



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

██████████
Docket No. 10882-24
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of the SM's (SM) naval record pursuant to Title 10, United States Code, Section 1552. After careful and conscientious consideration of relevant portions of SM's 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 14 May 2025. 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.

SM enlisted in the Navy with a pre-service history of marijuana use and began a period of active duty on 22 December 1986. On 7 March 1988, he was hospitalized following emergency medical care following a suicidal gesture in the context of marital stress. Although SM was diagnosed as having a mixed Personality Disorder (PD), which existed prior to his entry onto active duty, he was found fit for full duty. He then absented himself without authority on 17 March 1988 but was apprehended by military authorities the following day. He received nonjudicial punishment (NJP) for his violation of Article 86 of the Uniform Code of Military Justice (UCMJ) in addition to an offense under Article 112a due to wrongful use of cocaine. As a result of his misconduct, he was issued an administrative warning advising him that he was

being retained in the Navy but that further misconduct could result in administrative separation or disciplinary action.

He incurred another period of unauthorized absence (UA) from 25 May 1988 through 29 July 1988; during which he missed his ship's movement on two separate occasions. He was ultimately apprehended by civil authorities and returned to military authority. He negotiated a pre-trial agreement which insulated him from confinement in excess of 60 days but did not restrict sentencing with respect to a potential punitive discharge. On 15 September 1988, SM was tried by Special Court-Martial (SPCM) and found guilty of one charge and specification under Article 86 for his UA and for two specifications under Article 87 for missing his ship's movement through neglect. During his unsworn statement to the military judge, he expressly stated that he had not been able to adapt to military life. He attributed his UA to his failure to adapt, expressly asked the court not to retain him, and requested a lenient sentence in other respects after acknowledging the severity of the punitive discharge he had requested. Although his sentence did include a Bad Conduct Discharge (BCD), he elected to voluntarily waive his appellate rights, acknowledging that he did so only after consultation with his trial defense counsel and expressing his understanding that he was relinquishing the traditional benefits associated with his right to counsel. Following the completion of legal review and advice to the convening authority, his BCD was approved and executed on 20 December 1988.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie, Kurta, and Hagel Memos. These included, but were not limited to, your desire to upgrade SM's discharge and change his narrative reason for separation to convenience of the government for the primary purpose of obtaining approval from the Department of Veterans Affairs (VA) to inter his remains in a national cemetery collocated with your parent's remains. You submit alternative contentions that his discharge warrants an upgraded characterization on the basis of liberal consideration due to his mental health issues following his suicide attempt and PD diagnosis, that it warrants an upgrade under considerations of clemency based on his in-service record and post-discharge character and conduct, and/or that it warrants an upgrade on the basis of injustice due to ineffective assistance of legal counsel (IAC) during his SPCM proceedings. For the purpose of clemency and equity consideration, the Board considered the totality of your application.

Because you also contend that a mental health condition affected the circumstances of the SM's discharge, the Board considered the AO. It stated in pertinent part:

[The SM] was appropriately referred for psychological evaluation during his enlistment and properly evaluated during an inpatient hospitalization. His personality disorder diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed by the mental health clinician. A personality disorder diagnosis is pre-existing to military service by definition, and indicates lifelong characterological traits unsuitable for military service, since they are not typically amenable to treatment within the operational requirements of Naval Service. Unfortunately, there is no medical evidence to support his claims of another mental health concern. His in-service misconduct appears to be consistent with his diagnosed personality disorder, rather than evidence of another mental health condition incurred in or exacerbated by military service.

The AO concluded, “There is insufficient evidence from of a mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to a mental health condition, other than personality disorder.”

In response to the AO, you provided additional evidence in support of your application. After reviewing your rebuttal evidence, the AO remained unchanged.

After thorough review, the Board concluded the potentially mitigating factors you submitted for consideration were insufficient to warrant relief. Specifically, the Board determined that SM’s misconduct, as evidenced by his NJP and SPCM conviction, substantially outweighed the mitigating factors. In making this finding, the Board considered the seriousness of SM’s misconduct and found that his conduct showed a complete disregard for military authority and regulations. The Board observed SM was given an opportunity to correct his conduct deficiencies but chose to continue to commit misconduct; which led to his BCD. His conduct not only showed a pattern of misconduct but was sufficiently pervasive and serious to negatively affect the good order and discipline of SM’s command.

Further, the Board considered that Petitioner’s 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.

Additionally, the Board concurred with AO that there is insufficient evidence to attribute his misconduct to a mental health condition, other than personality disorder. As explained in the AO, his in-service misconduct appears to be consistent with his diagnosed personality disorder, rather than evidence of another mental health condition incurred in or exacerbated by military service.

Furthermore, with respect to the propriety and fairness of the punitive discharge, the Board concluded that the SM received the benefit of his bargain in that he chose to negotiate in favor of the immediate benefit of reduced confinement while specifically requesting the court to discharge him rather than seeking an alternative outcome, such as administrative separation.

Finally, with respect to the contentions related to IAC, the Board noted that it involves a two pronged test. First, the trial defense attorney’s performance must have fallen below an objective standard of reasonableness such that the actions or omissions were not what a reasonably competent lawyer would have done under similar circumstances. Second, the deficient performance must have had a reasonable probability of changing the outcome of the proceedings. For the Board’s purposes, the effect on the outcome specifically focused on whether there is a reasonable probability that such alleged defects might have altered the inclusion of a punitive discharge as part of the SPCM sentence. In the instant case, the Board observed that the SM negotiated a pre-trial agreement with the particular intention of insulating himself from prolonged confinement; an intention which his unsworn statement reiterated. In fact, after pleading guilty to the offenses of which he was convicted, the SM expressly requested the military judge not to retain him and to take into account the severity of a punitive discharge when considering the remainder of his sentence. In light of his specific request to be punitively discharged, the Board found insufficient evidence to support a claim of IAC, notwithstanding the numerous contentions alleged under the first prong of the test. Rather, and even assuming

arguing that one or more of the alleged deficiencies rose to the level of deficient performance, the Board concluded that the alleged deficiencies would not have altered the outcome of the SPCM sentencing proceedings. Similarly, the Board found insufficient evidence of procedural injustice from the record of the SPCM trial proceedings, notwithstanding that the guilty plea and sentencing concluded in under an hour. In this regard, the Board noted that the SM pleaded guilty to a simple charge of UA and the concurrent offenses of missing movement during the period of absence; requiring minimal inquiry to establish that he was able to plead providently to the offenses. Likewise, the Board found insufficient evidence that the SM failed to adequately appreciate the consequences of a punitive discharge. Rather, the Board found his unsworn statement specifically sought reduced punishment otherwise in light of the severity of the consequences inherent in the punitive discharge which he had requested.

As a result, the Board determined that there was no impropriety or inequity in SM's discharge and concluded that his misconduct and disregard for good order and discipline clearly merited his 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 SM's 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,

6/2/2025

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