



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: 5578-21

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 28 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. Although you were afforded an opportunity to submit an AO 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 originally enlisted in the Marine Corps on 13 September 1993. Your pre-enlistment medical examination on 11 February 1993 and self-reported medical history noted both no psychiatric or neurologic conditions or symptoms.

On 23 January 1995 your command issued you a “Page 11” counseling warning (Page 11) documenting an alcohol-related incident, specifically a DUI overseas. You did not make a Page 11 rebuttal statement. On 3 February 1995 you received non-judicial punishment (NJP) for driving under the influence of alcohol. You did not appeal your NJP.

On 24 January 1996 your command issued you a Page 11 warning documenting unauthorized absences (UA) from your appointed place of duty. You did not make a Page 11 rebuttal statement.

On 17 December 1996 your command issued you a Page 11 counseling sheet documenting your failure to pass the Marine Corps Physical Fitness Test (PFT) due to failing the three-mile run portion of the PFT. You did not make a Page 11 rebuttal statement.

On 29 January 1997 your command issued you a Page 11 counseling sheet documenting your UA from remedial physical training (PT). On 4 March 1997 you received NJP for being UA from remedial PT. You did not appeal your NJP. On 4 March 1997 your command issued you a Page 11 counseling sheet documenting your NJP. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation or further judicial proceedings. On 28 March 1997 the suspended portion of your NJP was vacated and ordered executed due to continuing misconduct.

On 7 April 1997 you received NJP for again being UA from remedial PT. You did not appeal your NJP.

On 7 May 1997 you were notified that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. You elected your rights to consult with military counsel and to present your case to an administrative separation board (Adsep Board). On 11 June 1997 an Adsep Board convened in your case. At the Adsep Board you were represented by a Marine Corps Judge Advocate. Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined that you committed the misconduct as charged and the majority of members recommended that you be separated from the Marine Corps with an other than honorable (OTH) characterization of service. On 26 June 1997 the separation authority approved and directed an OTH discharge. Ultimately, on 1 July 1997 you were discharged from the Marine Corps for a pattern of misconduct with an OTH characterization of service and assigned an RE-4 reentry code.

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 14 December 2021. The Ph.D. initially noted that although you contend you were diagnosed with PTSD, you did not provide clarifying information about the trauma related to your PTSD or information about your other mental health condition. The Ph.D. concluded by opining that the evidence failed to establish that you suffered from PTSD or other mental health conditions on active duty, or that your misconduct was mitigated by PTSD or other 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 Kurta, Hagel, and Wilkie Memos. These included, but were not limited to your contentions that: (a) your OTH characterization was abnormally and excessively punitive in nature given the nature of the charges levied against me by comparison to other service members with like or similar service records; (b) not all relevant evidence and materials relating to the case were considered at the hearing due to time constraints for the officers on the panel, and if a thorough review of all available evidence and testimony had been allowed the outcome of the Adsep Board would have been different; (c) you would like to enjoy the benefits and assistance that any other veteran and patriot receives; and (d) your discharge characterization has caused you many years of undue suffering. 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 convincing evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was 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 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 23 September 2021 to specifically provide additional documentary material. The Board determined the record clearly reflected that your active duty misconduct was intentional and willful 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 otherwise not be held accountable for your actions.

The Board determined that your contentions regarding purported irregularities during your Adsep Board were not persuasive and without merit. The Board relied on a presumption of regularity to support the official actions of public officers, and the Board presumed that you were properly processed and discharged from the Marine Corps due to a pattern of misconduct. The Board concluded that your statements alone regarding relevant evidence not being considered due to purported time constraints for officers on the panel were not enough to overcome the presumption of regularity. The Board also noted that if there were any discrepancies or procedural/substantive issues during the Adsep Board, your military counsel was free to submit a letter of deficiencies (LoD) post-board identifying such issues to the separation authority for their review. The Board noted that your record does not contain any such LoD.

Additionally, 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 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 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 for mental health conditions, 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,

2/8/2022

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Executive Director
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