



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. 9354-22

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 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 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.

You originally enlisted in the U.S. Navy, on 5 July 1978, and were honorably discharged, on 12 March 1984, for purposes of your immediate reenlistment on 13 March 1984. Your pre-enlistment physical examination, on 27 September 1977, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 14 January 1983, you received non-judicial punishment (NJP) for unauthorized absence (UA). You did not appeal your NJP. Your submarine duty physical examination, on 2 March

1983, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You stated on your medical history that you experienced a head injury, but otherwise noted that you currently were in good health and taking no medication.

On 7 March 1984, you received NJP for assault consummated by a battery for striking a fellow shipmate. The reduction in rank punishment awarded was suspended for six months. You did not appeal your NJP. On 25 April 1984, the suspended portion of your March 1984 NJP was vacated and enforced due to continuing misconduct. On the same day, you received NJP for the wrongful possession of a controlled substance. You did not appeal your NJP.

Subsequently, your command permanently decertified and removed you from the Personal Reliability Program (PRP) due to your demonstrated unreliability as evidenced by your drug-related NJP. As a result of your PRP removal, you were no longer authorized to perform any nuclear weapons-related duties.

Additionally, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with counsel and initially elected your right to request an administrative separation board. However, you subsequently submitted a conditional waiver request to waive your administrative separation board in exchange for your command recommending a General (Under Honorable Conditions) characterization of service. However, on 2 May 1984, the Separation Authority disapproved your conditional waiver request because the drug-related misconduct underlying your separation fell within a category of offenses which normally resulted in a discharge under Other Than Honorable conditions (OTH). On 4 May 1984 you re-executed your rights election form and you waived your right to elect an administrative separation board.

In the interim, your physical examination, on 7 May 1984, noted no neurologic or psychiatric conditions or symptoms. You again endorsed a head injury on your medical history, but stated you were currently in good health. On 8 May 1984, Commander, Submarine Squadron █ disqualified you for submarine duty and removed your enlisted submarine designator (SS) by reason of unreliability. Ultimately, on 21 May 1984, you were discharged from the Navy for misconduct with an OTH 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: (a) you suffered a baseball bat blow to the head and have not had proper brain functioning since then, (b) TBI diagnoses did not exist at the time of your active duty service, (c) you have been diagnosed with PTSD and informed you were suffering from it on active duty, (d) you also suffer from service-connected schizoaffective disorder, (e) marijuana is no longer the Class I Schedule drug that it was when you were discharged for it, (f) you did not possess the marijuana seeds and believe the security officer planted them in your car, and (g) you were railroaded out of the Navy due to three marijuana seeds. For purposes of clemency and equity consideration, the Board noted you submitted a personal statement, a Social Security benefits letter, and certain post-service medical documentation from November 2022.

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 March 2023. The Ph.D. stated in pertinent part:

While there is some in-service evidence of a head injury incurred during service, there is no evidence of on-going symptoms consistent with a Traumatic Brain Injury (TBI). The Petitioner's claims regarding the nature of his head injury are not consistent with his report in service. There is no evidence of a diagnosis of PTSD or another mental health condition during military service. Although he was evaluated on more than one occasion, military providers determined his symptoms were not sufficiently interfering to assign a formal mental health diagnosis. The Petitioner has provided no medical evidence in support of his claims. Additional records (e.g., active duty or complete 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 considered clinical opinion there is insufficient evidence of TBI incurred during military service. There is insufficient evidence of PTSD or another mental health condition that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to TBI, PTSD, or another mental health condition."

Following a review of your AO rebuttal submission, the Ph.D. did not change or modify their original AO.

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 TBI, mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such TBI and/or 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 TBI or any mental health-related conditions or symptoms. Moreover, even if the Board assumed that your misconduct was somehow attributable to TBI or 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 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. Additionally, the Board determined that illegal drug possession by a service member is contrary

to military core values and policy and poses an unnecessary risk to the safety of their fellow service members. The Board noted that marijuana use and possession in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. 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. Finally, the Board was not persuaded by your argument that marijuana seeds were planted in your vehicle and noted that you had two other NJPs in your record, including one for assaulting another Sailor. 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 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,

4/26/2023

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Deputy Director

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