



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. 917-24
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 2 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 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 30 July 2001. Your pre-enlistment physical examination, on 10 October 2000, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 9 November 2001, you reported for duty on board the █

On 6 May 2003, you received non-judicial punishment (NJP) for an unspecified offense. There is no indication in the record that you appealed your NJP. On 23 June 2003, you received NJP

for: (a) failure to obey a lawful order/regulation, (b) larceny, and (c) carrying a concealed weapon. You did not appeal your NJP. On 3 July 2003, you received NJP for failing to obey a lawful order/regulation. You did not appeal your NJP.

Following your third NJP, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. In the interim you received an adverse performance evaluation for the period ending 11 July 2003. The "Comments on Performance" section (Block 43) described the following:

This report submitted upon member's separation from active Naval Service under Other Than Honorable conditions. ██████████ lack of respect for authority has been a continual problem since reporting onboard. ██████████ was found guilty during Commanding Officer's NJP of violation of UCMJ Article 134 (Carrying a Concealed Weapon) and Article 92 (Disobeying Order or Regulation). His immature and insubordinate behavior, while assigned to ██████████ ██████████, demonstrated his total disregard for NAVY CORE VALUES. He has been consistently unwilling to maintain a full seabag. Due to his total aversion to work, ██████████ requires constant supervision to attempt to complete even the simplest tasks. ██████████ is an unreliable and untrustworthy individual who has been a burden to his Chain of Command. He has steadfastly refused all efforts to correct his many deficiencies. ██████████ has no potential for further Naval Service.

Ultimately, on 11 July 2003, you were discharged from the Navy for misconduct with an under Other Than Honorable conditions (OTH) characterization of service and were assigned an RE-4 reentry code.

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 a change to your record to reflect a Secretarial Authority discharge. You contend that: (a) you are a veteran of the United States Navy who suffers from chronic PTSD as a result of your deployments to the ██████████ and ██████████ in 2002, (b) during your deployment, the ██████████ came into contact with a pirate ship, and you fired a 50-caliber weapon at the ship, which eventually retreated, (c) later during the same tour you and others witnessed a fellow deck seaman attempt to take his own life, (d) these two incidents led you to developing PTSD, which caused severe, chronic symptoms including nightmares, flashbacks, depression, anxiety, insomnia, and guilt, (e) the Board should upgrade your discharge based on error and injustice, (f) your discharge was based on error as you were not afforded due process as required by the U.S. Navy prior to receiving an OTH discharge, (g) your discharge was based on injustice because you suffered from PTSD on active duty, which stemmed from your time in Djibouti and the Persian Gulf, (h) you were not diagnosed with PTSD until after you were discharged, though you were experiencing symptoms on active duty, (i) but for your PTSD symptoms, you would not have committed the misconduct leading to your discharge, and (j) your unrecognized and untreated PTSD symptoms serve to mitigate, excuse, and outweigh any of your misconduct. 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 10 June 2024. The Ph.D. stated in pertinent part:

There is no evidence he was diagnosed with a mental health condition during military service. Post-service, the VA has granted service connection for PTSD. Unfortunately, his available records are not sufficiently detailed to provide a nexus with all of his misconduct. While it is possible that he may have carried a concealed weapon due to hypervigilance symptoms associated with PTSD, it is difficult to attribute larceny to PTSD. 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 the VA of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute all of his misconduct to PTSD or another 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 of any nexus between any mental health conditions and/or related symptoms and your 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 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 cumulative 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. Lastly, the Board noted that Department of Veterans Affairs (VA) eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only are not binding on the Board.

The Board determined that you did not submit any convincing or credible evidence to substantiate your contention that you were not afforded due process prior to your separation. The Board concluded that the government enjoys the presumption of regularity in the conducting of its affairs and regarding its official records. Therefore, absent substantial evidence to the contrary, the Board determined the presumption of regularity applies in your case.

The Board observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average calculated from your available performance evaluations during your enlistment was approximately 2.0 in conduct. Navy regulations in place at the time of your discharge recommended a minimum trait average of 2.5 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your cumulative misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your serious misconduct and a repeated failure to conform to basic military standards of good order and discipline, all of which further justified your OTH characterization.

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 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. Moreover, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits or enhancing educational or employment opportunities.

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, 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,

8/7/2024

