



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

██████████
Docket No. 5414-24
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 20 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 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, 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)/mental health condition (MHC) (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). In addition, the Board considered an advisory opinion (AO) from a qualified mental health professional. 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 entered active duty on 16 August 1978. You subsequently completed this enlistment with an Honorable characterization of service on 11 January 1983 and immediately reenlisted.

In January 1983, you were arrested by civilian authorities and charged with assault, kidnapping, and rape; however, you were later released pending investigation. On 16 August 1983, you were issued a counseling warning regarding your obligations and support of your legal dependents. On 22 December 1983, you received non-judicial punishment (NJP) for two specifications of sleeping on post and unauthorized absence (UA). On 10 February 1984, you were found guilty on assault with intent to commit sexual assault and second degree sexual assault. You were later sentenced to 10 years in Adult Correction Institute and three years confinement, to be served concurrently, and probation on release.

Consequently, the Commanding Officer (CO) notified you for administrative separation for misconduct civilian conviction and commission of a serious offense. You elected to have an administrative discharge board (ADB) hear your case. Prior to your ADB, on 9 May 1984, you received your second NJP for UA and failure to obey a lawful order. On 16 May 1984, the ADB found misconduct and recommended you be separated with an Other Than Honorable (OTH) characterization of service. The CO forwarded the Board's recommendation to the Separation Authority (SA). On 12 July 1984, you were arrested by civilian authorities and charged with rape of a 62 years old woman¹. The SA accepted the ADB's recommendation, and you were discharged on 20 July 1984.

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 contention that you got depressed from racial prejudice and your divorce. You further contend that you were denied Department of Veterans Affairs (VA) benefits. 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 28 September 2024. The Ph.D. stated in pertinent part:

The Petitioner submitted articles on the Pact Act 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. His statement is not sufficiently detailed to provide a nexus with his misconduct. He did not submit any medical evidence in support of his claim. Furthermore, the nature and seriousness of his misconduct is not typical of someone who is suffering from a mental health condition. 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."

¹ You provided evidence that you were later acquitted in this case in addition to other post-discharge arrests.

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 civilian conviction, 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. The Board also considered the likely discrediting effect your civil conviction had on the Navy. Further, the Board concurred with the AO and determined there is insufficient evidence that your misconduct could be attributed to a mental health condition. As explained in the AO, the nature and seriousness of your misconduct is not typical of someone who is suffering from 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, 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 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, 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.

In reviewing your record, it appears you may be eligible for VA benefits based on your first period of Honorable service. The Board recommends you contact your nearest VA office regarding your eligibility for services.

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,

12/11/2024

