



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. 336-24
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 16 August 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 both an advisory opinion (AO) furnished by qualified mental health provider. Although you were provided an opportunity to submit an AO rebuttal, 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 U.S. Navy and began a period of active duty service on 8 July 1993. You underwent an enlistment waiver interview after disclosing on DD Form 1966 (Record of Military Processing – Armed Forces of the United States), a 1991 aggravated assault and battery charge in ██████████ that you represented was dismissed. Your pre-enlistment physical examination, on 12 March 1993, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms, or any mental health history or counseling. On 21 October 1993, you reported for duty on board the ██████████ in ██████████.

On 2 June 1994, you received non-judicial punishment (NJP) for two (2) separate assault specifications. You received the maximum punishment permitted for your offenses. You did not appeal your NJP. On the same day, your command issued you a “Page 13” counseling warning (Page 13) documenting your NJP. The Page 13 advised you that any further deficiencies in your performance and/or conduct may result in disciplinary action and processing for administrative separation. You did not submit a Page 13 rebuttal statement.

On 25 March 1995, you were convicted at a Summary Court-Martial (SCM) for the assault of a shipmate. You were sentenced to forfeitures of pay and confinement for fifteen (15) days. The Convening Authority approved the SCM findings and sentence. On 6 April 1995, you were released from confinement and returned to full duty status.

On 6 April 1995, your command notified you in writing that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense as evidenced by: (a) your 2 June 1994 NJP, and (b) your SCM conviction on 25 March 1995. On 6 April 1995, you elected in writing to both consult with counsel and to request a hearing before an administrative separation board (Adsep Board). You also elected to receive copies of documents forwarded to the Chief of Naval Personnel supporting the basis for the proposed separation. In the interim, your separation physical examination, on 12 April 1995, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 6 April 1995, an Adsep Board convened in your case on board the ██████████. At the Adsep Board, you were represented by a Navy Judge Advocate and you provided a sworn statement on your own behalf. Following the presentation of evidence and any witness testimony, the Adsep Board members unanimously determined that you committed misconduct due to the commission of a serious offense and recommended that you be separated with an under Other Than Honorable conditions (OTH) discharge characterization.

On 20 May 1995, your commanding officer (CO) recommended to the Separation Authority that you receive an OTH discharge characterization. Your CO stated, in part:

[Petitioner] is a danger to his shipmates as evidenced by a pattern of violent behavior. His actions can no longer be tolerated. I concur with the findings and recommendations of the administrative discharge board, specifically that [Petitioner] be separated with an Other Than Honorable characterization.

Ultimately, on 28 June 1995, you were discharged from the Navy for misconduct with an OTH characterization of service and assigned an RE-4 reentry code.

On 17 March 2011, this Board denied your first discharge upgrade petition. In requesting a discharge upgrade, you contended that you turned your life around and desired peace of mind.

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 contentions that: (a) substantive and procedural irregularities exist, and the chain of command committed material error and injustice - actions that operated to prejudice your substantial rights, and (b) your chain of command: (i) improperly processed you for administrative separation for misconduct without sufficient cause, (ii) improperly denied you the opportunity for an administrative separation/discharge board hearing whilst pursuing an OTH characterization of service, (iii) failed to adequately investigate or otherwise document the matters purportedly forming the basis(es) for your separation, (iv) failed to properly medically screen you for future service and/or separation from the USN prior to discharge, and (v) impermissibly discriminated against you on the basis of race, through both actual and unconscious bias and action. 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 29 May 2024. The Ph.D. stated 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. Temporally remote to his military service, he has received diagnoses of mental health concerns that have been attributed to military service by a civilian psychiatrist. Unfortunately, his personal statement is not sufficiently detailed to provide a nexus with his misconduct, given his claims of self-defense and innocence. 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 Ph.D. concluded, "it is my clinical opinion there is post-service evidence from a civilian psychiatrist of a mental health conditions 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 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 of any nexus between any mental health conditions and/or related symptoms and your cumulative misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to any mental health-related conditions or

symptoms. Moreover, 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 aggregate 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 determined, contrary to your contentions, that no substantive or procedural irregularities existed with your administrative separation processing for your three (3) separate substantiated assault specifications. The Board also noted that you had the absolute right to appeal your NJP to higher authority, as well as the right to object to trial by SCM, had you believed that the command did not adequately investigate or document certain matters forming the basis for your separation. The Board noted that the record reflects you were also properly advised in writing of your due process rights in connection with the Adsep Board, and that you elected your rights in writing on 6 April 1995. The Board also noted that neither you nor your assigned legal counsel raised any procedural, substantive, or evidentiary issues either before, during, or after your Adsep Board. The Board also determined that you did not provide any credible and/or convincing evidence to substantiate your claims of racially disparate treatment, bias, and/or discrimination. Lastly, the Board noted you received a separation physical examination on 12 April 1995 and that the Medical Officer determined you were qualified for separation and to perform all duties of your rank or rate at sea and on foreign shores.

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. The Board determined that an OTH characterization 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 cumulative misconduct and disregard for good order in discipline clearly merited your discharge. 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,

8/22/2024

