



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. 7793-22

Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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 27 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 and your response to the AO.

You enlisted in the United States Navy and commenced a period of service on 23 January 1998. Your enlistment application noted pre-service arrests for credit card fraud and trespassing.

In November 1999, a Medical Board approved you for six months limited duty ashore due to ongoing treatment for a shoulder injury. You were prescribed a number of different medications to control your pain, to include Oxycodone and Darvocet (Propoxyphene). On 31 March 2000, an Immunoassay (screening test) was conducted and your urine contained total THC (marijuana) metabolites equal to or greater than the DoD cut-off level. On 3 April 2000, a re-screen was

conducted and confirmed the presence of the THC metabolite. As a result, you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse and you elected your right to present your case at an administrative separation (ADSEP) board with representation of qualified counsel. The ADSEP board was held on 12 October 2000, and by a vote of 3 to 0, found that the basis for misconduct had been met and recommended separation with an Other than Honorable (OTH) characterization of service, suspended for 12 months. Your Commanding Officer concurred with the ADSEP board's recommendation, but the separation authority, Commander, Navy Personnel Command (CNPC), disagreed with the ADSEP board's recommendation of suspension and directed your immediate discharge. On 23 February 2001, you were discharged from the Navy for misconduct (drug abuse) with an OTH characterization of service and assigned a 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 change narrative reason for separation, separation code, and reenlistment code, (b) your contention that you were struggling with undiagnosed mental health issues during service, (c) the impact that those mental health issues had on your conduct, and (d) your discharge was erroneous based on the recommendation for a suspended separation. For purposes of clemency and equity consideration, the Board noted you provided documentation related to your post-service accomplishments and character letters.

In your petition, you contend that you suffered from undiagnosed mental health issues that were ultimately diagnosed post-service. You assert that your discharge characterization is extreme considering your mental health conditions, the minor nature of the misconduct, and your otherwise solid performance. In support of your request, you submitted evidence of a Department of Veterans Affairs (VA) determination of service connected diagnosis of Depressive Disorder and PTSD. 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 10 January 2023. The Ph.D. noted in pertinent part:

There is no evidence he was diagnosed with a mental health condition in military service. There is post-service evidence of a mental health condition (Depression) that is temporally remote and has been attributed to his military service. There is insufficient evidence to attribute his misconduct to a mental health condition, given his denial of marijuana use during military service. Additional records (e.g., complete Compensation and Pension Examination or other post-service mental health records listing 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 a mental health condition (Depression) that the VA has attributed to military service. There is insufficient evidence his misconduct could be attributed to a mental health condition."

In conjunction with the advisory opinion, the Board considered your response to the AO.

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. 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 mental health issues. Specifically, the Board felt that your misconduct, as evidenced by your positive drug test, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved a drug offense. 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 illegal drug use is 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 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. During your separation physical, on 17 January 2001, you report pain and other medical issues associated with your shoulder injury, but you do not disclose any mental health symptoms or concerns. Throughout your disciplinary processing, you never raised concerns of mental health symptoms that would have resulted in mental health referral. Your post-service evidence of mental health conditions (Depression and PTSD) are temporally remote, and the Board found it difficult to attribute your misconduct to a mental health condition, given your denial of marijuana use during military service, i.e. you did not claim that you were self-medicating due to pain or a related mental health condition. The ADSEP board heard the evidence and found that you did commit misconduct by knowingly consuming an illegal drug. Further, CNPC was within his authority to direct immediate separation over the ADSEP board's recommendation. After thorough review of the evidence, the Board concluded that your misconduct was not due to PTSD or other mental health-related symptoms. 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. While the Board carefully considered the evidence you provided 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,

3/2/2023

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Executive Director

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