



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. 8241-22
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 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 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 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 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 Navy and entered active duty on 25 June 2002. Your pre-enlistment physical examination, on 6 November 2000, and self-reported medical history both noted no neurologic or psychiatric conditions or symptoms. On 22 April 2003, you reported for duty on board the █ (█) in █, █

On 19 April 2006, the Naval Criminal Investigative Service (NCIS) initiated an investigation into your alleged carnal knowledge and indecent acts/liberties with a minor. It was suspected that you were involved in a romantic and sexual relationship with a 15-year old civilian. Your phone records revealed you had been communicating with the minor for several months. Some of the evidence obtained included professionally developed photos of you and the minor together, several text message exchanges between the two of you, and the investigation noted that you admitted to sending a photo of your penis via electronic mail to many women.

On 2 June 2006, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. You waived your rights to consult with counsel, submit statements, and to request an administrative separation board. In the interim, on 14 June 2006, your commanding officer (CO) recommended to the Separation Authority that you be discharged with an under Other Than Honorable (OTH) conditions characterization of service. Your CO concluded your misconduct was not compatible with the high standards of conduct demanded by the Navy, determined that you clearly undermined good order and discipline, had no potential for further naval service, and were unwilling to conform to Navy rules and regulations. Ultimately, on 23 June 2006, you were discharged from the Navy for misconduct with an OTH discharge and assigned an RE-4 reentry code.

On 5 February 2013, the Naval Discharge Review Board (NDRB) denied your initial application for discharge upgrade relief. You did proffer any mental health contentions with your NDRB application.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warranted relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) there is no prejudice to the Government allowing your discharge to be reevaluated and reconsidered, (b) you were not given a reasonable opportunity to mitigate or correct your mistake/behavior prior to your administrative separation, (c) you served honorably for four years notwithstanding your single act of indiscretion, (d) the single act of indiscretion should not be enough to prevent receiving an Honorable discharge, (e) you are still living with the consequences of your mistake, (f) since your discharge you have demonstrated the ability to overcome your mistakes and you have exhibited model post-service conduct, and (g) the reason for your discharge does not define who you are as a person and does not accurately represent the strong values you continuously live by. For purposes of clemency and equity consideration, the Board noted you provided supporting documentation describing post-service accomplishments and 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 23 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, his personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct, particularly as he claims he was unaware of her age. 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 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."

Following a review of your AO rebuttal submission, the Ph.D. slightly modified their AO. The Ph.D. noted your VA medical records describing treatment for multiple mental health conditions excluding PTSD. Notwithstanding the VA records, the Ph.D. determined there was no evidence your misconduct could be attributed to any potential service-connected mental health condition. The Ph.D. determined that while there was post-service evidence of VA mental health treatment, there was no evidence of a PTSD diagnosis. Despite the new medical records for consideration, the Ph.D. still concluded there was insufficient evidence your 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 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, even under the liberal consideration standard the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. 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 clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. Moreover, the Board concluded that your intentional misconduct including indecent acts or liberties with a minor was not the type of misconduct that would be excused or mitigated by mental health conditions even with liberal consideration. 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 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 noted that, although one's service is generally evaluated 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 basis to determine characterization of service. The Board determined that characterization under OTH conditions is generally warranted for misconduct and 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 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 serious misconduct clearly merited your receipt of an OTH characterization and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge. 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,

2/12/2023

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