



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: 4212-21

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 17 December 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 advisory opinion (AO) furnished by a qualified mental health provider. You were afforded an opportunity to submit an AO rebuttal, and you did do so.

You enlisted in the Marine Corps on 9 November 1999. Your pre-enlistment physical examination on 31 August 1998 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 30 November 2001 you received non-judicial punishment (NJP) for an unauthorized absence (UA) lasting two days. You did not appeal your NJP. On 2 October 2002 you received NJP for failing to obey a lawful order. You did not appeal your NJP. On 16 December 2002 you received NJP for failing to obey a lawful order and larceny.

On 3 January 2003 you commenced a period of UA that ended after fifty-eight days on 2 March 2003 with your surrender to military authorities. On 4 April 2003 you were placed in pretrial confinement while awaiting a Special Court-Martial (SPCM).

On 21 May 2003 pursuant to your guilty plea you were convicted at a SPCM for your long-term UA. As punishment you were sentenced to confinement for thirty days and a reduction in rank to the lowest enlisted paygrade (E-1).

On 16 June 2003 you were initially notified that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. You consulted with military counsel and elected to request an administrative separation board (Adsep Board).

However, prior to your separation, on 30 November 2003 you were arrested in █
█ for attempted burglary. You were held in civilian custody and released on 23 December 2003. On 22 January 2004 you received a "Page 11" counseling warning (Page 11) that noted your frequent Uniform Code of Military Justice violations detrimental to good order and discipline. The Page 11 specifically noted your attempted burglary offense and subsequent civilian confinement.

On 3 February 2004 you were re-notified that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. You waived your rights to consult with military counsel and to request an Adsep Board. Ultimately, on 23 April 2004 you were separated from the Marine Corps for misconduct with an other than honorable (OTH) discharge characterization and assigned an RE-4 reentry code.

On 12 December 2018 the Naval Discharge Review Board (NDRB) determined your OTH discharge was proper as issued and that no change was warranted. The NDRB concluded that despite your contention PTSD contributed to your misconduct, you did not submit any evidence in support of such contention and that there was nothing in your service or medical record supporting your contention either. On 18 September 2020, the VA granted you a service-connection for treatment purposes only for other specified trauma and stressor-related disorder (claimed as anxiety and unspecified sleep disorder).

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 27 October 2021. The Ph.D. noted that although you provided post-service evidence you incurred a mental health condition, there was no information about an in-service incident related to your mental health condition. The Ph.D. concluded by opining that although there is post-service evidence you may have incurred a mental health condition on active duty, there is insufficient evidence that your misconduct could be attributed to 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) you were recently

diagnosed with service-connected injuries; (b) the injuries you sustained while serving in the Marine Corps have affected your ability to work 100% to support your family; (c) since your discharge you have been a good citizen, father, and husband, and went back to school and earned your degree; and (d) if you are able to receive full benefits from the VA you would be able to receive the help you need to provide for your family and be able to work. 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 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. The Board also concluded that although you have post-discharge mental health diagnoses, active duty records contemporaneous to your service lacked sufficient evidence to establish a nexus between your mental health conditions/symptoms and your in-service misconduct. As a result, even under the liberal consideration standard the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. The Board additionally concluded that even if your misconduct was somehow attributable to any mental health conditions, the severity of your misconduct outweighed any 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 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 was aware that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average was 3.17 in conduct. Marine Corps regulations in place at the time of your discharge required a minimum trait average of 4.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your cumulative serious misconduct which justified your OTH characterization of discharge. The Board further 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 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 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 character, 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 pattern of serious 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,

1/11/2022

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Executive Director

Signed by: █