



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. 1577-23

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 30 October 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 offered the opportunity to reply to the AO, you chose not to do so.

You enlisted in the United States Navy and commenced a period of service on 6 February 1991. On 31 October 1991, you received non-judicial punishment (NJP) for violation of Uniform Code of Military Justice (UCMJ) Article 86, for six periods of unauthorized absence (UA) totaling six hours. You did not appeal this NJP. From 31 October 1991 to 31 August 1993, you were formally counseled seven times on issues related to UA, substandard appearance, oversleeping, disobedience by leaving your belongings out during inspection, and dereliction of duty by failing

to complete the fathometer pre-underway check as ordered. On 9 September 1993, you received your second NJP for violating UCMJ Article 92, for dereliction of duty by “conducting an improper electrical tag out for maintenance which could easily have resulted in serious injury or death.” You did not appeal this NJP.

On 15 September 1993, you were notified that you were being processed for an administrative discharge by reason of misconduct- commission of a serious offense and minor disciplinary infractions. You waived your right to consult with qualified counsel and your right to present your case at an administrative separation board. During your separation physical, on 7 October 1993, you denied any mental health concerns or symptoms. On 2 November 1993, you were discharged from the Navy with an Other Than Honorable (OTH) characterization of service and assigned an RE- 4 reentry 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 assertion that you were struggling with undiagnosed mental health conditions during your service, (c) the impact that your mental health had on your conduct, and (d) your claim that you received inadequate legal representation and were forced to waive your rights. For purposes of clemency and equity consideration, the Board noted you provided a summary of your post-service accomplishments.

In your request for relief, you contend that you were suffering from undiagnosed bipolar disorder during military service, which contributed to your misconduct. You assert that a proper diagnosis would have afforded you reasonable accommodations and/or resulted in your medical discharge with benefits. In support of your request, you provided a Department of Veterans Affairs (VA) psychiatrist letter dated 24 May 2022, who reports treating you since February 2012. You also supplied a psychiatrist letter dated 1 September 2022 noting diagnoses of “Bipolar II disorder, most recent episode depressed; Attention Deficit Hyperactivity Disorder (ADHD), inattentive type; and Unspecified Anxiety Disorder. The psychiatrist stated that “these disorders would have been present during his service in the military...[and] it is more likely than not a direct factor of his behavior/poor performance in service.” 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 6 September 2023. The Ph.D. noted in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any 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. Temporally remote from his service, a VA psychiatrist has diagnosed mental health conditions that are considered to have been experienced in service. Unfortunately, available records are not sufficiently detailed to provide a nexus with all of his misconduct.

While minor disobedience and oversleeping could be attributed to unrecognized mental health symptoms associated with irritability and disrupted sleep, it is difficult to attribute his dereliction of duty to a mental health condition. Additional records (e.g., 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 clinical opinion there is post-service evidence from a VA psychiatrist of mental health conditions that may be attributed to military service. There is insufficient evidence to attribute all of his misconduct to a mental health condition."

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 about undiagnosed mental health issues and the possible adverse impact on your service. Specifically, the Board felt that your misconduct, as evidenced by your NJPs and multiple counseling warnings, outweighed these mitigating factors. The Board considered the seriousness of your repeated misconduct and the likely negative impact that your conduct had on the good order and discipline of your command. The Board determined that such misconduct is contrary to the Navy core values and policy, and places an unnecessary burden on 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. The Board noted that you did not report that you were suffering from any mental or physical conditions that would have triggered referral for treatment. The Board agreed with the AO that your post-service diagnosis is temporally remote to your service, and fails to draw a sufficient nexus to your underlying misconduct.

The Board felt that even if your minor disobedience and oversleeping could be attributed to unrecognized mental health symptoms, your final misconduct related to dereliction of duty was serious, stood on its own for purposes of discharge, and was unrelated to a mental health condition. 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. The Board concurred with your Commanding Officer's separation recommendation, which states that you were "witnessed conducting an improper electrical tag out for maintenance which could easily have resulted in serious injury or death by electrocution of the maintenance man. Based on [Petitioner's] known intelligence and extensive training in electrical safety, it is the opinion of this command that this dereliction of duty is extremely serious misconduct as specified in MILPERSMAN 3630600, Para. 1.d.(1) and justifies mandatory processing for Misconduct Due to Commission of a Serious

Offense.” The Board concluded that your conduct constituted a significant departure from that expected of a Sailor and continues to warrant an OTH characterization.

Therefore, while the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos and reviewing the record liberally and 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,

11/2/2023

