



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

Docket No: 3656-21

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.

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 29 December 1999. Your pre-enlistment physical examination on 28 April 1999 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On your medical history you expressly denied: (a) ever being treated for a mental condition, and (b) ever consulting or been treated by clinics, physicians, healers, or other practitioners within the past 5 years for other than minor illnesses. You did admit to pre-service marijuana use 10-15 times with the last usage approximately one month before your physical.

On 13 December 2000 you received non-judicial punishment (NJP) for willfully disobeying a lawful written order prohibiting underage drinking. You did not appeal your NJP. On 27 December 2000 your command issued you a "Page 11" counseling sheet (Page 11) where you acknowledged that you were eligible but not recommended for promotion to Lance Corporal because of your December 2000 NJP. You did not make a Page 11 rebuttal statement.

On 3 May 2001 you received a Page 11 noting your inability to qualify on the rifle range. On 21 November 2001 you received a Page 11 documenting your failure on the most recent physical fitness test for failing the 3-mile run.

On 8 May 2002 you received NJP for two specifications of failing to obey a lawful order. You did not appeal your NJP. On 14 May 2002 your command issued you a Page 11 where you acknowledged that you were eligible but not recommended for promotion to Lance Corporal because of your May 2002 NJP. You did not make a Page 11 rebuttal statement.

On 16 October 2002 the Navy Drug in Jacksonville, Florida reported to your command that you tested positive for THC (marijuana). On 8 November 2002 your command issued you a Page 11 documenting your illegal drug involvement. You did not make a Page 11 rebuttal statement.

On 26 November 2002 you were convicted at a Summary Court-Martial of the wrongful use of a controlled substance. As punishment you were reduced in rank to the lowest enlisted paygrade (E-1), forfeitures of pay, and confinement for thirty days. On 27 November 2002 a Medical Officer determined you to be cannabis dependent and recommended outpatient treatment.

On 17 December 2002 you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You elected to waive your rights to consult with counsel, submit written statements, and to request an administrative discharge board. In the interim, on 21 January 2003 you were discharged from the Substance Abuse Rehabilitation Program (SARP) as a treatment failure. The SARP Clinical Director concluded you had a poor prognosis based on your refusal of treatment, your unwillingness to abstain from the use of alcohol or drugs, and your reluctance to implement a structured recovery program. Ultimately, on 11 March 2003 you were discharged from the Marine Corps for drug abuse with an other than honorable (OTH) characterization of service and assigned an RE-4 reentry code.

As part of the review process, the BCNR Physician Advisor, who is a medical doctor (MD) and a Fellow of the American Psychiatric Association, reviewed your contentions and the available

records and issued an AO dated 31 July 2021. The MD initially noted that you requested a discharge upgrade contending that you suffered from ADHD and undiagnosed PTSD from childhood trauma. The MD observed that you did not describe any traumatic events on active duty, or any service-connected psychological symptoms or behavioral changes. The MD noted that you reported your behavioral difficulties pre-existed your military service and that you did not disclose any mental health history during your recruitment or enlistment processing. The MD also noted that there was no other evidence of a mental health diagnosis or psychological/behavioral changes indicating an unfitting mental health condition on active duty. The MD observed that throughout your disciplinary actions, counselings, and administrative processing, there were no concerns cited warranting referral to mental health resources. The MD noted that although you claimed an in-service mental health condition, you did not provide any description of symptoms meeting the criteria for an unfitting mental health condition, and you did not indicate how such symptoms interfered with your ability to function, or how such symptoms were related to your active duty misconduct. The MD concluded by opining that the preponderance of objective evidence failed to establish you suffered from an unfitting mental health condition on active duty, or that your in-service misconduct could be attributed to an unfitting 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) you were diagnosed on 28 January 2021 with PTSD dating back to childhood; (b) you spent a lot of your childhood in mental institutions, in children's correction homes, and that you were beaten for your uncontrolled behavior; (c) you were misdiagnosed for years with bipolar and schizophrenia, and you acted out and numbed your feelings with street drugs and the drugs the doctors would prescribe for my "mental illnesses;" (d) PTSD has caused you great loss in life with poor decision making, impulse control, inability to cope and recover mentally, and an inability to deal with confrontation leading to a lifetime of drug use and self-sabotage; (e) post-service you serve your country through your community, and you owned and operated a mission where you donated and collected needs for the community such as clothing, food, and monetary donations for bill assistance; (f) you have also done not-for-profit catering for disabled veterans events as a chef, and sheltered homeless adults and children and provided clothing, food, transportation to doctors, and other resources to become productive citizens; and (g) your untreated PTSD left you unable to cope in the military leading to the sabotage of your enlistment. 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 nexus between any mental health conditions or mental health-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. Additionally, the Board determined that you had

a legal, moral, and ethical obligation to remain truthful on your enlistment paperwork. Had you properly and fully disclosed your pre-service mental health history, you would likely have been disqualified from enlisting. The Board determined that the record reflected you failed to disclose your disqualifying pre-service mental health issues as part of your pre-enlistment medical documentation and thus 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 otherwise not be held accountable for your actions.

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. 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 Sailor. Lastly, the Board declined to 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, charitable community service 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 the Board concluded that your misconduct clearly merited your receipt of an OTH.

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

Executive Director