



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. 7073-23
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 21 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, and applicable statutes, regulations, and policies, to include the Kurta Memo, the 3 September 2014 guidance from the Office of the Secretary of Defense concerning discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), the 24 February 2016 guidance from the Principal Deputy Under Secretary of Defense concerning discharge upgrade requests by PTSD or TBI (Carson Memo), and the 25 July 2018 guidance from the Under Secretary of Defense regarding application of equity, injustice, and clemency to discharge upgrade requests (Wilkie Memo) (collectively "the Clarifying Guidance"). The Board also considered the 30 January 2024 advisory opinion (AO) from a licensed clinical psychologist. Although you were provided an opportunity to respond to the AO, you chose not to do so.

A review of your record shows that you initially enlisted in the Navy's delayed entry program, and that you were notified of the initiation of administrative separation processing on 19 January 2000 due to a moral disqualification that existed prior to your entry. You were ultimately separated with an entry level separation on 3 February 2000. Enlistment documents in your

record demonstrate that you had a prior service non-minor misdemeanor conviction for possession of marijuana as well as another non-minor misdemeanor for petty larceny shoplifting. Available enlistment documents also contain a statement from you wherein you state that you never intend to use marijuana again.

You again enlisted in the Navy and commenced a period of active duty on 2 August 2000. In April 2001, you were issued a formal written counseling concerning your obligation to report offenses and warning you of the consequences of further misconduct. On or about 14 March 2002, you received nonjudicial punishment for unauthorized absence. In September 2003, you completed a pre-separation physical, a purpose of which was to determine whether you were medically qualified for separation. Your separation documents reflect that you stated you were in good health, and there is no indication that any provided recommended that you be reviewed for any potentially unfitting conditions. On 2 October 2003, you receive nonjudicial punishment again for use of a controlled substance after you tested positive for the use of marijuana. On 7 October 2003, you were notified of the initiation of administrative separation and your rights in connection therewith. You waived your right to an administrative board. On 9 October 2003, your commanding officer transmitted his recommendation that you be discharged with an Other Than Honorable (OTH) characterization of service. On 17 October 2003, you were so discharged.

In your petition, you request to have your discharge characterization upgraded from OTH to "Honorable," that your narrative reason for separation be changed from "Misconduct" to "Medical Separation," and that you be assigned to the Permanent Disability Retired List (PDRL). In support of your request, you contend that your hearing degraded while you were on active duty and that you were suffering from mental health problems due to matters in your personal life, such as the death of your mother. You assert that it was error that you were not sent to a medical evaluation board. You provided several written statements from shipmates to support your claims.

To assist it in reviewing your petition in light of your assertion that you suffered a mental health condition while on active duty, the Board obtained the 30 January 2024 AO, which was considered unfavorable to your position. According to the AO:

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 no medical evidence in support of his claims of a mental health condition. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his 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, "it is my clinical opinion there is insufficient evidence of a diagnosis of a mental health condition. There is insufficient evidence to attribute his misconduct to a health condition."

The Board carefully reviewed your petition and the material that you provided in support of your petition and disagreed with your rationale for relief. In keeping with the letter and spirit of the Clarifying Guidance, 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. With respect to your request for a service disability retirement, the Board observed that, in order to qualify for military disability benefits through the Disability Evaluation System (DES) with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or the member or to the welfare or safety of other members; the member's disability imposes unreasonable requirements on the military to maintain or protect the member; or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting.

In reviewing your record, despite its application of special and liberal consideration, the Board concluded that the preponderance of the evidence does not support a finding that you met the criteria for placement into the DES at any time in during your service. At the outset, the Board determined that there does not appear to be any documentation in your record, and you did not provide any, that anyone in your chain of command noted that you were unable to perform the duties of your rate due to any physical or mental health condition. Further, the Board observed the lack of any documentation that a medical provider recommended that you be reviewed by a medical evaluation board for any potentially unfitting conditions. To the contrary, the record evidence demonstrates that you received a pre-separation physical, during which a medical professional evaluated your physical and mental condition to determine if you were suitable for discharge, and there is no indication that you were found to be unfit for discharge. In fact, you stated to the medical provider that you were in good health. In addition, your record reflects that the actual reason for your discharge was due to misconduct. Thus, even assuming, *arguendo*, that you had a disability condition while you were in service, such misconduct would have taken precedence over your disability processing. Finally, the Board substantially concurred with the findings of the AO, which found no evidence that you were diagnosed with a mental health condition in military service, that you exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition, and that you provided no medical evidence in support of your claims of a mental health condition. Therefore, the Board determined insufficient evidence exists to support a finding that you were entitled to any military disability benefits.

With respect to your request for an upgrade of your discharge characterization from OTH to Honorable, the Board also applied special and liberal consideration and determined that relief was not warranted. In reaching its decision, the Board determined that your Other than Honorable characterization of service was rational, considering your service record included a nonjudicial punishment, a written warning, and a second nonjudicial punishment for drug abuse despite your prior warning. With respect to any mitigation, the Board substantially concurred with the AO, which found insufficient evidence to attribute your misconduct to a mental health condition. You did not provide evidence of mitigation sufficient to overcome the presumption of regularity inherent in your administrative processing and assignment of discharge characterization.

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,

4/5/2024

