



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. 3209-23

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.

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 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 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 and your response to the AO.

You enlisted in the United States Navy and commenced an initial period of service on 10 July 1979. During your initial term of service, you received three non-judicial punishments (NJP) for violations of the Uniform Code of Military Justice (UCMJ) Article 95, resisting arrest, Article 128, aggravated assault, Article 86, unauthorized absence, and Article 92, failure to obey an order. You reenlisted, on 13 May 1983, for a second period of service.

On 19 January 1984, you tested positive for drugs during a routine urinalysis. On 16 February 1984, you underwent drug and alcohol screening and found not to be drug dependent. The clinician recommended discharge, as his prognosis was poor. On 22 February 1984, you received

NJP for violation of UCMJ Article 112(a), for wrongful use of a controlled substance (marijuana/THC), related to the urinalysis from test conducted on 19 January 1984. As a result, you were placed on the urinalysis surveillance program. You were counseled and notified that you were being retained in the service, but would be required to comply with the requirements of the Level I Treatment Program. You were informed that failure to attend and complete Level I treatment would result in an administrative separation (ADSEP) recommendation. Less than one month later, on 20 March 1984, you again tested positive for THC while in the urinalysis surveillance program.

On 11 April 1984, you were notified that you were being processed for an administrative discharge by reason of misconduct - drug abuse. You elected your right to consult with qualified counsel and your right to present your case at an ADSEP board. On 17 May 1984, by a vote of 3 to 0, the ADSEP board found that the basis of misconduct was met, and recommended separation with an Other Than Honorable (OTH) characterization.

During your separation physical, on 27 June 1984, you denied any mental health concerns or symptoms, marking only "depression/excessive worry" with no additional information. Ultimately, on 15 August 1984, you were discharged from the Navy with an OTH characterization of service due to your misconduct and assigned an RE- 4 reentry code.

You previously submitted an application to the Board for Correction of Naval Records and were denied relief on 12 August 2016.

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 after your first positive urinalysis, you began to organize your finances, train as an x-ray technician, and disassociate with your friends that abused drugs, (c) your contention that you were suffering from undiagnosed mental health issues caused by your service, and (d) the impact that your mental health had on your conduct. For purposes of clemency and equity consideration, the Board noted that you provided documentation related to your post-service accomplishments and a character letter.

In your request for relief, you contend that you incurred mental health concerns due to personal and financial stressors and poor direction from leadership, which contributed to your misconduct. You assert that you sought assistance related to your depression, but that only the drug program was offered, and therefore you had another "lapse in judgment." In your previous request for review, you claimed that "during the Iran and Iraq crisis... [you were tasked with] picking up body parts, cleaning up blood, and the remainder of a plane," which contributed to mental health concerns and a decision to self-medicate with marijuana. 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 1 September 2023. The Ph.D. noted in pertinent part:

During military service, the Petitioner was diagnosed with alcohol and substance use disorders. Although he reported experiencing symptoms of depression, there is no evidence that he was diagnosed with a mental health condition other than

alcohol and substance use disorder. He has provided no post-service medical evidence to support his claims. Unfortunately, there is insufficient information regarding the Petitioner's misconduct to attribute it to a mental health condition other than alcohol or substance use disorder, given his denials of problematic use when evaluated in service. Additionally, his current statements are inconsistent with previous statements regarding his mental health status in service. 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 altering the opinion.

The Ph.D. concluded, "it is my clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service, other than alcohol and substance use disorders. There is insufficient evidence to attribute his misconduct to a mental health condition other than alcohol or substance use disorders."

The Ph.D. reviewed your rebuttal statement received on 16 October 2023, wherein you asserted that you are 100% service connected by the Department of Veterans Affairs (VA) for PTSD. However, the original AO remained unchanged due to lack of medical evidence necessary to support a nexus to your service or misconduct. The VA problem list, including the diagnosis of PTSD and severe depression, were considered by the Board.

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 NJP and two positive drug tests, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved repeated drug offenses. 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 substance abuse 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. Your post-service medical documents are temporally remote to your service and fail to draw sufficient nexus to the underlying misconduct. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board determined the record clearly reflected 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. After your first urinalysis, you were provided alcohol treatment and an opportunity to change your behavior. The Board concluded that your continued misconduct constituted a significant departure from that expected of a Sailor 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.

Sincerely,

10/28/2023

