



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. 5946-23
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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.

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 29 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, 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 the advisory opinion (AO) furnished by a qualified mental health professional dated 6 December 2023, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the Navy and began a period of active duty on 20 January 1999. Upon your enlistment, you admitted using marijuana and being arrested for possession of a controlled substance. On 24 November 1999, you received nonjudicial punishment (NJP) for a period of unauthorized absence (UA). On 18 March 2002, you received an Evaluation Report that commented you had significant problems dealing with authority, were disrespectful to senior enlisted personnel, did not take direction or criticism well and were often belligerent, had unsatisfactory appearance, refused to accept responsibility, would not work towards Collateral

Duty Inspector qualification, required constant prodding to complete your military requirements, refused to progress to higher levels of responsibility, possessed poor communication skills, and lacked the ability to cope with stressful situations. On 23 April 2002, a medical officer diagnosed you with Personality Disorder.

On 23 July 2002, you received a second NJP for missing movement. On 25 July 2002, you received a third NJP for disrespect towards a superior officer, willful disobedience, and insubordinate conduct. On the same date, you were counseled concerning your previous UCMJ violations resulting on NJPs. Subsequently, you were advised that failure to take corrective action could result in administrative separation. On 14 August 2002, you were charged with missing movement and UA. On 29 August 2002, you requested an Other Than Honorable (OTH) discharge characterization in lieu of trial by court martial. On 9 September 2002, the separation authority approved your request for an OTH discharge characterization in lieu of trial by court martial. On 17 September 2002, you were so discharged.

Post-discharge, you applied to the Naval Discharge Review Board (NDRB) for a discharge upgrade. On 14 September 2012, the NDRB denied your request after determining your discharge was proper as issued.

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 contention that your discharge was the result of false charges resulting in administrative separation. For purposes of clemency and equity consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board's review, the Board considered the AO. The AO stated in pertinent part:

There is evidence that the Petitioner was diagnosed with a personality disorder in service. This diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation conducted. A personality disorder diagnosis is preexisting to military service by definition, and indicates the presence of unsuitable lifelong characterological traits, since they are not typically amenable to treatment within the operational requirements of military service. Unfortunately, he has provided no medical evidence to support his claims of other mental health concerns. There is insufficient evidence to attribute his misconduct to another mental health condition, particularly as he denies having engaged in the misconduct. 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 AO concluded, "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 these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs and request to be discharged in lieu of trial by court martial, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the likely negative impact it had on the good order and discipline of your unit. The Board also noted that the misconduct that led to your request to be discharged in lieu of trial by court-martial was substantial and, more likely than not, would have resulted in a punitive discharge and extensive punishment at a court-martial. Therefore, the Board determined that you already received a large measure of clemency when the convening authority agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and likely punitive discharge. Further, the Board concurred with the AO and found that insufficient evidence exists to attribute your misconduct to a mental health condition. As explained in the AO, you provided no medical evidence in support of your claim. Therefore, the Board determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not be held accountable for your actions. Finally, the Board noted you provided no evidence to substantiate your contention that you were erroneously discharged based on false charges. The Board considered that you submitted a request to be discharged in lieu of trial by court-martial after consulting with legal counsel.

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. 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. 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 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,


2/8/2024

