



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

█
Docket No. 4307-23
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 limitation 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 22 November 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) (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 also considered an advisory opinion (AO) furnished by a qualified mental health provider and your response to the AO.

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.

The fact and circumstances of your service remain unchanged from your previous applications.

On 9 July 2021, the Board denied your initial petition for discharge upgrade relief. On 20 January 2023, the Board again denied your petition for relief.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warranted relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire to upgrade your characterization of service and change your narrative reason for separation and reentry code. You contend that: (a) you request reconsideration based on behavioral health concerns related to your discharge that are service-connected, (b) you are presenting new medical evidence for reconsideration, (c) your discharge was unfair at the time and remains so now, (d) you should be given liberal consideration, (e) your discharge was not equitable, (f) you were not afforded the right to a separation board, and (g) you were not afforded counsel or the opportunity to present your case before an administrative separation board. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

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 5 October 2023. The Ph.D. stated in pertinent part:

There is no evidence that the Petitioner was diagnosed with a mental health condition during military service. Post-service, two civilian mental health providers have provided treatment for chronic PTSD symptoms attributed to military service.

While the Petitioner's civilian provider has expressed the opinion that his separation could be attributed to PTSD, his provider has not explained how the Petitioner's misconduct could be attributed to symptoms of PTSD. Larceny and false official statements are not typically associated with PTSD, and are more consistent with the Petitioner's pre-service behavior than an atypical PTSD reaction.

While there could be instances in which his civilian charges could be attributed to irritability or aggression associated with PTSD, it is difficult to attribute the behavior in the civilian arena in this case to PTSD symptoms, particularly given the limited information provided by the Petitioner and his civilian clinicians regarding his traumatic precipitants, specific PTSD symptoms, and their relationship to his misconduct.

Additional records (e.g., complete post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific relationship to his in-service misconduct) may aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my clinical opinion there is post-service evidence from two civilian mental health providers of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD."

In response to the AO, your legal counsel provided arguments in rebuttal. Following a review of your AO rebuttal submission, the Ph.D. did not modify their original AO.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First and foremost, the Board determined that there were no substantive, procedural, or due process errors that prejudiced you with your administrative separation board. The record is clear that, on 23 May 2001, the administrative separation processing notice clearly provided you: (a) with the right to consult with counsel, (b) with the right to request an administrative separation board, and (c) to have representation at such board by qualified counsel. You elected (in writing) to consult with counsel, but you waived your rights to request an administrative separation board and to legal representation at such board when you signed and dated your election of rights form on 23 May 2001. Additionally, the Board unequivocally concluded that your command had the requisite authority to separate you based on your cumulative active duty misconduct. The Board also noted that discharge processing for misconduct, whether done administratively or as a result of a court-martial, would take absolute precedence over any disability and/or physical evaluation board process.

The Board considered the factual discrepancies in the record that seriously call into question the veracity of your mental health contentions. Your two revised letters from civilian practitioners, now conclude that your PTSD diagnosis was largely supported by several traumatic combat incidents you experienced on active duty. Such conclusions and diagnoses could only be made based on information you personally described to your providers during the course of your treatment. However, a review of your service records indicate you were never exposed to combat operations. To the contrary, at all relevant times during your “pre-9/11” enlistment you were assigned to shore duty in the United States at █ and never in a forward-deployed theater of operations either on a ship, or with a combatant command/unit. Moreover, the available records indicate the only lingering medical issue you were dealing with on active duty was “left knee patellofemoral syndrome” following a fall down a stairwell where you twisted your left knee. The Board noted that this unresolved injury disqualified you from both sea duty and overseas duty.

In accordance with the Hagel, Kurta, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced and their possible adverse impact on your service. However, the Board concluded that there was no nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, even under the liberal consideration standard the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your cumulative misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. Moreover, the Board concluded that your intentional misconduct including theft, making a false official statement, violating a protective order, assault and battery, and carrying a concealed weapon were not the types of misconduct

that would be excused or mitigated by mental health conditions even with liberal consideration. The Board also concluded 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.

The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board determined that characterization under OTH conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. As a result, the Board determined that there was no impropriety or inequity in your discharge and concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. 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 have now attempted on three (3) separate occasions to upgrade your discharge at the BCNR without success. With certain non-material exceptions, your contentions and proffered supporting evidence have largely remained unchanged for each of your petitions, and the Board has declined to grant clemency each time even in light of Wilkie Memo considerations. Unfortunately, at this time the decision of the Board now is final, and your only future recourse would be to seek relief, at no cost to the Board, from a court of appropriate jurisdiction.

Sincerely,

12/1/2023

