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

[redacted]
Docket No. 5541-23
Ref: Signature Date

[redacted]

Dear Petitioner:

This is in reference to your request 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 8 February 2024. The names and votes of the members of the panel 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, 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). In addition, the Board considered the 18 December 2023 Advisory Opinion (AO) from a Licensed Clinical Psychologist and your response to the AO.

A review of your record shows that you enlisted the United States Naval Reserve (USNR) on 31 August 1996. You mobilized in support of [redacted] ([redacted]) from 6 August 2004 to 1 May 2005. Upon your return, you were evaluated by the Department of Veterans Affairs (VA) and diagnosed with Post Traumatic Stress Disorder (PTSD). You re-enlisted in the USNR on 5 September 2007.

On 19 December 2012, you made a call to 911, identified yourself as an off-duty Department of Defense (DoD) police officer, and requested assistance with a traffic incident. United States Park Police Officers arrived and you again identified yourself as a DoD police officer, displayed DoD police credentials as well as a firearm. You informed Park Police you pulled over a driver who was driving erratically and the driver fled.

On 27 August 2013, you re-enlisted in the USNR for an additional six years until 26 August 2017.

On 16 June 2014, a Grand Jury for the United States District Court for the District of [redacted] charged you with "Impersonating an Officer of the United States" based upon evidence that you were not a DoD police officer and you were not authorized by the DoD to carry police credentials, a police badge or firearm. Pursuant to a plea agreement, on 13 February 2015, you pleaded guilty to one charge of "Impersonation of an Officer of the United States" in the United States District Court for the District of [redacted]. You were sentenced to five years of probation, 40 hours of community service, and a fine. Consequently, you were processed for administrative separation from the Navy Reserve for commission of a serious offense.

On 16 May 2015, you underwent an administrative separation board (ASB). The ASB found the evidence supported a finding of misconduct - commission of a serious offense and recommended a General (Under Honorable Conditions) (GEN) discharge with no transfer to the Individual Ready Reserve (IRR).

On 22 May 2015, you submitted a letter of deficiency, requesting that the findings of the ASB be modified to permit you to be transferred to the IRR to complete your enlistment contract, as you had over 18 years of service. In September 2015, the Assistant Commander of Navy Personnel Command for Reserve Management recommended suspension of your separation for 12 months given your years of service. However, your separation was not suspended and you were discharged, on 1 October 2015, with a GEN characterization of service.

In 2020, you petitioned the Naval Discharge Review Board (NDRB) for an upgrade of your characterization of service and a change to your narrative reason for separation in light of your PTSD condition. On 7 May 2020, the NDRB denied relief, finding that your PTSD diagnosis was not the underlying cause of your misconduct, and that your characterization of service was equitable and consistent with the characterization of discharge given others in similar circumstances.

For this petition, you contend the ASB improperly did not consider any evidence pertaining to your PTSD diagnosis, in violation of MILERSMAN 1910-702 which states that separation authorities must make a determination as to whether a mental health condition was a contributing factor to the conduct forming the bases supporting the administrative separation. You also claim material error that you were not transferred to the IRR. You submitted character letters, VA medical records, and VA rating decisions to support your claim.

The Board carefully reviewed your petition and the material you provided in support of your petition and concluded these potentially mitigating factors were insufficient to warrant relief.

In keeping with the letter and spirit of the Kurta Memo, 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, to include whether they qualified you for the military disability benefits you seek.

With respect to ASB error, the Board observed that a PTSD evaluation is only required if the member served in an imminent danger zone in the two year period prior to the notification of separation processing. You were deployed in 2004-2005; thus medical screening for PTSD was not required. In addition, although you were eligible to be transferred to the IRR, it was within the ASB's discretion to grant this relief and there is no material error in the ASB deeming your misconduct significant enough to recommend denying your transfer.

With respect to being medically retired, the Board noted that in order for a reservist to qualify for military disability retirement, the reservist has to submit a line of duty request (LOD) for the medical condition. If the LOD is approved, a medical provider refers a service member to the disability evaluation system (DES) if they believe the member has a condition that prevents them from continued service. In this process, the service member has to be found unfit; meaning there must be evidence the service member is unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. In reviewing your record, the Board concluded the evidence does not support a finding that in 2012 you were unable to perform the duties of your office grade and rank. Further, the Board noted your argument for a medical retirement is partially based on the VA decision to issue you service connected disability ratings. The Board was not persuaded by your VA evidence since eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based without a requirement that unfitness for military duty be demonstrated.

Finally, with regard to your request for a discharge characterization upgrade. 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 for a discharge upgrade and previously discussed contentions.

Based on your assertions that you incurred PTSD during your military service, which might have mitigated your discharge character of service, a qualified mental health professional reviewed your request for correction to your record and provided the Board with an AO. The AO stated in pertinent part:

> The Petitioner submitted evidence that he was diagnosed by the VA with PTSD in 2006. He submitted a letter dated June 2014 from a treating psychiatrist who indicated that he had treated the Petitioner for PTSD since 2006. He also submitted 16 character references. Although there is evidence that he was diagnosed with PTSD due to combat experiences while in Iraq, his misconduct of impersonating an officer is not a typical symptom of PTSD. The Petitioner noted that he was acting with hypervigilance when he impersonated an officer, however the totality of his actions exceed that of what would be expecting when exhibiting hypervigilance alone.

The AO concluded, "it is my considered clinical opinion there is sufficient evidence of a mental health condition (PTSD) that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to his diagnosed PTSD."

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 civil conviction, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the discrediting nature of your conduct. Further, the Board concurred with the AO that there is insufficient evidence that your misconduct could be attributed to his diagnosed PTSD. The Board considered that you were diagnosed with PTSD in 2006 and were able to successfully re-enlist twice and serve in the USNR with this condition until this incident.

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.

Based on the foregoing review, the Board did not discern any facts that would support you being eligible for a disability retirement, a transfer to the IRR, or an Honorable characterization of service. Rather, the evidence of record demonstrates you were properly discharged as a result of misconduct and appropriately assigned a GEN characterization of service. In sum, in its review and liberal consideration of all the evidence, the Board did not observe any error or injustice in your naval records. 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,

3/20/2024

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