



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. 10678-23
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 26 July 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 (PTSD) (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). Additionally, the Board also considered an advisory opinion (AO) furnished by qualified mental health provider and your AO rebuttal submission.

You enlisted in the U.S. Navy and began a period of active duty service on 25 June 1985. Your pre-enlistment physical examination, on 17 November 1984, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms. On your pre-enlistment medical history, you disclosed both marijuana and "speed" usage. On 22 October 1985, you reported for duty on board the █ in █, █.

On 4 January 1986, your command issued you a “Page 13” counseling warning (Page 13) documenting your public intoxication. The Page 13 advised you that any further deficiencies in performance and/or conduct may result in disciplinary action and possible administrative discharge.

On 2 February 1987, your command issued you Page 13 documenting your being consistently late for duty, and late when returning from liberty status. The Page 13 advised you that any further deficiencies in performance and/or conduct may result in disciplinary action and possible administrative discharge.

On 6 April 1987, your command issued you Page 13 documenting your being late for work. The Page 13 advised you that any further deficiencies in performance and/or conduct may result in disciplinary action and possible administrative discharge.

On 18 May 1987, you received non-judicial punishment (NJP) for the wrongful use of a controlled substance (marijuana). You did not appeal your NJP. While you were participating in a weekly urinalysis surveillance program, during the week of 5 August 1987, you again tested positive for marijuana.

Following your second positive drug test, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You waived your rights to consult with counsel, submit written statements, and to request a hearing before an administrative separation board. In the interim, your drug dependency screening indicated you were not drug dependent. Ultimately, on 17 September 1987, you were discharged from the Navy for misconduct with an Other Than Honorable conditions (OTH) characterization of service and were assigned an RE-4 reentry code.

On 1 November 2021, this Board denied your initial petition for discharge upgrade relief. You did not proffer any mental health contentions with your 2021 petition.

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 change to your basis for separation to Secretarial Authority. You contend that: (a) the Navy made a material error in discretion by separating you with an OTH; specifically, your chain of command erred in their discretionary powers when they charged you with drug abuse from one occasion rather than providing you with the necessary rehabilitative services, (b) the chain of command also erred in their failure to provide you with the appropriate resources for grief counseling after your loss of multiple family members, which ultimately led you to find relief by using marijuana, (c) but for your command's error, you would have received a greater discharge characterization, (d) the material error was objectively clear when analyzed through a modern lens of mental health, (e) given your mental health and traumatic personal events you experienced while serving, there were mitigating factors involved in your misconduct drug use that was not adequately considered by your command at the time, (f) you have had to live with the shame and embarrassment that accompanies anything OTH discharge characterization for nearly thirty-seven (37) years, and (g) you have still persevered and created a successful and flourishing life

for yourself and those around you. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

As part of the Board review process, a licensed clinical psychologist (Ph.D.) reviewed your contentions and the available records, and issued an AO dated 4 June 2024. The Ph.D. stated in pertinent part:

Petitioner submitted five character references and post-service accomplishments in support of his claim. There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service, or that he exhibited any symptoms of a mental health condition aside from possible undiagnosed substance abuse. His statement is not sufficiently detailed to provide a nexus with his misconduct. Additional records (e.g., mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. 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."

Following a review of your AO rebuttal submission, the Ph.D. did not change or otherwise modify their original AO.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. In accordance with the Hagel, Kurta, and Wilkie Memos, 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. However, the Board concluded 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. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Additionally, even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record reflected that your 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 not be held accountable for your actions.

The Board was not persuaded by your argument that the Navy was responsible in your misconduct resulting in your OTH characterization. The Board determined you were mentally responsible for your behavior and to ensure you conformed to acceptable standards of good order and discipline. The Board noted that you received three (3) counseling warnings prior to your first NJP, noting your deficiencies and outlining the consequences for continued misconduct. Additionally, based on your factual situation and circumstances at the time of your discharge, the Board concluded that your command was justified in processing you for drug abuse and separating you with an OTH characterization of service upon your discharge from active duty.

The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. Additionally, the Board determined that illegal drug use is contrary to Navy core values and policy, renders such service members unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. 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 determined that characterization under OTH conditions is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor.

As a result, the Board determined that there was no impropriety or inequity in your discharge and concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. 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,

7/30/2024

