



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. 5369-23
Ref: Signature Date



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.

Because your application was submitted with new post-service medical evidence not previously considered in either of your recent applications, the Board found it in the interest of justice to review your application. A three-member panel of the Board, sitting in executive session, considered your application on 19 January 2024. 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 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (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 and your response to the AO.

Before applying to this Board, you applied to the Naval Discharge Review Board (NDRB) for a discharge upgrade contending that your post-service conduct warranted consideration of clemency. The NDRB denied your request for an upgrade on 6 November 2008 based on its determination that your discharge was properly issued. You also previously applied to this Board for an upgrade to your characterization of service, contending that your punishment was too harsh for an unauthorized absence (UA), and were denied on 24 September 2021. Subsequently, you applied for reconsideration, contending that your post-service character

warranted consideration of clemency and further arguing that your father's serious illness and subsequent death, as well as the impact it had on your mother and your mental state regarding your ability to help and care for your family, contributed to your UA; however, you were again denied the requested relief on 8 February 2023. The facts of your case remain substantially unchanged.

Given your recent application and request for reconsideration, the Board notes that the previous summary of your relevant military service and the misconduct which resulted in your discharge "under other than honorable conditions" "as a result of a court-martial (SPCM)" remains unchanged. Although the Board again observed that your service record does not contain specific records to document the process of your SPCM and discharge, the separation code of "JJD2" indicates that you were adjudged a punitive discharge which was approved and executed following appellate review of your findings and sentence rather than the administrative discharge reflected by your current characterization of service. While the Board found probable evidence of an administrative error in assigning your characterization of service as "under other than honorable conditions" rather than due to the punitive discharge characterization of "Bad Conduct," the Board concluded that correction of this error would be to your detriment rather than benefit and, therefore, determined that your record should remain unchanged in that regard.

With respect to your current application, 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 to "Honorable" and change your narrative reason for separation to "Secretarial Authority" as well as your continued contentions that your command failed to follow required procedures in reporting your absences which resulted in material error, it was an injustice to fail to consider your exemplary quality of service, it was an error to fail to consider the reasons for your UAs, which you believe were mitigating in light of your family problems, and your claim that you experienced major depression following a back injury during your active duty period and suffered from a somatoform psychological condition which was severe enough to result in suicidal ideations due to your pain. For purposes of clemency and equity consideration, the Board considered the evidence you submitted in support of your application.

Because you contend that a mental health condition affected the circumstances of your discharge, the Board also considered the AO. The AO stated in pertinent part:

During military service, the Petitioner was referred for a mental health evaluation regarding a possible mental health condition, but the results are not found in the record. The physician treating his back pain considered his pain may have had a psychological component or may have been exaggerated. There is no evidence of a diagnosis of PTSD that may be attributed to military service. Post-service, a VA clinician has attributed a mental health condition (adjustment disorder) to in-service stressors, including the death of his father. Unfortunately, available records are not sufficiently detailed to attribute all his misconduct to a mental health condition. While some of his UA could be attributed to grief and emotional strain over the illness and eventual death of his father, it is difficult to attribute extended UA to mental health concerns, particularly in the context of his in-service providers' opinions regarding his condition. Additional records (e.g., a detailed personal statement 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 insufficient evidence of a diagnosis of PTSD. There is post-service evidence from a VA provider of another mental health condition that may be attributed to military service. There is insufficient evidence to attribute all of his misconduct to a mental health condition.”

In response to the AO, you submitted rebuttal argument. The Board noted that your rebuttal to the AO reiterated your mental health diagnoses; however, it failed to address the primary and most significant issue raised within the AO with respect to the extended period of UA which resulted in your SPCM and discharge.

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 court-martial convictions, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Further, the Board concurred with the AO regarding the lack of evidence to substantiate a nexus between your mental health diagnosis and the totality misconduct and extended periods of UA which resulted in your punitive discharge. Moreover, the Board expressly observed that, for your period of service spanning from 12 July 1994 through 26 April 1996, you earned only one year, one month, and 20 days of net active service as a result of documented lost time of 235 days attributed to your multiple, extended periods of UA. The Board found this scope of absences inexcusable in light of the AO and your contended reasons for your absences. Additionally, the Board found that unexpectedly absenting yourself from your command placed an undue burden on your chain of command and fellow service members, and likely negatively impacted mission accomplishment.

Further, although your average performance markings marginally exceeded the minimum of 4.0 required for an Honorable discharge, the Board noted that your average conduct markings of 2.8 feel significantly short, in light of your repeated periods of UA, which the Board concluded fell far short of “exemplary,” notwithstanding your contentions otherwise. Likewise, the Board found your contentions of error with respect to the documentation of your periods of UA without merit insofar as you failed to demonstrate any material prejudice. Upon reconsideration of all available and relevant evidence of record, the Board concluded that the potentially mitigating factors you submitted for consideration are insufficient to outweigh the totality of your misconduct and extensive lost time.

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, _____

2/13/2024

