



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. 5949-23
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 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 4 March 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 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). The Board also considered the advisory opinion (AO) furnished by 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 Navy and commenced active duty on 13 July 2000, after being previously rejected for military service in September 1999 for a positive drug/alcohol test. You admitted that you had used marijuana fifty times from 1995 to 2000. You did not indicate a history of

Attention Deficit Hyperactivity Disorder (ADHD) or “nervous trouble of any sort” on your enlistment physical.

On 16 January 2001, you commenced a one-day period of unauthorized absence (UA) that ended in your surrender. On 20 February 2001, you commenced another one-day period of UA that ended in your surrender.

On 11 April 2002, you commenced a period of UA that ended on 15 April 2002. On 24 May 2002, you received non-judicial punishment (NJP) for two specifications of UA, on 1 April 2002 and from 11 April 2002 to 15 April 2002. On 30 May 2002, you were issued an administrative remarks (Page 13) counseling concerning deficiencies in your performance and/or conduct. You were advised that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative discharge.

On 5 August 2002, you commenced a period of UA, during which time you missed your ship’s movement, that ended on 12 August 2002. On 16 August 2002, you received NJP for UA from 5 August 2002 to 12 August 2002, missing movement, failure to obey a lawful written order, dereliction of duty, and drunk on duty. On 18 August 2002, you received Page 13 counseling concerning those offenses and were advised that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative discharge.

On 6 December 2002, you commenced a period of UA, during which time you missed your ship’s movement, that ended on 4 February 2003. You were placed in pretrial confinement and presented with charges of breaking restriction, UA, missing movement through design, wrongful possession of ammunition onboard a Naval installation, and wrongful possession of marijuana.

On 27 February 2003, you submitted a written request for an Other Than Honorable (OTH) discharge in order to avoid trial by court-martial and admitted to breaking restriction, UA, missing movement, and wrongful possession of marijuana. Prior to submitting this request, you conferred with a qualified military lawyer at which time you were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. Your request was granted, and your commanding officer was directed to issue you an under OTH discharge. On 23 April 2003, you were so discharged.

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 change your discharge characterization of service and your contentions that you were diagnosed with ADHD at five years old and never received treatment, the untreated ADHD caused you to be impulsive and led to very poor decision making, and you are now taking medication and realize that you would not have made the mistakes you made in the Navy if you had utilized treatment previously. For purposes of clemency and equity consideration, the Board considered your statement and the Psychiatric Virtual Visit notes you provided. The Board noted that you did not provide advocacy letters or documentation of post-service accomplishments.

As part of the Board’s review process, a qualified mental health professional reviewed your

contentions and the available records and issued an AO dated 22 January 2024. The AO stated in pertinent part:

The Petitioner submitted outpatient psychiatric records from █. November 2021 records indicate that he presented complaining of ADHD symptoms. He was subsequently diagnosed with ADHD, Anxiety and Cannabis abuse. The records are inconsistent with his anecdote contained within his personal statement. The Petitioner noted that he was diagnosed with ADHD at the age of five; however, records noted above indicate that he had never been diagnosed with ADHD. There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He submitted evidence of post-service diagnoses of ADHD, Anxiety and Cannabis abuse that are temporally remote to service. His personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct.

The AO concluded, “it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition.”

After thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs and separation 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 fact it involved a drug offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. The Board also considered the likely negative impact your repeated misconduct had on the good order and discipline of your command. Finally, the Board noted that you were given multiple opportunities to address your conduct issues but you continued to commit misconduct, which ultimately led to your request for an undesirable discharge to avoid trial for your offenses. The Board believed that considerable clemency was extended to you when your request for discharge to avoid trial by court-martial was approved. Additionally, the Board concurred with the AO and determined that there is insufficient evidence of a mental health condition that may be attributed to your military service and insufficient evidence that your misconduct could be attributed to a mental health condition. As explained in the AO, there is no evidence that you were diagnosed with a mental health condition while in military service, or that you exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition.

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 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,

3/19/2024

