



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

█
Docket No. 7712-22
0863-19
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 the advisory opinion (AO) from a qualified mental health professional and your response to the AO.

You enlisted in the Navy and commenced a period of active duty on 23 August 1977. On 24 August 1978, you were found guilty at non-judicial punishment (NJP) for violating Uniform Code of Military Justice (UCMJ) Article 112 (a), for possession of marijuana. On 9 February 1979, you were found guilty at your second NJP for violating UCMJ Article 86, for two periods of unauthorized absence (UA) from your appointed place of duty totaling 6 days. On 1 March 1979, you were found guilty at your third NJP for violating UCMJ Article 128, for assault, Article 92, for unlawful introduction, use, sale, or transfer of marijuana, and Article 80, for attempted theft. On 27 April 1979, you were found guilty at your fourth NJP for violating UCMJ Article 121, for committing larceny, and Article 86, for a period of UA from an appointed

place of duty. On 4 May 1979, you were found guilty at your fifth NJP for violating UCMJ Article 92, for failure to obey a lawful order. You did not appeal any of these NJPs.

On 10 May 1979, you were notified that you were being recommended for administrative discharge from the Navy by reason of misconduct due to drug abuse and due to frequent involvement with military authorities. You were advised of and elected your right to consult with military counsel. After speaking with qualified counsel, you waived your right to present your case to an administrative discharge board. On 17 May 1979, you were found guilty at your sixth and final NJP for violating UCMJ Article 112 (a), for possession of marijuana. You did not appeal this NJP.

Prior to your separation, you underwent medical evaluation due to your illegal drug use and it was determined that you were not alcohol or drug dependent. On 21 August 1979, you were discharged from the Navy by reason of misconduct with an OTH characterization of service and an RE-4 reenlistment code.

You previously applied to this Board and were denied relief on 28 January 2020.

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, (b) your assertion that you suffered from racial harassment and threats, and (c) the impact that such harassment may have had on your mental health and your conduct during service. For purposes of clemency and equity consideration, the Board considered your arguments in conjunction with the assessment provided by your mental health provider.

In your petition, you contend that you incurred PTSD and other mental health symptoms following racial harassment. In support of your request, you submitted a September 2022 letter from a civilian psychologist listing a diagnosis of Other Specified Trauma and Stressor Related Disorder attributed to “the trauma stressors and racial harassment and threats that occurred in service.” 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 22 December 2022 as part of your initial petition. The Ph.D. noted in pertinent part:

There is no evidence he was diagnosed with a mental health condition (MHC) in military service. Throughout his disciplinary processing, there were no concerns raised of an MHC that would have warranted a referral for evaluation. Post-service, he has received a diagnosis of a trauma-related MHC that has been attributed to military service. Unfortunately, available records are inconsistent regarding his misconduct and it is not possible to establish a nexus with his MHC. For example, it is difficult to attribute larceny and attempted theft to an MHC. Additionally, the Petitioner’s report to his civilian provider is not consistent with his service record, which contains three separate NJPs with charges related to marijuana. While UA could be attributed to avoidance following a trauma-related MHC, it is not possible to attribute assault to an MHC, as the Petitioner claims it was self-defense. 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 an MHC that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to an MHC."

In response to the AO, you submitted arguments in support of your application for relief.

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. Specifically, the Board felt that your misconduct, as evidenced by your six NJPs, 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, and your contentions about the harassment occurring during service and its adverse impact on your service. The Board considered the seriousness of your misconduct, and the fact that it involved drug offenses, assault, and 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 serious misconduct was contrary to the Navy core values and policy, renders such Sailor unfit for duty, and poses an unnecessary risk to the safety of fellow shipmates.

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 felt that your post service diagnosis was temporally remote to your service and is not consistent with your service record and the type of misconduct. The Board concurred with the AO that while UA could be attributed to avoidance following a trauma-related MHC, it is harder to attribute assault and larceny to an MHC. The Board also noted that you never raised any psychiatric or neurologic concerns, and/or mental health symptoms during the separation process, nor do you disclose any harassment or impact of such harassment. Finally, the Board noted that in your initial petition to the Board, your explanation for drug use was due to a finger injury incurred while on active duty, whereas now you are arguing the misconduct was caused by harassment rather than self-medication due to pain. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms and instead 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. 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. Further, 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. 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

