



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: 5492-20

Ref: Signature Date



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 was insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 9 July 2021. The names and votes of the members of the panel 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 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo).

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You enlisted in the Marine Corps and began a period of active duty in July 2011. In December 2013 you deployed in support of Operation Enduring Freedom, serving at █. Your deployment concluded in July 2014. On 15 October 2014, you were evaluated at Naval Hospital, █ for mental health concerns. In January 2015, you completed a Post-Deployment Mental Health Assessment which indicated that you were receiving care for depression over the past year. On 19 August 2015, you received nonjudicial punishment (NJP) for violating Article 134 (General Article, Adultery) of the Uniform Code of Military Justice. On 6 April 2016, you were involved in a serious single-motorcycle accident that resulted in a

Traumatic Brain Injury. Your Command opened a Line of Duty (LOD) Investigation into the accident. On 13 May 2016, the Investigating Officer concluded that your injuries resulting from the motorcycle accident that resulted in a Traumatic Brain Injury were not in the LOD because they were the result of your own misconduct. On 8 July 2016, you received NJP for failure to obey a lawful order or regulation—speeding in excess of 140 miles per hour. Your service record also reflects Administrative Remarks (1070) dated 8 July 2016, in which you were informed that you may receive a general discharge (under honorable conditions) upon release from Active Duty based on a pattern of misconduct as evidenced through two Squadron Level NJPs and a previous page 11 counseling. On 17 July 2016, you were discharged from the Marine Corps, upon Completion of Required Active Service, and received a general discharge and a reentry (RE) code of RE-4.

You previously petitioned the Board (NR19-8600), seeking a change to your LOD determination in part to access medical care for your injuries resulting from the motorcycle accident. You stated that you suffer from long-term injuries and are not able to receive medical care from Veterans Affairs (VA) due to the LOD determination. You assert that you were suffering from Post Traumatic Stress Disorder (PTSD) at the time of the accident, and that evidence regarding your mental health condition was not available at the time of the LOD determination. You contended that PTSD likely impacted your decision-making ability. The previous Board considered your contention regarding PTSD and its impact on the motorcycle accident, and found that the circumstances surrounding your motorcycle accident were not reflective of symptoms typically associated with PTSD. The Board noted that information in your record indicated that you passed an officer at a high rate of speed and then accelerated to 143 miles per hour. The Board found that the nature of your conduct does not appear to be clearly connected to the symptomology of the disorder.

In your current application, you seek to have all pertinent documentation amended to reflect that the injuries you sustained on 6 April 2016, as a result of the motorcycle accident were incurred in the line of duty and were not due to willful misconduct. You also request any other relief the Board deems appropriate. You provide new evidence, to include a 12 June 2020 evaluation from a Licensed Psychologist, Forensic Psychology in which the Licensed Psychologist opined that your sensation seeking behavior and subsequent purchase of a motorcycle were manifestations of your service-related PTSD. Based on your Legal History, the Licensed Psychologist further opined that you conducted your life absent of willful misconduct, with the exception of a parking ticket and that your purchase of a motorcycle was suggestive of the unconscious nature of the dissociative subtype of your PTSD. The Executive Summary provided by the Licensed Psychologist states that you exhibited dissociative PTSD symptoms during your motorcycle accident, and that you could neither understand nor appreciate the nature of your actions that resulted in the motorcycle accident.

Your request was fully and carefully considered by the Board in light of the Secretary of Defense's Memorandum, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requested by Veterans Claiming Post Traumatic Stress Disorder" of 3 September 2014, Principal Deputy Under Secretary of Defense's Memorandum, "Consideration of Discharge Upgrade Requests Pursuant to

Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or TBI” of 24 February 2016, and the Under Secretary of Defense’s Memorandum “Clarifying Guidance to Military Discharge Review Board and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment” of 25 August 2017. The Board also reviewed your petition in light of the Under Secretary of Defense’s Memorandum, “Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations” of 25 July 2018.

As part of the review process, a Physician Advisor reviewed your request, and issued an Advisory Opinion dated 11 April 2021. The Advisory Opinion in stated that your 2019 and your current application for review lend credibility to your contention that your misconduct was not willful. Based on the available evidence, the Advisory Opinion concluded that there is sufficient evidence that you exhibited behaviors associated with PTSD during your military service and that your misconduct may be mitigated by PTSD.

The Board, in its review of your entire record and application, carefully weighed all potentially mitigating factors, including your contention that you were suffering from PTSD, which impacted your ability to understand nor appreciate the nature of your actions that resulted in the motorcycle accident. The Board weighed the information in both the 12 June 2020 evaluation from a Licensed Psychologist, Forensic Psychology and the 11 April 2021 Advisory Opinion. The Board also considered your contention that the LOD determination was made without evidence regarding your mental health condition.

The Board noted that the guidance in the Secretary of Defense’s Memorandum, “Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requested by Veterans Claiming Post Traumatic Stress Disorder” of 3 September 2014, Principal Deputy Under Secretary of Defense’s Memorandum, “Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or TBI” of 24 February 2016, and the Under Secretary of Defense’s Memorandum “Clarifying Guidance to Military Discharge Review Board and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment” of 25 August 2017 is focused on the review of discharge relief. You request to expand the application of liberal consideration to your LOD determination. However, as your LOD determination resulted in a finding of misconduct on your part and you were separated with a general characterization of service (due to a pattern of misconduct as noted in the 8 July 2016 remarks), the Board considered whether your discharge characterization merits an upgrade in consideration of your mental health condition. The Board substantively concurred with the findings of the Advisory Opinion and noted the Licensed Psychologist’s determinations and determined that you did have a mental health condition that may mitigate your general discharge and your condition occurred/existed while during military service. However, the Board found that while your condition may have mitigated your misconduct that led to the discharge, the general characterization of service was appropriate. The Board determined that

your mental health condition did not entirely excuse you from accountability for your in-service actions and it did not outweigh your general discharge. The Board found that the general discharge was supported by your two NJPs and that the current characterization of service is appropriate even in consideration of your mental health condition.

The Board evaluated your request for a change to the LOD determination in consideration of the clemency guidance contained within the Under Secretary of Defense's Memorandum, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations" of 25 July 2018. The Board noted your deployment in support of Operation Enduring Freedom, your personal struggles upon your return, the impact that your mental health condition may have had on your decision-making and risk-taking activities, and the circumstances surrounding your motorcycle accident. The Board noted that your average marks in enlistment were 4.2/4.0, indicating that you were able to perform your military duties upon your return from the Marine Corps. The Board inferred that although you may have been taking increased risks in your personal life as noted in the Executive Summary from the Licensed Psychologist, you were able to exercise appropriate decision-making and judgment sufficient to achieve satisfactory marks in Proficiency and Conduct.

The Board turned its attention to available facts surrounding your motorcycle accident. The Board took particular note of the information in the Civilian Police Report when considering your contention (as opined by the Licensed Psychologist) that you did not understand nor appreciate the nature of your actions that resulted in the motorcycle accident. The Civilian Police Report included a Narrative Summary in which the civilian officer stated "I was on a routine patrol in a clearly marked CHP patrol vehicle...and was travelling southbound █... when I observed V-1 pass by in the high occupancy vehicle (HOV) lane, at an extremely high rate of speed. I estimated the S/V was in excess of 100 MPH I began pacing the S/V at 104 MPH from the #2 lane. I requested a rolling, wants check on the S/V's license plate. . . . As soon as I finished running the place, the S/D looked over his right shoulder and looked directly at me. I then activated the forward facing emergency lights in order to initiate an enforcement stop. . . . when the S/D accelerated to a speed of 143 MPH." The Board found that based on the information in the Civilian Police Report and even in consideration of your mental health condition, you were operating a motorcycle on a civilian interstate at a speed in excess of 100 MPH. The Board noted that based on the Civilian Police Report, you accelerated and fled after looking directly at the CHP vehicle. Even taking into account your statement in the LOD investigation that you did not recall the circumstances leading up the accident and noting the opinion of the Licensed Psychologist, the Board found that you engaged in risky behavior of operating a motorcycle with excessive speed on a public interstate and fleeing from authorities, resulting in the accident. The Board determined that while your mental health condition may be taken into consideration as a matter of clemency, it does not absolve you of accountability for your actions. Furthermore, the Board found that nature and seriousness of your misconduct leading up to the accident (excessive speed and fleeing from authorities) is such that a change to your record is not warranted.

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 Memo. Based upon this review, the Board concluded the potentially mitigating factors discussed above were insufficient to warrant relief. Specifically, the Board determined that your general discharge issued upon completion of your active duty service is supported by the pattern of misconduct documented in your service record, and that your LOD determination was issued without error or injustice, and even in consideration of the information in your current application, the LOD determination does not merit a change. 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,

7/29/2021

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Executive Director

Signed by: █