



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. 7892-22

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 14 April 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. Although you were afforded an opportunity to submit an AO rebuttal for consideration, 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 U.S. Navy and entered active duty on 8 January 1998. Your pre-enlistment physical examination, on 20 August 1997, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 8 July 1998, while still at █ you received a “Page 13” retention warning (Page 13) for your poor military performance due to the underage possession of alcohol. The Page 13 expressly warned you that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative separation. You did not elect to submit a Page 13 rebuttal statement

On 25 September 1998, you receive non-judicial punishment (NJP) for unauthorized absence (UA). You did not appeal your NJP. On 20 October 1998, the suspended portion of your NJP was vacated and enforced due to continuing misconduct. On 27 October 1998, you received NJP for insubordinate conduct. You did not appeal your NJP. On 23 May 2000, you received NJP for misbehavior of a sentinel or lookout for sleeping on watch. You did not appeal your NJP.

On 7 November 2001, you were convicted at a Summary Court-Martial (SCM) of: (a) the wrongful use of a controlled substance on board a vessel, (b) the wrongful possession of a controlled substance on board a vessel, (c) the wrongful introduction of a controlled substance with intent to distribute, (d) the wrongful distribution of a controlled substance on board a vessel, (e) being impaired by a controlled substance on duty, (f) false swearing, and (g) making a false official statement. You were sentenced to a reduction in rank to E-3, forfeitures of pay, and confinement for thirty days.

On 7 November 2001, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You waived your rights to consult with counsel, to submit statements for consideration, and to request an administrative separation board. In the interim, on 19 November 2001, a Navy Drug Screening Laboratory message indicated your urine sample collected on 26 October 2001 tested positive for marijuana above the established testing cutoff level. On 3 December 2001, your separation physical examination and self-reported medical history both noted no neurologic or psychiatric conditions or symptoms. Ultimately, on 3 December 2001, you were discharged from the Navy for misconduct with an under Other Than Honorable conditions (OTH) characterization of service and assigned an RE-4 reentry code.

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 for a discharge upgrade and contentions that: (a) according to the applicable naval regulations your entire service record should have been considered and brought into consideration on your discharge characterization, (b) if the commanding officer reviewed and used your entire service record he would have seen that your service was more than Honorable, (c) at a minimum you should have received a General (Under Honorable Conditions) characterization and a maximum of Honorable due to the command not following applicable Navy guidance and policy, (d) you received a flag letter of commendation, (e) the President pardoned all U.S. citizens of Federal marijuana convictions, and (f) applicable Navy guidance and policy supported full reconsideration and a second look at your discharge. For purposes of clemency and equity consideration, the Board noted you provided documentation describing post-service accomplishments but no advocacy letters.

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 11 January 2023. The Ph.D. 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 in service or provide a nexus with his misconduct. While his medical screenings noted a change in his reported alcohol use behavior, service records demonstrate problematic alcohol use proceeded the reported stressful period. While the Petitioner did report increased stress, there is insufficient evidence of symptoms of a severity to warrant a clinical diagnosis, particularly given his report that he was not experiencing mental health symptoms during his separation physical. 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 Ph.D. concluded, "it is my considered clinical opinion there is insufficient evidence of a diagnosis of PTSD or another mental health condition that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD or another mental health condition."

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 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. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record reflected that your 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 not be held accountable for your actions.

The Board observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average calculated from your available performance evaluations during your enlistment was approximately 2.20 in conduct. Navy regulations in place at the time of your discharge recommended a minimum trait average of 2.50 in conduct (proper military

behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your pattern of serious misconduct which further justified your OTH characterization of discharge.

The Board determined that your contention of a blanket presidential pardon for federal marijuana convictions was without merit. The Board noted that on October 6, 2022, President Biden issued a presidential proclamation pardoning federal convictions for simple marijuana *possession* offenses in violation of the Controlled Substances Act, or in violation of D.C. Code 48–904.01(d)(1). The Board noted neither code provision applied to your case as your drug-related offenses were charged as violations of the Uniform Code of Military Justice, and that your drug offenses also included use, introduction, and distribution charges, in addition to simple drug possession.

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 determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. The Board determined that characterization under OTH 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. Moreover, 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. As a result, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. 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,

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4/20/2023

