



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. 2003-24
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 1 November 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 considered an advisory opinion (AO) furnished by qualified mental health provider. Although you were provided an opportunity to respond to the AO, you chose not to do so.

You enlisted in the U.S. Navy and began a period of active duty service on 24 February 2003. You received an enlistment waiver for one (1) non-minor misdemeanor. Your pre-enlistment physical examination, on 24 July 2002, and self-reported medical history both noted no psychiatric or neurologic issues, history, or symptoms. You expressly denied any “seizures, convulsions, epilepsy or fits,” on your medical history.

On 11 September 2003, you commenced an unauthorized absence (UA) that terminated on 12 September 2003.

On 22 January 2004, you received non-judicial punishment (NJP) for: (a) failing to obey a lawful order/regulation, (b) UA, and (c) being drunk on duty. You did not appeal your NJP.

On 28 April 2004, a Navy Drug Screening Laboratory message indicated you tested positive for cocaine at 1,080 ng/ml, well above the Department of Defense established testing cutoff of 100 ng/ml. On 3 May 2004, you received NJP for the wrongful use of a controlled substance (cocaine). You did not appeal your NJP.

Consequently, your command notified you of administrative separation proceedings by reason of misconduct due to drug abuse. You waived your rights to consult with counsel and to request a hearing before an administrative separation board. Ultimately, on 16 July 2004, you were separated from the Navy for misconduct with an OTH discharge characterization 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 contentions that: (a) you were discharged for testing positive for marijuana, (b) you were self-medicating and you did not know what was wrong with you, (c) you have been diagnosed with localization-related epilepsy and suffer from seizures, (d) you receive partial social security disability income and live in subsidized housing for homeless, disabled veterans, (e) due to your OTH discharge you cannot request veterans benefits, and without additional income you are at risk for homelessness again. For purposes of clemency and equity consideration, the Board considered the totality of the evidence you provided in support of your application.

A licensed psychiatrist (M.D.) reviewed your contentions and the available records, and issued an AO dated 20 September 2024. As part of the Board's review, the Board considered the AO. The AO stated in pertinent part:

Petitioner's in-service personnel and health care records document his in-service diagnosis of Alcohol Abuse and refusal for treatment. His in-service personnel records document disciplinary actions for drunk on duty and wrongful use of cocaine, which resulted in his misconduct discharge with an Under Other Than Honorable characterization of service. Review of available in-service record does not provide evidence of other medical or psychological symptoms or behavioral changes indicative of any tumor of the brain or other neurological conditions.

During numerous interactions with the medical department, command DAPA, and his chain of command related to his in-service misconduct and administrative separation proceedings, there was no evidence of any concerns by Petitioner, his clinicians, or chain of command that he suffered from any mitigating medical or psychological conditions other than the identified Alcohol Abuse condition.

Post-discharge civilian medical records indicated he was diagnosed and treated for a benign brain tumor of the meninges in 2017, and subsequently developed epilepsy related to his surgery. The occurrence of this diagnosis and treatment was temporally distant to his military service.

After review of all available objective clinical and non-clinical evidence, in my medical opinion, at the time of discharge from military service, Petitioner did not suffer from any medical or mental health conditions other than his diagnosed condition of Alcohol Abuse. Petitioner did not evidence any signs or symptoms of a brain tumor or other neurological condition during his military service. His benign meningeal brain tumor was discovered “following an accident at work” for which he underwent surgical resection in 2017 with subsequent development of epilepsy.

The M.D. concluded, “in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner’s contention he suffered from a medical or mental health condition that may be attributed to his military service, other than his documented Alcohol Abuse condition. There is insufficient evidence to attribute his in-service misconduct to a medical or 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 purported medical or mental health conditions and/or related symptoms and your misconduct and determined that there was insufficient evidence to support the argument that any such medical and/or 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 medical or mental health-related conditions or symptoms. Even if the Board assumed that your misconduct was somehow attributable to medical or any mental health conditions, the Board unequivocally concluded that the severity of your cumulative misconduct far outweighed any and all mitigation offered by such medical or 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 also noted that Social Security Administration (SSA) eligibility determinations for disability compensation, and other SSA-administered benefits are for internal SSA purposes only. Such SSA eligibility determinations are not binding on the Department of the Navy and have no bearing on previous active duty service discharge characterizations.

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 1.0 (out of a possible 5.0) in conduct. Navy regulations in place at the time of your discharge recommended a minimum trait average of 2.50 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 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 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,

11/19/2024

