



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. 4766-23
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 offered an opportunity to reply 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 25 May 2000. On 1 April 2002, you began a period of unauthorized absence (UA) from your unit, and you remained absent until 2 April 2002. On 5 June 2005, you received non-judicial punishment (NJP) for violating Uniform Code of Military Justice (UCMJ) Article 112(a), for the wrongful use of cocaine as evidenced by a positive urinalysis. You did not appeal this NJP. On 1 August

2005, you were discharged from the Navy for misconduct with an Other than Honorable (OTH) characterization of service and assigned an RE- 4 reentry code. Consequently, you were notified that you were being processed for an administrative discharge due to misconduct by reason of drug abuse. You waived your right to consult with qualified counsel and your right to present your case at an administrative separation board. Ultimately, you were discharged on 1 August 2005 with an Other Than Honorable (OTH) characterization of service.

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 change your characterization of service, (b) your assertion that you were struggling with undiagnosed mental health conditions during your service related to your grandfathers passing, as well as several other traumatic incidents during military service, including fear of terrorist attack following the █ bombing, firing missiles, and witnessing bodies floating in the water during tsunami relief, (c) the impact that your mental health had on your conduct, and (d) your assertion that you don't know why the urinalysis came back positive for cocaine, as you only used marijuana. For purposes of clemency and equity 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 depression following your grandfather's death, and that "the marijuana helped me cope with the things that I was dealing with and served as an inhibitor to the stress and depression I was currently facing." In support of your request, you provided Department of Veterans Affairs (VA) evidence of diagnoses of Major Depressive Disorder, Anxiety Disorder, and Psychotic Disorder paranoid thoughts from November 2017 and September 2020. 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 2 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. He has provided VA evidence of mental health concerns that are temporally remote to military service and appear unrelated. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct. Additional records (e.g., in-service 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 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 NJP, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved a drug offense. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command. The Board determined that illegal substance abuse is contrary to the Navy core values and policy, renders such Sailor unfit for duty, and poses an unnecessary risk to the safety of fellow shipmates. The Board found that it was irrelevant whether you tested positive for cocaine, as the urinalysis indicated, or marijuana, as you admitted to. The Board felt that any type of drug abuse is against the Navy's "Zero Tolerance" drug policy.

In making this determination, the Board concurred with the advisory opinion that there was no convincing 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. The Board noted that you did not report that you were suffering from any mental or physical conditions that would have triggered referral for treatment. The Board felt that your post-service diagnosis is temporally remote to your service and fails to draw a sufficient nexus to your underlying misconduct. Further, the Board noted that you did not raise any claims of mental health concerns during your NJP. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board found 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. As a result, the Board determined your conduct constituted a significant departure from that expected of a Sailor and continues to warrant an OTH characterization.

While the Board carefully considered the evidence you submitted in mitigation and commends you for your post-discharge accomplishments, 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,

1/10/2024
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