



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. 3415-23
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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 6 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 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 to 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). The Board also considered the advisory opinion (AO) of a qualified mental health provider. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

The Board determined that your personal appearance, with or without counsel, would not materially add to the understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on evidence of record.

You enlisted in the Navy with a pre-service history of marijuana use and an arrest for illegal fireworks, and you began a period of active duty on 7 May 1996. Shortly before you completed your first year of service, on 21 March 1997, your brother died due to acute intoxication by heroin. On 9 January 1998, you were subject to nonjudicial punishment (NJP) for wrongful use of cocaine, a violation of the Uniform Code of Military Justice (UCMJ) under Article 112a. As a result, you were notified of processing for administrative separation and elected to waive your

hearing before an administrative separation board. On 2 February 1999, a recommendation was forwarded for your discharge under Other Than Honorable (OTH) conditions for the reason of misconduct due to drug abuse. This recommendation was approved by Commander, ██████████, via naval message, and you were discharged under OTH conditions on 27 February 1999.

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 change your narrative reason for separation, as well as your contentions that your discharge is unjust because you suffered during your military service from depression, anxiety, traumatic brain injury (TBI), and undiagnosed post-traumatic stress disorder (PTSD). You assert that the single occasion which you tried cocaine was to self-medicate to cope with the death of your brother. You also claim that you informed your chain of command of his passing, but that you were not offered grief counseling or resources to assist you with coping, which you believe was due to the negative stigma which was associated at the time with mental health services. For purposes of clemency and equity consideration, the Board noted you submitted a personal statement, seven character letters describing your post-service accomplishments and behavior, evidence of your service-connected disability ratings from the Department of Veterans Affairs (VA), copies of family records, a court order from the state of ██████████ dismissing a previous felony conviction for drinking under the influence, and your brother's death certificate.

Because you contend that PTSD, another mental health condition affected, and/or a traumatic brain injury affected the circumstances of your discharge, the Board also considered the 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. Post-service, the VA has granted service connection for TBI and another mental health condition. The VA has denied service connection for PTSD. Unfortunately, his personal statement is not sufficiently detailed to provide a nexus with his misconduct, particularly given the gap between his brother's death and his misconduct. Additional records (e.g., in-service or 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 post-service evidence from the VA of TBI and another mental health condition that may be attributed to military service. There is insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD, TBI, or another mental health condition."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJP, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included 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. Additionally, the Board concurred with the AO regarding the concerns with the nexus between your misconduct of cocaine use on the 24th of December 1998, nearly two years after your brother's unexpected death. Further, given that your brother's death was due to a drug overdose, the Board struggled to understand why you would choose to self-medicate with a highly dangerous illegal drug such as cocaine. Rather, and absent evidence to the contrary, the Board found your cocaine use was, more likely than not, tied to being home with friends during a holiday period as opposed to self-medication. The Board further struggled to understand what inference you intended from having received a post-discharge DUI conviction and, subsequently, obtaining a court-ordered dismissal of the felony conviction. Although the Board favorably noted that you have some evidence of post-discharge character, the Board found this evidence insufficient without further explanation regarding your post-service substance use, whether alcohol or controlled substances, or your rehabilitation therefrom, especially in light of the contended reason for your self-medication use being due to your sibling's own overdose. 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 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,

10/24/2023

