



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. 9580-23
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 5 June 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 Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (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, dated 8 April 2024. Although you were provided an opportunity to comment on 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 entered active duty on 25 July 1988. On 18 April 1989, you received non-judicial punishment (NJP) for missing curfew. On 4 January 1990 and 19 July 1990, you received NJP for unauthorized absence (UA) totaling four days, insubordinate conduct, dereliction

in the performance of duty, destruction of personal property, and assault consummated by a battery. On 22 March 1991, a special court-martial (SPCM) convicted you of attempting to commit a breach of peace and two specifications of UA totaling 168 days. As part of your sentence, you were awarded a Bad Conduct Discharge (BCD). After the BCD was approved at all levels of review, on 2 September 1993, you were so discharged.

You previously applied to this Board for a discharge upgrade but were denied on 19 January 2022. The Board determined the mitigation evidence you submitted in support of your request was insufficient to offset the seriousness of your misconduct.

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 upgrade your discharge to Honorable and your contentions that you incurred Traumatic Brain Injury (TBI) while on active duty and your TBI mitigate the circumstances that led to your BCD, you are now rehabilitated, and you continue to improve daily. For purposes of clemency and equity consideration, the Board noted your previously submitted evidence of post-discharge accomplishments.

As part of the Board's review, a qualified mental health professional reviewed your request and provided the Board with an AO on 8 April 2024. The AO stated in pertinent part:

That although the Petitioner did incur two head injuries incurred in service, the evidence does not provide support for a TBI, as there is no evidence of on-going or residual associated medical or neurological symptoms in his service medical record after the initial emergency treatment of the injury. The Petitioner has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to provide a nexus with his misconduct. Additional records (e.g., post-service medical 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 TBI that may be attributed to military service. There is insufficient evidence to attribute his misconduct to TBI."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined your misconduct, as evidenced by your NJPs and SPCM, outweighed the potential mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and determined that it showed a complete disregard for military authority and regulations. The Board also concurred with the AO that there is insufficient evidence your misconduct could be attributed TBI. As explained in the AO, there is no evidence of on-going or residual associated medical or neurological symptoms in your service medical record after your initial treatment of your head injuries and you failed to provide evidence to support your claim. Therefore, the Board determined you were mentally responsible for the misconduct that formed the basis for your punitive discharge.

As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant a BCD. 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,

6/24/2024

