



**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. 1113-24  
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 Board waived the statute of limitation 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 23 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 the 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 to 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). The Board also considered the advisory opinion (AO) of a qualified mental health provider and your response to the AO.

You enlisted in the Navy after receiving a waiver for civil offenses of driving under the influence (DUI) of alcohol and patronizing a prostitute. You began a period of active duty on 9 January 2003. You served without incident for more than three years, to included receiving a personal award for serving from January 2006 through June 2006 as a member of the █ during anti-piracy missions. You reenlisted on 6 October 2006 and commenced a second period of active duty.

Between 2 April 2007 and 9 April 2007, you absented yourself without authority. A medical evaluation on the date of your return to military authority documented that you were having an acute reaction to stress, with a need to rule out anxiety disorder, and that you were experiencing bereavement without complications after the death of two close friends within a 45-day period. You were referred to the psychiatry clinic, although your records do not indicate that you followed up on this referral. On 19 April 2007, you were subject to nonjudicial punishment (NJP) as a result of your violation of Article 86 of the Uniform Code of Military Justice due to your unauthorized absence (UA) and were reduced to the paygrade of E-4 with suspended forfeitures of pay.

You had a second period of UA from 8 to 9 May 2007, after which you were subject to a routine urinalysis. On 11 May 2007, you received a second NJP for your UA period in addition to violations of Article 92, for failure to obey an order or regulation, and Article 112 for being drunk on duty on 8 May 2007. Your punishment included the vacation of your previously suspended forfeitures of pay and reduction to the paygrade of E-3 with additional, but suspended, forfeitures of pay. You were also issued administrative counseling warning you that continued misconduct could result in administrative separation under adverse conditions. The urinalysis test taken on 9 May 2007 returned a positive result for use of cocaine, and the portion of your second NJP punishment which had previously been suspended was also vacated.

Pending disciplinary action for your drug use, you absented yourself on 22 June 2007 and remained absent until you were apprehended by civilian authorities on 1 March 2008.

Unfortunately, the documents pertinent to your administrative separation are not in your official military personnel file (OMPF). Notwithstanding, the Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Your Certificate of Release or Discharge from Active Duty (DD Form 214), reveals that you were separated from the Navy on 18 March 2008 with an Other Than Honorable (OTH) characterization of service, your narrative reason for separation is "In Lieu of Trial by Court-Martial," your separation code is "KFS," and your reenlistment code is "RE-4."

Based on the information contained on your DD Form 214, it appears that you submitted a voluntary written request for an OTH discharge for separation in lieu of trial (SILT) by court-martial. In the absence of evidence to contrary, it is presumed that prior to submitting this voluntary discharge request, you would have conferred with a qualified military lawyer, been advised of your rights, and warned of the probable adverse consequences of accepting such a discharge. As part of this discharge request, you would have acknowledged that your characterization of service upon discharge would be an OTH.

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 and change your narrative reason for separation and separation code to reflect "Secretarial Authority." You contend that you developed service-connected post-traumatic stress disorder (PTSD) from traumas experienced during your service with the anti-piracy boarding team, especially after you were injured and tasked with documenting actions taken during a prisoner mission which included captured child pirates. You explain that you were referred by your

command for therapy and to speak with the Chaplain on your difficulty in adapting to a desk job after your time with the boarding team. For purposes of clemency and equity consideration, you submitted substantial progress notes as well as a letter from your treating psychologist with the Department of Veterans Affairs (VA) where you attend approximately six monthly appointments for treatment of your PTSD. You also submitted a personal statement attesting that you participate in a variety of volunteer efforts, although you did not submit any substantiating documentation or advocacy letters.

Because you contend that PTSD or another mental health condition affected your discharge, the Board also considered the AO. The AO stated in pertinent part:

During military service, the Petitioner was diagnosed with a stress-related mental health condition. Post-service, the VA has granted service connection for PTSD. His misconduct does follow his sea deployment, where he encountered his purported traumatic precipitants. It is possible that his UA, disobedience and substance use could be considered behavioral indicators of PTSD. However, it is difficult to attribute his misconduct solely to PTSD symptoms, given pre-service problematic alcohol behavior that appears to have continued in service. 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 in-service evidence of a mental health condition that may be attributed to military service. 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."

In response to the AO, you provided additional arguments regarding the circumstances of your case. After a review of your response, the AO remained unchanged.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs and SILT discharge, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Further, the Board noted that your misconduct included a drug offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members.

The Board applied liberal consideration to your contended mental health condition consistent with the partially favorable advisory opinion. Additionally, although the advisory opinion found insufficient evidence to attribute all of your misconduct to PTSD or another mental health condition, the Board concurred with your rebuttal to the AO to the extent that the incident your pre-service DUI offenses was more than a decade prior to your military service and you appear to have served your entire first enlistment without any alcohol or drug related issues. However, to the extent that the Board applied liberal consideration to your traumatic experiences and the potential impact that might have had on your initial UA periods or even your potential self-medication, the Board noted that your final period of UA, which lasted for more than eight

months and was terminated by your apprehension, would not normally be considered attributable to a mental health condition. Therefore, the Board 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.

Finally, the Board also noted that the misconduct that led to your request to be discharged in lieu of trial by court-martial was substantial and, more likely than not, would have resulted in a punitive discharge and/or extensive punishment at a court-martial. Therefore, the Board determined that you already received a large measure of clemency when the convening authority agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and possible 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 an OTH characterization. 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 the 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 is attached 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,

9/16/2024

