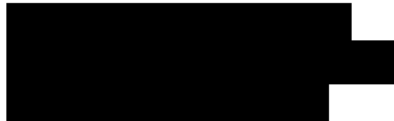




DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

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Docket No. 0521-23
6849-21
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 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 30 January 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 the advisory opinion (AO) from a qualified mental health professional that was issued as part of your previous petition. Although you were previously afforded the opportunity to submit an AO rebuttal, you chose not to do so.

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.

You enlisted in the Navy and commenced a period of active duty on 2 February 1983. On 11 March 1985, you issued an administrative remarks (Page 13) counseling concerning deficiencies in your performance and conduct, specifically, your involvement in an alcohol

related incident (Driving Under Influence). You were advised that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative discharge. On 8 August 1986, you were found guilty at non-judicial punishment (NJP) for violating Uniform Code of Military Justice (UCMJ) Article 92, for dereliction in the performance of duty, and Article 128, for simple assault by placing a locked .45 caliber weapon to the neck of a shipmate. You did not appeal this NJP.

On 8 March 1988, you were found guilty at your second NJP for violating UCMJ Article 112(a), for wrongful use of cocaine. You did not appeal this NJP. Subsequently, you were notified that you were being recommended for administrative discharge from the Navy by reason of misconduct due to drug abuse. You were advised of and waived your rights to consult with military counsel and to present your case to an administrative discharge board. On 4 April 1988, you were discharged from the Navy by reason of misconduct due to drug abuse with an OTH characterization of service.

Post-discharge, you applied to the Naval Discharge Review Board (NDRB). The NDRD denied your request on 3 May 1989 after determining your discharge was proper as issued. You also previously applied to this Board and were denied relief on 15 June 2022.

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 explanation of the events that occurred on Shellback Day, (c) the harassment you suffered at the hand of your senior chief, and (d) the impact that the claimed harassment had on your mental health and your conduct during service. For purposes of clemency and equity consideration, the Board considered the statements you submitted in your initial application as well as the new material that you provided for review in this request for relief.

In your petition, you contend that you incurred PTSD and depression following the harassment and degradation experienced on Shellback Day, which contributed to substance use to cope with your mental health condition. You submitted statements of support from shipmates regarding the Shellback incident and the circumstances of your burn injury, as well as evidence of post-service community contributions. 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 15 April 2022 as part of your initial petition. The Ph.D. noted in pertinent part:

During military service, the Petitioner was diagnosed with a substance use disorder. Substance use is incompatible with military readiness and discipline and considered amenable to treatment, depending on the individual's willingness to engage in treatment. There is no evidence that he was not responsible for his behavior or unaware of his misconduct. Throughout his military processing, there were no concerns raised of another mental health condition that required evaluation. Unfortunately, he has provided no medical evidence in support of his claims. His current statements are temporally remote from military service and insufficient to establish a clinical diagnosis. Additional records (e.g., post-service

mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) are required to render an alternate opinion.

The Ph.D. concluded, "it is my clinical opinion that there is insufficient evidence of a mental health condition that could be attributed to military service, other than his substance use disorder identified during military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition other than his substance use disorder."

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. Specifically, the Board felt that your misconduct, as evidenced by your two NJPs, outweighed these mitigating factors. In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about the harassment occurring during service and its adverse impact on your service. The Board considered the seriousness of your misconduct, and the fact that it involved both a drug offense and an assault with a weapon committed on a fellow shipmate. 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 and assault 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 convincing 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. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board noted that you never raised any psychiatric or neurologic concerns during the separation process, nor do you disclose any harassment or impact of such harassment. Moreover, the Board observed that you did not submit any clinical documentation or treatment records to support your claims of harassment and mental health concerns. 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,

2/2/2023



Executive Director

Signed by: █