



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: 2644-21

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 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 29 October 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 a qualified mental health provider, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal and you did not do so.

You originally enlisted in the U.S. Marine Corps on 16 October 2006. Your pre-enlistment physical on 29 September 2006 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 20 March 2008 you received non-judicial punishment (NJP) for the willful disobedience of a superior commissioned officer for violating the terms of a military protection order to refrain from contact with your wife. You did not appeal your NJP. On the same day your command

issued you a "Page 11" counseling sheet (Page 11) documenting your NJP. The Page 11 expressly warned you that a failure to take corrective action may result in judicial or adverse administrative action. You did not make a Page 11 rebuttal statement.

On 17 October 2008 you received NJP for failing to obey a lawful order, unauthorized absence (UA), and for the theft of five video games from the MCCS. You did not appeal your NJP. On the same day your command issued you a "Page 11" counseling sheet (Page 11) documenting your NJP. The Page 11 expressly warned you that further deficiencies in performance and/or conduct may result in further administrative actions which could ultimately lead to administrative separation under other than honorable (OTH) conditions. You did not make a Page 11 rebuttal statement. On 23 October 2008 you received a second Page 11 documenting your NJP. The Page 11 expressly warned you that failure to take corrective action might result in judicial or adverse administrative action. You did not make a Page 11 rebuttal statement. On 13 October 2009 your command issued you a Page 11 documenting your dismissal from the Men's Education Program due to excessive absences. You did not make a Page 11 rebuttal statement.

On 30 July 2010 you received NJP for two separate specifications of failing to obey a lawful general order. You did not appeal your NJP. On 12 January 2011 you received a Page 11 documenting your failure to keep accountability of your government gear assigned to you by the Consolidated Issue Facility Section. The Page 11 expressly warned you that a failure to take corrective action may result in judicial or adverse administrative action. You did not make a Page 11 rebuttal statement.

On 13 January 2011, based on your guilty pleas, you were convicted at a Special Court-Martial (SPCM) of: (a) conspiracy to commit larceny with █ on divers occasions at █ gymnasium and at the █ gymnasium, and (b) six separate specifications of larceny. The Military Judge (MJ) accepted your SPCM guilty plea pursuant to the pretrial agreement you signed only after the MJ was satisfied that you fully understood the meaning and effect of your guilty plea, and finding that your plea was made voluntarily and with full knowledge of its meaning and effect. On the SPCM record, you would have stated to the MJ that you discussed every aspect of your case, including the evidence against you, and possible defenses and motions, in detail with your lawyer, and that you were satisfied with your counsel's advice. You received as punishment a reduction in rank to the lowest enlisted paygrade (E-1), confinement for ninety days, and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD).

On 26 July 2011 the Navy-Marine Corps Court of Criminal Appeals determined that your SPCM findings and sentence were legally and factually sufficient. Upon the completion of appellate review in your case, on 1 December 2011 you were discharged from the Marine Corps with a BCD and assigned an RE-04 reentry code.

As part of the Board review process, the BCNR Physician Advisor who is a medical doctor and Fellow of the American Psychiatric Association (MD), reviewed your contentions and the available records and issued an AO dated 20 September 2021. The MD initially observed that

your active duty records did not contain evidence of a mental health diagnosis or psychological/behavioral changes indicating a mental health condition. The MD noted that throughout your disciplinary actions and counselings there were no concerns raised warranting your referral to mental health resources. The MD also noted that despite you claiming suffering from PTSD and other mental health conditions, you did not: (a) provide any description of traumatic events or symptoms meeting the criteria for a mental health condition, (b) indicate how those symptoms interfered with your ability to function, or (c) link any mental health symptoms to your experience of contended erroneous punishment. The MD concluded by opining that the preponderance of objective evidence failed to establish you suffered from PTSD/mental health condition on active duty, or that your in-service experience of alleged erroneous punishment resulted in PTSD and/or 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 Hagel, Kurta, and Wilkie Memos. These included, but were not limited to your contentions that: (a) on the night in question in March 2010, █ contacted you for a ride to run a few errands, and you were unaware of his intentions and actions when he asked you for a ride that day; (b) you feel you were unjustly charged; (c) you felt you were poorly represented by your lawyer as well as your new First Sergeant and all SNCO's at that time; (d) prior to your incident there wasn't anything on your record; (e) this incident is keeping you from receiving an honorable discharge; and (f) because of this incident it has been difficult to obtain certain jobs and opportunities. However, given the totality of the circumstances, the Board determined that your request does not merit 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 you suffered from any type of diagnosed mental health conditions while on active duty, or that any such mental health conditions 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 conditions or symptoms. Moreover, the Board observed that you did not submit any clinical documentation or treatment records to support your mental health claims despite a request from BCNR on 11 May 2021 to specifically provide additional documentary material. Even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. The Board concluded that the misconduct you committed, particularly the conspiracy and larceny, is not the type of misconduct that would be excused by mental health conditions even with liberal consideration. 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 not be held accountable for your actions.

The Board observed, contrary to your contentions, that the SPCM conviction was not your only active duty misconduct. The Board noted that you also received NJP three separate times as well as multiple adverse Page 11 entries in your record. Additionally, the Board determined that no ineffective assistance of counsel (IAC) occurred. The Board noted there is no convincing evidence in the record to support your contention that you did not receive adequate representation or experienced IAC. The Board concluded that you failed to meet the burden to show that: (a) your defense counsel's performance was deficient and fell below an objective standard of reasonableness, and (b) but for the alleged deficiencies, there was a reasonable probability of a more favorable result. Accordingly, the Board concluded that no IAC occurred, and such suggestion or argument is not persuasive.

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. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. Thus, 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 pattern of serious misconduct and disregard for good order and discipline clearly merited your receipt of a BCD.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. You were properly convicted at a SPCM of serious misconduct, and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. 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.

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, _____

11/3/2021

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Executive Director

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