



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. 4630-23

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 18 December 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. Although you were provided an opportunity to respond to the AO, you chose not to do so.

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.

You enlisted in the United States Navy and commenced a period of service on 29 January 2001. You disclose that in early 2003, you learned that that your wife was having an affair with a

shipmate. On 13 January 2003, you began a period of absence without leave from your unit and you remained absent until you returned to military control on 2 May 2003. During that period, you missed ship's movement on 14 January 2003. On 5 May 2003, you began a two-day period of unauthorized absence (UA). On 8 May 2003, you were found guilty at Summary Court-Martial (SCM) of violating Article 86, for two specifications of UA, totaling 112 days, and Article 87, for missing ship's movement. You were awarded 45-days restriction, forfeitures of pay, and reduction in rank.

On 20 May 2003, you were notified that you were being processed for an administrative discharge by reason of misconduct due to commission of a serious offense. You waived your right to consult with qualified counsel and your right to present your case at an administrative separation board, but elected to submit a statement in lieu of a board. In your statement, you explained the mental and physical toll that remaining on the ship was having on you and requested that the mitigating circumstances deserved a General (Under Honorable Conditions) characterization of service. On 5 June 2003, your Commanding Officer recommended your separation with an OTH, citing that your decision to go UA forced your shipmates to carry a heavier burden during your repeated absences. On 30 June 2003, you were discharged from the Navy due to your misconduct with an OTH characterization of service and assigned an RE- 4 reentry code.

You previously submitted an application to the Naval Discharge Review Board (NDRB) and were granted partial relief on 2 December 2015. Specifically, NDRB upgraded your OTH characterization of service to a General (Under Honorable Conditions) (GEN) characterization as a matter of clemency.

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, change your narrative reason for separation, and change your reentry code, (b) your contention that you were suffering from symptoms of anxiety and stress during your time in service related to your wife's affair, and (c) the impact that your mental health had on your conduct. For purposes of clemency consideration, the Board noted that you provided documentation related to your post-service accomplishments and character letters.

In your request for relief, you contend that you incurred mental health issues during service caused by the stress of your wife's adultery and continued exposure to the shipmate with whom she had an affair. You explain that the stress and anxiety caused by this issue drove you to go UA. 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 November 2023. The Ph.D. noted 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. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a

nexus with his misconduct. The presence of personal stressors by themselves is not sufficient to establish a mental health condition. 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.

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. There is insufficient evidence to attribute his misconduct to a mental health condition."

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 SCM conviction, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved a substantial period of UA. Further, the Board also considered the negative impact that your conduct had on the good order and discipline of your command. The Board concluded that unexpectedly and repeatedly absenting yourself from your command placed an undue burden on your chain of command and on fellow Sailors, and negatively impacted mission accomplishment.

In making this determination, the Board concurred with the advisory opinion that there was insufficient 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. There was nothing in your official service records that indicated you sought mental health treatment. Further, you did not provide any post-service medical evidence of mental health treatment. As a result, the Board concluded that while your misconduct was motivated by anxiety and stress, such issues did not rise to the level of a mental health condition and does not excuse your actions. 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.

The Board reviewed and considered the clemency information that you provided. While the Board commends your post-service accomplishments, they felt that you already received adequate clemency from the NDRB. The Board agreed with the NDRB that your conduct did seem to be an anomaly based on the circumstances, and that your post-service conduct warranted an upgrade from OTH to GEN, but that a further upgrade to Honorable or other changes to your record are not warranted. The Board determined that GEN characterization is appropriate when significant negative aspects of a Sailor's conduct outweighs the positive aspects, which remains accurate in your case.

Additionally, the Board did not find an injustice with your narrative reason for separation, separation code, or reentry code. The Board concluded that you were assigned the correct separation information based on the totality of the circumstances, and that such entries were

proper and in compliance with all Department of the Navy and Marine Corps directives and policy at the time of your discharge.

As a result, the Board concluded significant negative aspects of your service outweigh the positive aspects and continues to warrant a GEN 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,

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