



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

█
Docket No. 2558-23
Ref: Signature Date

█
█
█
█
█

Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 Board waived the statute of limitation 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 25 September 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 the 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 considered an Advisory Opinion (AO) from a qualified mental health professional and your response to the AO.

You enlisted in the Navy and began a period of active service on 2 June 2003. On 5 June 2004, you received your first nonjudicial punishment (NJP) for failure to obey other lawful written order and missing movement. Due to your misconduct, you were issued an administrative counseling/warning and advised that subsequent violation of the UCMJ (Uniform Code of Military Justice), conduct resulting in civilian conviction, or deficient conduct or performance of duty could result in an administrative separation Under Other Than Honorable (OTH)

Conditions. On 18 May 2005, you received a second NJP for a period of unauthorized absence (UA). This was followed by a third NJP, held on 28 June 2005, for failure to obey a lawful written order, after which you were issued a second administrative counseling/warning again advising you that subsequent violation of the UCMJ, conduct resulting in civilian conviction, or deficient conduct or performance of duty could result in an administrative separation Under OTH conditions. On 12 December 2005, you received your fourth and final NJP for another period of UA. You were subsequently notified of your pending administrative processing by reason of misconduct due to pattern of misconduct, at which time you waived your right to consult with military counsel and to have your case heard before an administrative discharge board. On 17 January 2006, the separation authority directed you be discharged with an OTH for misconduct and, on 20 January 2006, you were so discharged.

You previously applied to the Naval Discharge Review Board (NDRB) for an upgrade to your characterization of service and were denied on 3 April 2014.

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 characterization of service and your contentions that you incurred PTSD, other mental health concerns, and Traumatic Brain Injury (TBI) during military service. You further contend that you were injured prior to your discharge, you were denied care, and are requesting an upgrade to access care from the Department of Veterans Affairs (VA). For purposes of clemency and equity consideration, the Board noted you provided a statement, and medical and VA documents.

Based on your assertions that you incurred PTSD, other mental health concerns, and TBI during military service, which might have mitigated the circumstances of your separation, a qualified mental health professional reviewed your request for correction to your record and provided the Board with an AO. The AO stated 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. Post-service, the VA has provided treatment for mental health concerns that are temporally remote to his military service. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service 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 misconduct) may aid in rendering an alternate opinion.

The AO conclude, "it is my clinical opinion there is insufficient evidence of TBI or a diagnosis of PTSD. There is post-service evidence that the VA has provided treatment for other mental health conditions. There is insufficient evidence to attribute his misconduct to TBI, PTSD, or another mental health condition."

In response to the AO, you submitted rebuttal evidence in the form of a statement and medical documents. On 13 September 2023, after reviewing your evidence, the AO was revised as follows:

There is some post-service evidence from a civilian provider of a diagnosis of TBI that may be attributed to military service. There is post-service from the VA of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD or TBI.

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 these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authorities and regulations. Further, character of service is based, in part, on military bearing and trait averages which are computed from marks assigned during periodic evaluations. Your military bearing average was 2.0. An average of 2.5 in military bearing was required at the time of your separation for a fully Honorable characterization of service. Additionally, the Board concurred with AO that there is insufficient evidence to attribute your misconduct to TBI, PTSD, or another mental health condition. As explained in the revised AO, available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with your misconduct. Your diagnoses are temporally remote to military service, and your pattern of misconduct in service is not consistent with a traumatic precipitant. Finally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. 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. 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 the 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 is attached 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,

10/11/2023

