



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. 1974-23

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 11 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 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)/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, dated 1 September 2023. Although you were provided an opportunity to comment on the AO, 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 entered active duty with the Navy on 4 February 1991. On 18 July 1991, you were formerly counseled on the deficiencies in your performance and conduct due to your

unauthorized absence (UA) while in service school.

On 22 July 1991, you received non-judicial punishment (NJP) for being in a UA status for 20 days. On 18 December 1991, you received NJP for failure to obey a lawful order, underage drinking, two specifications of assaulting another Sailor and disorderly conduct. On 15 July 1992, you received NJP for UA. On 16 July 1992, you were formerly counseled regarding your UA. On 14 August 1992, you received an alcohol dependency assessment which determined you would benefit from Level III substance abuse treatment through the Department of Veterans Administration after discharge. On 23 September 1992, you received your fourth NJP for UA. Subsequently, you were notified of pending administrative separation action by reason of misconduct due to a pattern of misconduct and alcohol rehabilitation failure. After you waived your rights, your commanding officer (CO) forwarded your package to the separation authority (SA) recommending your discharge with a General (Under Honorable Conditions) (GEN) characterization of service. However, the separation authority (SA) disagreed with the CO's recommendation and directed an OTH discharge by reason of a pattern of misconduct. On 27 October 1992, you were so discharged.

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 to upgrade your discharge and contentions that you incurred mental health concerns during military service, you never received counseling after the death of a shipmate, you were not properly counseled regarding your rights, you were told you would receive a GEN discharge, you were harassed by your supervisor and made to feel less than others because you were Hispanic, and, since your discharge, you are attending college, started a roofing business, and developed your subordinates to become better citizens. For purposes of clemency and equity consideration, the Board noted you provided a personal statement, a college admission letter, two certificates of training from active duty, and character letters.

As part of the Board's review, a qualified mental health professional reviewed your request and provided the Board with an AO on 1 September 2023. The mental health professional stated in pertinent part:

There is no evidence that the Petitioner was diagnosed with a mental health condition or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He submitted two character references and a personal statement however, none are sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The AO concluded, "it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined your misconduct, as evidenced by your NJPs, outweighed the potential mitigating factors. In making this finding, the Board considered the likely seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. The Board considered the likely negative impact your conduct had on the good order and discipline of your command. The Board also concurred with AO that there is insufficient evidence to attribute PTSD/MHC to your military service or misconduct. As pointed out in the AO, you provided no evidence to establish clinical symptoms or provide a nexus with your misconduct. Further, the Board noted that there is no evidence in your record, and you submitted none, to support your contentions. Additionally, the Board noted that the record shows that you were notified of and waived your right to present your case to an administrative board (ADB). In doing so, you gave up your first and best opportunity to advocate for retention, assistance, or a more favorable characterization of service. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. While the Board carefully considered the evidence you provided in mitigation and commends you for your post-discharge accomplishments, 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,

10/23/2023

