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is insufficient 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 his misconduct could be attributed to TBI or another mental health condition."

In response to the AO, you submitted additional evidence in support of your application. Following a review of your AO rebuttal submission, the Ph.D. did not modify or change their original AO. While the Ph.D. noted the records supported your contention of an active duty head injury, the Ph.D. determined there was still no evidence of residual symptoms consistent with an ongoing TBI.

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 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, the Board concluded that your misconduct was not due to a TBI or any mental health-related conditions or symptoms. 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.

Additionally, the Board noted the Department of the Navy policy to screen certain personnel for PTSD/TBI was not implemented until well after your 2007 discharge. Thus, the Board determined that any contentions based on 10 USC §1077 were not persuasive. The Board also determined that you did not exhaust your administrative remedies with respect to your request to add certain missing military decorations and/or ribbons, and the Board denied such request in its entirety. The Board advised you to first submit a request to Navy Personnel Command in Millington, Tennessee to review your entitlement to certain awards prior to requesting any BCNR relief. The Board also was not persuaded by your contention that you somehow requested an administrative board and did not receive one prior to your discharge. The Board noted that when your command used notification procedures to process you for separation, you were not entitled to request a board given that you had less than six total years of active duty service and were not facing an Other Than Honorable characterization of service.

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 noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. The Board determined that a GEN characterization or under other than honorable 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. 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, employment, or military enlistment opportunities. As a result, the Board determined there was no impropriety or inequity in your separation processing, narrative reason for separation, separation code, discharge characterization, and reentry code, and even under the liberal consideration standard, the Board concluded that your misconduct clearly merited your receipt of a GEN discharge and no higher. 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. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. 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,

3/9/2023

[REDACTED]

Executive Director

Signed by: [REDACTED]