



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

■
Docket No. 9197-22
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.

A three-member panel of the Board, sitting in executive session, considered your application on 23 May 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 Secretary of the Navy Memorandum, "Disability Evaluation System Dual Processing" of 1 June 2016 (SECNAV DES Memo) and the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). The Board also considered the 17 March 2023 advisory opinion (AO), as well as 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.

A review of your record shows that you enlisted in the Navy and commenced a period of active duty on 15 December 2009. On 14 May 2020, upon testing positive for cocaine on a toxicology screening for entrance to ■ Medical Center, you admitted to cocaine use. Upon discharge from ■ Medical Center you were referred to the substance abuse rehabilitation program (SARP) and recommended for alcohol treatment. You thereafter were admitted to a hospital for inpatient substance abuse treatment on 1 June 2020. Thereafter, you were enrolled in SARP Alcohol and Drug Intensive Outpatient Program and released early from it, on 7 July 2020, due to your inability to commit to program requirements.

On 23 June 2020, you were notified of the initiation of administrative separation processing and your rights in connection therewith due to use of cocaine. On 31 July 2020, you received an adverse evaluation reflecting your positive urinalysis. In addition, you were notified in a formal written counseling that your recommendation for advancement to chief petty officer was withdrawn. On 13 September 2020, you were involved in car accident after you hit another car going at a high rate of speed. The next day you were charged in state court for driving under the influence with a special charge for a blood alcohol content in excess of .15.

In the meantime, you were processed in the disability evaluation system and, on 17 September 2020, the physical evaluation board (PEB) issued its notification of decision that you were found to be unfit and you were to be placed on the temporary disabled retired list (TDRL).

On 24 September 2020, you were again notified of the initiation of administrative separation processing and your rights in connection therewith for use of a controlled substance, commission of a serious offense, and for alcohol rehabilitation failure. You waived your right to an administrative board. On 29 September 2020, your commanding officer transmitted his recommendation that you be discharged. The commanding officer's recommendation letter included, at its enclosure (11), a "Dual Processing Mental Health Review Memo of 18 August 2020." This demonstrates that your command expressly considered your disability processing in connection with your separation processing. In addition, in his written comments, your commanding officer recommended a General (Under Honorable Conditions) characterization of service as follows:

Comments of the Commanding Officer. Since May 2020, [Petitioner] has had two criminal offenses - drug use and driving under the influence of alcohol (BAC over twice the legal limit). She is also an alcohol rehabilitation treatment failure. [Petitioner] has been diagnosed with medical conditions that may be affecting her behavior and choices. In light of this, I have chosen the administrative route to ensure accountability for her actions. Based on the substantial misconduct committed by [Petitioner] and the impact of her medical conditions, I recommend she be separated from the naval service for misconduct with a characterization of General (Under Honorable conditions].

You were so discharged on 2 October 2020.

In 2022, you filed an application with the Naval Discharge Review Board (NDRB), in which you sought "restoration of rank and a medical retirement." Upon review of the various factors, including applicable clarifying guidance, the NDRB granted your relief in the form of upgrading your discharge characterization to Honorable and changing your narrative reason for discharge to Secretarial Authority.

In your petition, you seek the removal of your Performance Evaluation dated 31 July 2020, your reinstatement to the paygrade of E-7, medical retirement reflected on your discharge document in accordance with the PEB findings dated 31 August 2020, back pay for date of rate dated

13 September 2020 to 2 October 2020, retirement eligibility and pay dated 2 October 2020 to the present with placement on the Permanent Disability Retirement List (PDRL). In support of your requests, you contend that you were suffering from post-traumatic stress disorder and other mental health conditions prior to your discharge, which mitigated your misconduct, and for which you should have been placed on the PDRL. Prior to your discharge you were in the disability evaluation system and you had been found to be disabled and you were pending transfer to the TDRL. You further contend that the Chief of Naval Personnel denied you due process in failing to apply the SECNAV DES Memo.

To assist it in reviewing your petition, the Board obtained the 17 March 2023 AO, which was considered unfavorable to your position, concluding as follows:

Conclusion. This petition should be denied. Petitioner waived an administrative board for drug abuse, alcohol rehabilitation failure, and commission of a serious offense all warranting separation from the Naval Service. Petitioner's due process rights were not violated. Petitioner neither shows a material error or injustice occurred nor does she meet her burden to overcome the presumption of regularity attached to the official actions of the Navy. There is no basis to grant relief in this case, and the request for relief should be denied.

In response to the AO, you provided a rebuttal dated 19 April 2023, in which you addressed a variety of factors. In part, you disputed the AOs reliance of the presumption of regularity, arguing that it is an “umbrella term to say that my administrative process was properly executed.” You continued:

if one looks at the timeline of separation, there is absolutely no chance of such a rapid decision at the separation authority without unlawful interference. I understand the reason the JAGC quotes the Naval Discharge Review Board language to justify its actions, but considering ALL the facts, I believe that the removal of advancement, and withdrawal of retirement was unjust as we look at the case in its entirety. The events created a perfect storm of misconduct that was a complete misrepresentation of my character. The substantive inaccuracy and lack of critical detail in the advisory opinion reflects how the JAGC continues to fail Sailors and cover the tracks reflecting their errors.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, including reviewing your response to the AO in its entirety, and the Board disagreed with your rationale for relief. In keeping with the letter and spirit of the Kurta Memo, 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, to include whether they qualified you for the military disability benefits you seek. In reaching its decision, the Board substantially concurred with the AO, particularly in its finding that you suffered no violation of due process in the processing of your discharge. To the contrary, the Board observed that your commanding officer appropriately followed the dictates of the SECNAV DES Memo by, among other things, effecting a Dual Processing Mental Health Review and by specifically addressing the Dual Processing in his comments. Further,

despite the fact that you waived your administrative board, your commanding officer granted you clemency in the form of recommending that you be discharged with a General (Under Honorable Conditions) characterization of service vice an Other Than Honorable (OTH) characterization of service. Your commanding officer made this recommendation despite the fact that you not only had a drug offense, but you also had an aggravated civilian DUI charge. Each of these occurrences separately warranted the potential of an OTH characterization of service. Yet, despite your board waiver and these two serious offenses, the Chief of Naval Personnel accepted your commanding officer's recommendation that you receive a discharge under Honorable conditions. As a result, having found no error or injustice in your discharge processing and having found substantial compliance with the SECNAV DES Memo, even in light of the Kurta Memo and reviewing the record liberally, the Board did not find evidence of an error or injustice that warrants granting you a military disability or associated back pay.

In addition, with respect to your request to remove your evaluation report and request to be reinstated to E-7 along with back pay, the Board found no basis for these requests. The Board determined that the evaluation in question reflected accurate information and did not appear to be prepared for any improper purpose. As for your request to be "reinstated" to E-7, the Board found no evidence in your service record that you were ever actually advanced to E-7. Rather, the documentation in your service record demonstrated that your recommendation for advancement was withdrawn after you admitted to the use of cocaine while you were on active duty. 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,

6/5/2023

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Executive Director

Signed by: █