



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. 8496-22

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. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the United States Navy and commenced active duty on 7 January 2002. On your enlistment application, you disclosed a pre-service marijuana use of approximately 52 times. You also noted that you were rejected from the Army due to your history of drug use.

On 19 June 2003, you were found guilty at Summary Court Martial (SCM) of violating Uniform Code of Military Justice (UCMJ) Article 86, for a period of unauthorized absence (UA) from 3 March 2003 to 11 May 2003, totaling 70 days. You were awarded 10 days confinement and forfeitures of pay. On 25 January 2004, you were again found guilty at SCM for violations of

UCMJ Article 86, for a period of UA, and Article 87, for missing ships movement. You were awarded 30 days confinement and reduction in rank to E-2.

On 2 March 2004, you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse and commission of a serious offense. You waived your right to consult with qualified counsel and your right to present your case at an administrative separation board. Prior to your separation, on 13 March 2004, you received Non-judicial Punishment (NJP) for violating UCMJ Article 112(a), for the wrongful use of a controlled substance (marijuana). On 14 April 2004, you were discharged from the Navy for misconduct (drug abuse) with an Other Than Honorable (OTH) characterization of service and assigned an 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, (b) your contention that you were struggling with undiagnosed PTSD, and (c) the impact that mental health issues had on your conduct. For purposes of clemency and equity consideration, the Board noted you provided character letters.

In your petition, you contend that you incurred Post Traumatic Stress Disorder (PTSD) during military service, which might have mitigated the circumstances surrounding your misconduct. You explain that you felt like you were losing your mind and had no one to turn to, and made a mistake by using drugs. 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 29 December 2022. The Ph.D. noted in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service. Post-service, he has received a diagnosis of PTSD that is temporally remote to his military service. Unfortunately, available records are not sufficiently detailed to indicate clinical symptoms in service or a nexus with his misconduct. There is insufficient information regarding his traumatic precipitant, as the cited plane crash occurred prior to his entrance into military service and his substance use pre-dated his military service. Substance use is incompatible with military readiness and discipline and the Petitioner was aware of his misconduct and deemed responsible for his behavior. Additional records (e.g., complete mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may assist in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD."

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 regarding mental health. Specifically, the Board felt that your misconduct, as evidenced by your two SCMs and one NJP, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved substantial periods of UA and 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. Your post-service diagnosis of PTSD is temporally remote to your military service and lack sufficient detail to indicate clinical symptoms in service or a nexus with your misconduct. The Board noted that the traumatic precipitant cited by your character witness, the crash of █ occurred prior to your entrance into military service. The Board also highlighted that your substance use pre-dated your military service. The Board concluded that substance abuse is incompatible with military readiness and discipline.

Throughout your disciplinary processing, you never raised concerns of a mental health condition or mental health symptoms that would have warranted a referral for evaluation. You did not appeal your SCMs or NJP, and you waived your right to present your case at an administrative separation board with the assistance of counsel. As a result, the Board concluded that your misconduct was not due to 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 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,

3/2/2023

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Executive Director
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