



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. 8412-22

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 24 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 qualified mental health provider and your response to the AO.

You enlisted in the U.S. Navy and entered active duty on 8 June 1992. Your pre-enlistment physical examination, on 12 June 1991, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 8 May 1995, you extended your enlistment for another twelve months.

On 19 December 1995, you received non-judicial punishment (NJP) for two separate specifications of assault, and drunk and disorderly conduct. You did not appeal your NJP.

On 11 May 1996, your command documented certain deficiencies in carrying out your duties with a written “Record of Counseling” (counseling sheet). On 28 May 1996, your command issued you a “Personnel Counseling Report Form” (counseling warning) documenting an unauthorized absence (UA). On the same day, your command issued you a second counseling warning for violating a direct order. On 10 June 1996, your command vacated and enforced the suspended portion of your December 1995 NJP due to your continuing misconduct.

On 17 June 1996, you were notified of administrative separation proceedings by reason of misconduct due to the commission of a serious offense. You were processed using “notification procedures,” which meant that you were not entitled to request an administrative separation board, but the least favorable discharge characterization you could receive was General (Under Honorable Conditions) (GEN). You expressly waived in writing your rights to consult with counsel, submit written rebuttal statements, and to request General Courts-Martial Convening Authority review of your separation. In the interim, your separation physical examination, on 24 June 1996, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. Ultimately, on 16 July 1996, you were discharged from the Navy for misconduct with a GEN 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 you had undiagnosed PTSD, you were told you would receive an Honorable discharge, and would be able to use your GI Bill. For purposes of clemency and equity consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

The VA previously granted you a service-connection for PTSD with a 50% rating. 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 25 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 a clear pattern of psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. Post-service, the VA has determined service connection for PTSD, but there is no information regarding symptoms or the traumatic precipitant. Unfortunately, available records are not sufficiently detailed to provide a nexus with his misconduct. Additional records (e.g., complete post-service mental health records, including 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 AO concluded, “it is my clinical opinion there is evidence of a diagnosis of PTSD from the VA that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD.”

In response to the AO, you submitted medical documentation in support of your application. Subsequently, the AO was revised and stated in pertinent part:

Petitioner provided a March 2021 Independent Medical Opinion listing diagnoses of Other Specified Trauma and Stressor-Related Disorder and Alcohol Use Disorder, uncomplicated. Traumatic precipitants included an explosion that occurred while he was unknowingly repairing live wiring, a fight with a Shipmate, and harassment during boot camp. He submitted the December 2020 Compensation and Pension Examination listing a diagnosis of Other Specified Trauma-and Stressor-Related Disorder, during which the Petitioner denied any history of previous mental health treatment. The evaluation noted the Petitioner’s experience cutting the live wire was a traumatic event, and that he did not meet symptom criteria for a full PTSD diagnosis, as he reported no avoidance or negative alterations in cognitions. The Petitioner provided evidence of evaluation and treatment of Unspecified Depressive Disorder, “to address symptoms of depressed mood secondary to chronic pain...since 2019,” from September 2022 to January 2023. Petitioner provided additional evidence of diagnosis and treatment of PTSD, and PTSD-related mental health concerns that is temporally remote to his military service. Unfortunately, there is insufficient evidence to attribute his misconduct to a potential mental health condition, given the passage of time before symptoms became interfering such that the Petitioner sought mental health treatment in 2020. Original Advisory Opinion remains unchanged.

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 cumulative misconduct was not due to mental health-related conditions or symptoms. The Board unequivocally determined the record clearly reflected that your misconduct was willful and intentional and demonstrated you were unfit for further service. 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.

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 a GEN characterization or under other than honorable (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. 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, employment, or military enlistment 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 clearly merited your receipt of a GEN discharge and no higher. 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,

2/28/2023

