

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

> Docket No. 2056-23 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.

Because your application was submitted with new evidence not previously considered, the Board found it in the interest of justice to review your application. A three-member panel of the Board, sitting in executive session, considered your application on 23 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 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (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). The Board also considered the advisory opinion (AO) furnished by a qualified mental health professional. Although you were provided an opportunity to respond to the AO, you chose not to do so.

You previously applied to this Board for an upgrade to your characterization of service denying drug abuse. The Board denied your request on 4 March 2019.

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 change your discharge characterization of service and your contention that a legal pseudoephedrine overdose was the reason you were discharged, that you suffered a pre-service traumatic brain injury (TBI), and you suffer from post-traumatic stress disorder (PTSD) after witnessing a friend's suicide when you

were thirteen. For purposes of clemency and equity consideration, the Board considered the evidence you submitted in support of your application.

As part of the Board's review process, a qualified mental health professional reviewed your contentions and the available records and issued an AO dated 31 August 2023. which was previously provided to you. The AO noted in pertinent part:

Petitioner contended he incurred PTSD after witnessing a close friend's death by suicide when he was 13, which contributed to his in-service misconduct. He claimed he incurred a TBI at age 19 "and suffered a brain hemorrhage having to take steroids to reduce the swelling while in a neck brace for weeks." He submitted statements in support of his pre-service experiences, which contributed to mental health difficulties in service.

There is in-service evidence of an alcohol or substance use disorder, for which the Petitioner received treatment. There is no evidence of TBI or PTSD in-service, and the Petitioner denied any history of mental health concerns or TBI upon enlistment. He has provided no medical evidence in support of his claims. While the Petitioner and his family now claim that pre-service mental health and TBI symptoms influenced his in-service behavior, these claims are temporally remote from military service and likely influenced by alterations in memory with the passage of time. Available evidence indicates that the Petitioner's in-service misconduct represented a continuation of pre-service problematic behavior with alcohol and substance use. 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 AO concluded, "it is my clinical opinion there is insufficient evidence of TBI or PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct to TBI, PTSD, or another mental health condition, other than his alcohol and substance use disorders."

After thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it involved a drug offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. The Board was not persuaded by your contention that your positive drug test for cannabinoid was due to the use of pseudoephedrine. Specifically, the Board considered that you were given the opportunity to refuse NJP and demand trial by court-martial to dispute the positive drug test; an option you did not pursue. You also waived your right to an ADB, which was another opportunity to dispute the positive test results. The Board further noted that you did not submit in your application package any evidence of the potential for pseudoephedrine to have resulted in a false positive

drug test. The Board also considered the likely negative impact your repeated misconduct had on the good order and discipline of your command and that you were given opportunities to address your conduct issues but you continued to commit misconduct.

Additionally, the Board considered your contention that your misconduct was mitigated by your PTSD. The Board concurred with the AO and determined there is insufficient evidence of TBI or PTSD that may be attributed to military service and there is insufficient evidence to attribute your misconduct to TBI, PTSD, or another mental health condition, other than your alcohol and substance use disorders. Further, the Board concurred with the AO that your in-service misconduct represented a continuation of pre-service problematic behavior with alcohol and substance use.

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 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.

| 11/6/ | 2023 | |
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| Executive Director | | |
| Signed by: | | |

Sincerely,