



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: 5563-21

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 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 19 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 the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. You were afforded an opportunity to submit an AO rebuttal and you did 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 14 February 2003. Your pre-enlistment physical

examination on 16 November 2002 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. As part of your pre-enlistment application, you signed and acknowledged the “USMC Policy Concerning Illegal Use of Drugs.”

On 7 January 2005 a Navy Drug Lab message indicated you tested positive for cocaine. On both 12 January and 25 January 2005 your command issued you “Page 11” counseling warnings documenting your illegal drug involvement. On 5 March 2005 you refused a Medical Officer’s evaluation for drug abuse/addiction.

On 19 April 2005 pursuant to your guilty plea you were convicted at a Summary Court-Martial (SCM) for the wrongful use of cocaine. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1) and confinement for twenty-nine days. On 20 April 2005 the Convening Authority approved the findings and sentence. Pursuant to a pretrial agreement, you agreed to waive any administrative separation board proceedings based on your drug use conviction, and you also provided a confessional stipulation of fact admitting your cocaine use was wrongful.

On 24 June 2005 you were notified of administrative separation proceedings by reason of misconduct due to drug abuse. You consulted with military counsel, but pursuant to the pretrial agreement, you waived your rights to present your case to an administrative separation board. Ultimately, on 1 August 2005 you were discharged for misconduct with an other than honorable conditions (OTH) characterization of service and assigned an RE-4B reentry code.

On 23 April 2009 the Naval Discharge Review Board (NDRB) determined that your OTH discharge was proper as issued and no change was warranted. The NDRB noted that you did not present any issues for the board to review with your application. On 23 July 2020 the VA granted you a service-connection for treatment purposes only for PTSD with alcohol dependence, generalized anxiety disorder and depression. The VA noted your mental illness was first diagnosed on 6 March 2020.

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 3 November 2021. The MD initially observed that your in-service record contained enlistment and discharge physical examinations in which you denied any mental health symptoms/conditions or substance abuse. The MD also observed that in March 2005 you were seen at the Substance Abuse Counseling Center following a positive urinalysis but refused the Medical Officer’s Evaluation. The MD noted that the remainder of your service records did not contain any mental health diagnoses, or psychological symptoms/behavioral changes indicative of a mental health condition. The MD also noted that throughout your military service, disciplinary actions and administrative processing, there were no indications of a mental health condition requiring referral to mental health resources. The MD determined that cocaine would not be an expected substance to use by an individual suffering from PTSD symptoms given that the common physiological effects from cocaine use including jitteriness, anxiety, and other physical sensations, are the very such effects typically feared by a person who suffers from anxiety symptoms. The MD concluded by opining that

although you carry a post-discharge PTSD diagnosis, there was insufficient objective evidence that PTSD or other unfitting mental health conditions mitigated your active duty misconduct.

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) your disabilities are service-connected; and (b) the VA granted you a service-connection for treatment purposes only for PTSD with alcohol dependence, generalized anxiety disorder and depression. 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, notwithstanding any VA determinations, that there was no nexus between any PTSD and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions were related to or mitigated the misconduct forming the basis of your discharge. As a result, the Board concluded that your drug-related misconduct was not due to mental health-related conditions or symptoms. The Board determined the record clearly reflected that your misconduct was intentional and demonstrated you were unfit for further service. The Board also concluded 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.

Additionally, the Board observed 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 3.9 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 serious misconduct which further justified an OTH characterization of discharge.

The Board also 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 noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. 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 declined to summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. Moreover, the Board noted that

VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only. Such VA eligibility determinations, disability ratings, and/or discharge classifications are not binding on the Department of the Navy and have no bearing on previous active duty service discharge characterizations.

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 pattern of 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,

2/3/2022

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Executive Director

Signed by: █