



**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. 4344-23  
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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 26 January 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 dated 23 January 2024. The Board also considered all material that was previously submitted as part of Docket Number NR20210005936, which was administratively closed at your request to allow sufficient time to acquire additional evidence in support of your request.

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.

On 28 December 1978, prior to your enlistment, you underwent an enlistment physical wherein you reported a history of sleepwalking, frequent headaches, indigestion, intestinal trouble, jaundice or hepatitis, broken bones, recent weight changes, motion sickness, and frequent trouble sleeping. You were evaluated by mental health for your sleepwalking, which was deemed “insignificant” and without evidence of psychological illness or emotional disturbance. Your medical record also notes a “relatively serious case of infectious hepatitis” during which you missed 4-5 months of school in 10th grade, but no on-going sequelae of the illness was identified. You received an enlistment waiver for sleepwalking and were deemed medically qualified for enlistment.

You enlisted in the United States Navy and began a period of active service on 2 March 1979. On your enlistment application, you disclosed pre-service marijuana use. On 6 September 1979, you received non-judicial punishment (NJP) for violating Uniform Code of Military Justice (UCMJ) Article 92, for possession of hashish. On 19 September 1979, you received your second NJP for violating UCMJ Article 109, for willfully spoiling “the bulkhead of the Bosun (sic) Locker by painting FTN on the same using a can of black spray paint.” On 31 January 1980, you received an evaluation assigning marks of 2.8 in Professional Performance and 2.0 in Military Behavior; noting that you had “constantly been in trouble, demonstrated little or no interest in the work of the deck force....” On 22 February 1980, you received your third NJP for violating UCMJ Article 86, for a period of unauthorized absence (UA) totaling about 13 days. On 11 July 1980, you received your fourth NJP for violating UCMJ Article 86, for periods of UA, and Article 91, for disobedience of a lawful order. On 19 July 1980, you received your fifth NJP for violating UCMJ Article 92, for possession of a controlled substance (marijuana). On 8 August 1980, you received your sixth and final NJP for violating UCMJ Article 86, for a 2.5-hour period of UA, and for being UA from men’s muster. You did not appeal any of these six NJPs.

On 13 November 1980, you began a period of UA until returning to military control on 24 December 1980. You began a second period of UA on 13 February 1981 that ended on 27 May 1981. On 24 June 1981, you were found guilty at Special Court Martial (SPCM) of violating UCMJ Article 86, for the above periods of UA, and Article 87, for missing movement on 16 February 1981. You were sentenced to a Bad Conduct Discharge (BCD), confinement at hard labor for three months, and forfeitures of pay. You were subsequently placed on appellate leave while your case was reviewed by the Navy and Marine Corps Court of Criminal Appeals (NMCCA).

On 17 August 1981, you participated in a psychiatric evaluation as part of the appellate review process, which found no evidence of organic or functional thought process disorders. You acknowledged marijuana and alcohol use and it was recommended that you receive a formal evaluation for substance use disorder. On 20 November 1981, during your pre-separation physical, you reported medical concerns, similar to those reported pre-enlistment, and new conditions of swollen/painful joints, shortness of breath, chronic/frequent colds, pain or pressure in chest, leg cramps, hernia (age 10), and frequent painful urination. No additional comments were made on the endorsed complaints, nor were any current medical or mental health conditions identified. You were deemed qualified for separation without additional consultation. Ultimately, you were discharged from the Navy on 13 December 1982, after full appellate review by NMCCA, with a BCD as adjudged by the court and assigned an RE-4 reentry code.

You previously applied to this Board and were denied relief on 27 July 2020. You subsequently applied for reconsideration.

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 and change your narrative reason for separation, (b) your contention that you suffered from undiagnosed mental health conditions due to abuse sustained during service and symptoms related to your diagnosed HCV, and (c) 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.

In your petition, you contend that you were suffering from unrecognized symptoms of PTSD and other mental health concerns due to hazing and physical assaults that occurred during your military service. You assert that you reported the attacks to your chain of command, but that they failed to take action, which resulted in you going UA to avoid the abuse. You explain that undiagnosed symptoms of Hepatitis C (HCV) contributed to your mental health symptoms, resulting in your use of marijuana to self-medicate. You go on to state that because of unrecognized symptoms of HCV, you were frequently tired and fatigued, and led to you being targeted as weak. As part of the Board review process, the BCNR Physician Advisor who is a Psychiatrist (M.D.), reviewed your contentions and the available records and issued an AO dated 28 February 2022. The Physician Advisor noted in pertinent part:

Petitioner's in-service record did not contain any diagnoses of mental health disorders, or symptoms/behaviors indicative of a mental health disorder. His records contained infrequent sick call appointments for routine medical complaints. His pre-service history of acute hepatitis and subsequent recovery was known to medical examiners during his enlistment physical examinations. Their physical examination did not reveal any physically disqualifying sequelae and he was medically cleared to enlist. Throughout his counselings, disciplinary, and administrative processes, there were no concerns for a medical or mental health condition that would have warranted referral for medical/psychiatric evaluation, until an Appellate Board request for psychological evaluation for suitability for continued service during his post-Court-Martial appeal process. In the psychiatric evaluation, he denied any mental health symptoms or conditions, requested to remain on active duty, and was found psychiatrically suitable for continued service.

Petitioner presented evidence of post-discharge diagnoses of Depression and PTSD, which examiners opined mitigated his in-service misconduct (such as drug use to alleviate pain/depression/anxiety; UA as an avoidance defense from perceived threat from shipmates and pressures from work environment). However, clinical evidence contemporary to Petitioner's military service was insufficient to establish diagnoses of PTSD or Depression. There was insufficient objective medical evidence presented supporting his contention of chronic medical sequelae to his reported HCV infection during his military service. Additional clinical evidence, such as post-service treatment records documenting his HCV infection history and linkage between Petitioner's medical and mental

health diagnoses and his misconduct are required to render an alternate opinion. Should the Petitioner choose to submit additional records, they will be reviewed in context of his claims.

The Physician Advisor concluded, “it is my considered medical opinion there was insufficient in-service objective evidence of psychological/behavioral markers to support Petitioner’s contention of PTSD or Depression incurred during his military service, or that there was objective clinical evidence he suffered from clinically significant sequelae from his preservice acute viral hepatitis during his military service. There was insufficient evidence that Petitioner’s in-service misconduct may have been mitigated by PTSD/Depression.”

In response to this advisory opinion, you requested that your case be administratively closed to provide sufficient time to respond. Your case was reopened on 22 May 2023, and the additional evidence that you provided was sent for review and comment.

The original Physician Advisor, as well as another BCNR Medical Advisor, who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an updated co-signed AO on 22 November 2023. The Physician Advisors noted in pertinent part:

Petitioner was appropriately referred for psychological evaluation and properly evaluated during his enlistment, and he denied mental health concerns. Post-service, he has received diagnoses of Chronic HCV infection (diagnosed in 2018-2019 upon return from living in Philippines for 15 years), PTSD and other mental health diagnoses that are temporally remote to his military service. Unfortunately, available records are not sufficiently detailed to establish clinically significant symptoms in service or provide a nexus with his misconduct. Petitioner’s pre-service marijuana use appears to have continued in service. It is difficult to consider how vandalism could be considered an indicator of PTSD. The Petitioner denies the wrongful disposal of the fire extinguisher. While UA could be considered an indicator of avoidance, it is difficult to attribute the Petitioner’s behavior to avoidance, given his denials of mental health symptoms 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 rendering an alternate opinion.

There is no evidence of a mental health diagnosis or symptoms/behaviors indicative of a mental health disorder in the Petitioner’s service medical records, which contain evidence of infrequent sick call appointments for routine medical complaints. His pre-service history of acute hepatitis and subsequent recovery was known to his examiners, who medically cleared him to enlist. Though post-discharge, he has presented evidence of a diagnosis of chronic HCV infection (with purported mental health symptoms associated with his condition that he asserts negatively affected his military service), there is insufficient clinical evidence to establish a nexus between a possible in-service HCV condition and his misconduct.

During the appellate review process, the Petitioner was evaluated by a military psychiatrist for suitability for continued service. During the evaluation, he denied

any mental health symptoms and was found psychiatrically suitable for continued service.

The M.D. and Ph.D. concluded, “it is my clinical opinion there is insufficient evidence of TBI that may be attributed to military service. There is post-service evidence from a civilian psychologist 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.”

The Board considered both your original argument dated 22 May 2023, as well as your second rebuttal response dated 23 January 2024. Specifically, the Board reviewed the civilian mental health treatment records which discussed the impact that assaults and other abuse had on your mental health and in-service conduct.

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 your mental health. Specifically, the Board felt that your misconduct, as evidenced by your NJPs and SPCM conviction, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved repeated periods of UA and possession of illegal drugs. 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 your conduct was contrary to Navy core values and policy, and posed an unnecessary risk to your fellow shipmates. The Board also highlighted that your periods of UA placed an unnecessary burden on your command and negatively affected mission accomplishment

In making this determination, the Board concurred with the most recent AO that you received psychological evaluation during your time in service and denied mental health concerns. Although you disclosed a series of medical issues, the Board felt that there was insufficient evidence to establish a nexus between these conditions and the underlying misconduct, especially since you were deemed medically qualified for separation. The post-service diagnoses of Chronic HCV infection, PTSD and other mental health conditions are temporally remote to you military service and fail to establish clinically significant symptoms during service or provide a nexus to you misconduct. The Board felt that it was more likely that your pre-service misconduct continued in service, especially due to the very limited period of service and the fact that your misconduct began almost immediately and spanned the entirety of that timeframe. Further, the Board agreed with the AO that some of the misconduct that you committed are not normal indicators of PTSD or other mental health conditions. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms.

The Board found 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. The Board felt that you received advice from qualified counsel throughout the court martial process and that were aware of your rights. You never raised the issue mental health concerns during the court-martial process, or during any of your NJPs. You also did not raise such issues to the appellate court during their review. As a

result, the Board concluded that your conduct constituted a significant departure from that expected of a Sailor and continues to warrant a BCD, as issued by the court.

While the Board carefully considered the evidence you submitted in mitigation and commends you on your post-discharge accomplishments, 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,

2/7/2024

