



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: 3582-21
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 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 7 January 2022. 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.

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 on 11 February 2008. Your pre-enlistment physical on 30 January 2008 and self-reported medical history noted no psychiatric or neurologic conditions or

symptoms.

On 31 July 2009 you received non-judicial punishment (NJP) for failing to obey a lawful order by driving on ██████████ with a suspended driver's license, exceeding the posted speed limit on base, and having an unregistered weapon under the driver's seat. You did not appeal your NJP.

On 13 May 2011 you commenced a period of unauthorized absence (UA) that terminated after 104 days with your surrender to military authorities on 25 August 2011. On 12 September 2011 you commenced a second period of UA that terminated after fifty-two days with your surrender to military authorities on 3 November 2011. On 10 November 2011 you commenced a third period of UA that terminated after fifty-three days with your apprehension by the Iowa State Police on 2 January 2012.

On 6 February 2012 pursuant to your guilty pleas, you were convicted at a Special Court-Martial (SPCM) of your three separate specifications of UA totaling 209 days. You received as punishment, sixty days of confinement, forfeitures of pay, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). On 30 May 2012 the Convening Authority approved the SPCM sentence as adjudged and partially suspended.

On 21 March 2013 the Navy-Marine Corps Court of Criminal Appeals rejected your multiple assignments of error and affirmed the SPCM findings and sentence. Upon the completion of appellate review in your case, on 12 June 2013 you were discharged from the Marine Corps with a BCD and assigned an RE-04 reentry code.

As part of the review process, the BCNR Physician Advisor, who is also a medical doctor (MD) and a Fellow of the American Psychiatric Association, reviewed your contentions and the available records and issued an AO dated 8 November 2021. The MD initially observed that you contended your UA occurred due to not thinking clearly during your hospitalization for kidney failure while on leave, and being told by your chain of command you would be facing charges for UA. The MD noted that you did not describe any additional traumatic experiences, psychological symptoms or behavioral changes indicative of an unfitting mental health condition, or any effect on your occupational functioning. The MD also noted that you did not provide any post-discharge clinical evidence for review. The MD observed that you were hospitalized on active duty in ██████████ for kidney stones, kidney inflammation, and intractable headaches, and that after appropriate periods of evaluation and treatment, all of your conditions resolved and you were discharged to full duty. The MD noted that you were evaluated and treated by mental providers while incarcerated in the brig and diagnosed with an anxiety disorder, not otherwise specified, and depression. The MD also noted that the clinical notes indicated that the primary cause of your anxiety and depression were fears you had brain damage affecting his mood, behaviors, and judgement from your history of kidney stones and one episode of kidney inflammation, as well as your upcoming release from the brig and discharge from service. The MD further noted that you did not reveal any history of in-service traumatic

events to your mental health providers. The MD noted that throughout your military service, disciplinary actions and administrative processing you were considered fully responsible for your actions and fit for full duty. The MD determined that there were no indications of additional mental health conditions requiring additional referral to mental health resources, specifically conditions that would have impaired your decision making at the time of your misconduct. The MD also determined that there was no objective clinical evidence that your decisions to go UA were due to an unfitting mental health condition, or that you were not competent or responsible for your actions at the times of your decisions to go UA. The MD concluded by opining that there was insufficient evidence you incurred service-connected PTSD or other unfitting mental health conditions, or that your active duty misconduct could be attributed to PTSD or other unfitting mental health conditions.

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) you have one overseas deployment in support of Operation Enduring Freedom; (b) you were not thinking clearly and this unfortunately led you to the biggest mistake of your life when you left the hospital without being cleared and you went UA; (c) you feel as if you were given a lifetime punishment and every day is a constant struggle to provide; (d) with your BCD you are overlooked for good jobs, higher education is difficult to access, and you lack real medical care; and (e) there is so much more to you than the mistakes you made over eighteen years ago. 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, even under the liberal consideration standard, the Board concluded that there was no nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions 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 concluded that even if your SPCM misconduct was somehow attributable to any mental health conditions, 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 also 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.

Further, 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. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard for mental health conditions, the Board concluded that your 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 clemency. As a result, 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,

1/18/2022

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Executive Director

Signed by: █