



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

█
Docket No. 8317-22
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 7 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 and your response to the AO.

Following a brief period of service in the Army National Guard in 1996, you enlisted in the U.S. Navy and entered active duty on 28 May 1997. Your pre-enlistment physical examination on 18 May 1996 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 19 September 2000, after being read your rights and waiving your right to remain silent, you admitted to visiting an off-base "porn" shop in █ that sold hallucinogenic mushrooms. You

purchased a bag of mushrooms and consumed the entire contents that same day. You admitted that a short time later, you began to feel euphoric and that the “high” lasted approximately four hours. You stated that it was the one and only time you experimented with mushrooms.

On 27 September 2000, you received non-judicial punishment (NJP) for the wrongful use of a controlled substance, namely, mushrooms containing psilocybin or psilocin. You appealed your NJP citing factual/legal impossibility theories and certain due process violations, but higher authority denied your appeal.

Following your NJP, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. In the interim, your separation physical examination, on 25 September 2000, and self-reported medical history both noted no neurologic or psychiatric conditions or symptoms. Ultimately, on 9 January 2001, you were discharged from the Navy for misconduct with an under Other Than Honorable conditions (OTH) characterization of service and assigned a RE-4 reentry code.

On 1 July 2002, the Naval Discharge Review Board (NDRB) denied your initial application for discharge upgrade relief. The NDRB determined your discharge was proper as issued and no change was warranted. On 8 June 2021, this Board denied your petition for relief. You did not proffer any mental health contentions in your petition. On 22 March 2022, this Board denied your second petition that did include certain mental health contentions for the Board to consider.

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) you submitted new evidence to support your mental health and PTSD claims, (b) you witnessed a Sailor fall to his death while in port overseas and you are unable to get that imagery out of your head, (c) the VA granted you a service-connection for an unspecified trauma and stressor-related disorder effective 19 August 2021, and (d) you were a model Sailor who made a solitary lapse in 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 24 January 2023. The Ph.D. stated in pertinent part:

Unfortunately, the Petitioner’s service record is lacking evidence of a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Post-service, the VA has granted service connection for a trauma related mental health condition that is temporally remote to his military service. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms during military service or provide a nexus with his misconduct. Although the Petitioner stated he was having trouble at his command, which contributed to a decision to use mushrooms, it is difficult to attribute single-use experimentation to self-medication

for an undiagnosed mental health condition. Additional records (e.g., active duty or complete post-service mental health records, to include the Compensation and Pension examination, 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. There is evidence the VA has diagnosed a trauma-related mental health condition that has been attributed to military service. There is insufficient evidence to attribute his misconduct to a mental health condition."

Following a review of your AO rebuttal submission, the Ph.D. did not change or modify their original AO. The Ph.D. noted your AO rebuttal did not submit any new or additional medical evidence for consideration.

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 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 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, 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 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. 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 still concluded that insufficient evidence of an error or injustice exists to warrant upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. 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,

4/11/2023

█
Executive Director

Signed by: █