



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

█
Docket No: 8512-20

Ref: Signature Date



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 limitations 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 2 July 2021. 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 also considered an advisory opinion (AO) furnished by qualified mental health provider, which was previously provided to you. Although you were afforded an opportunity to submit a rebuttal, you did not do so.

You enlisted in the Marine Corps on 13 May 2003. Your pre-enlistment physical examination on 23 April 2003 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You denied ever having any eye disorders or eye trouble in your medical history. You also expressly denied any and all pre-service marijuana use.

On 12 September 2003 you received non-judicial punishment (NJP) for the wrongful use of a controlled substance (marijuana). You did not appeal your NJP. On the same day you received a "Page 11" counseling warning where you acknowledged you were being processed for administrative separation.

On 15 October 2003 your discharge was directed and approved for misconduct due to drug abuse with an other than honorable (OTH) characterization by the Commanding General, Marine Corps Base, █. Ultimately, on 22 October 2003 you were discharged from the Marine Corps for drug abuse with an OTH characterization of service and assigned an RE-4B reentry code after completing less than six months of active duty service. Unfortunately, some of the administrative separation (Adsep) documents are not in your record. However, the Board relied on a presumption of regularity to support the official actions of public officers, and given the narrative reason for separation and corresponding separation and reentry codes as stated on your Certificate of Release or Discharge from Active Duty (DD Form 214), the Board presumed that you were properly processed and discharged from the Marine Corps for misconduct due to drug abuse after waiving your right to an Adsep board. The Board noted that in blocks 25 through 28 of your DD Form 214 it states "MARCORSEPMAN par 6210.5," "HKK1," "RE-4B," and "Misconduct," respectively. Such DD Form 214 notations collectively refer to a discharge involving drug abuse with an Adsep board waiver.

As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 3 May 2021. The Ph.D. initially observed that your in-service records did not contain evidence of a mental health diagnosis or psychological/behavioral changes indicating a mental health condition. The Ph.D. noted that throughout your active duty service, there were no concerns noted requiring referral to mental health resources. The Ph.D. also noted that your in-service records did not indicate you were exposed to a primary or secondary trauma, and that you did not submit any medical records for review. The Ph.D. noted that marijuana use in any form is still against Department of Defense regulations and is not exempted for medical purposes in the military. The Ph.D. concluded by opining that the preponderance of objective evidence failed to establish you were diagnosed with or suffered from a mental health condition on active duty, or that your misconduct could be mitigated by a mental health condition.

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 contentions that: (a) the military knew of your "medication" prior to enlisting; (b) the military knew of your "medication" after basic training and only months later did the military have an issue; (c) you were unjustifiably discharged and given an OTH; and (d) if people can have their records changed/expunged for being imprisoned for marijuana, then a person who chooses to serve their country should get their discharge changed for doing the same thing for medical reasons. However, given the totality of the circumstances, the Board determined that your request does not merit relief.

In accordance with the Kurta, Hagel, 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 that you suffered from any type of mental health condition while on active duty, or that any such mental health conditions or symptoms were related to or mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. Moreover, the Board observed that you did not submit any clinical documentation or treatment records to support your PTSD/mental health claims despite a request from BCNR on 31 December 2020 to specifically provide additional documentary material. The Board also concluded that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should otherwise not be held accountable for your actions.

The Board observed that, contrary to your contentions, you did not disclose your purported medical marijuana usage to the Marine Corps and instead expressly denied any and all marijuana usage. The Board noted that on your pre-service medical history you also denied having any medical, mental health, or eye disorders for which marijuana usage could reasonably be used to treat as an alternative form of therapy. In fact, the Board specifically noted that other than pre-service acne, you denied ever having any and all medical conditions, disorders, or injuries on your medical history.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade and determined that Marines should receive no higher discharge characterization than is due. The Board determined that characterization under OTH conditions is generally warranted for misconduct and 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 Marine. Lastly, absent a material error or injustice, the Board generally will not summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. The Board carefully considered any matters submitted regarding your post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that given the totality of the circumstances your request does not merit relief. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your misconduct clearly merited your receipt of an OTH.

Finally, despite the fact that some of your Adsep records were not in your service record, the Board relies on a presumption of regularity to support the official actions of public officers. In the absence of substantial evidence to rebut the presumption, to include evidence submitted by the Petitioner, the Board presumes that you were properly processed for separation and discharged from the Marine Corps. In the end, the Board concluded that you received the correct discharge characterization based on your circumstances, and that such OTH characterization was

in accordance with all Department of the Navy directives and policy at the time of your discharge.

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,

7/9/2021

[REDACTED]

Executive Director

Signed by: [REDACTED]