



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: 6497-21

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 considered an Advisory Opinion (AO) from a qualified mental health provider, a copy of which was previously provided to you. You were provided an opportunity to submit an AO rebuttal, and you did do so in December 2021.

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 13 August 2002. Your pre-enlistment physical examination on 20 July 2001 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 24 July 2003 you received non-judicial punishment (NJP) for unauthorized absence (UA) and a failure to obey a lawful order. You did not appeal your NJP.

On 24 July 2003 your command issued you a "Page 11" counseling warning (Page 11) for being UA on 21 January 2004 and for failing to follow of Officer of the Deck's instruction to contact your chain of command to inform them of your situation. The Page 11 expressly warned you that a failure to take corrective action or further UCMJ violations could limit your future for military service and include, but not limited to, administrative punishment and/or separation from the service. You did not submit a Page 11 rebuttal statement.

On 18 October 2004 your command issued you a Page 11 warning to document your civilian DUI citation when you were caught driving with a BAC of 0.16. The Page 11 expressly warned you that a failure to take corrective action or further UCMJ violations could limit your future for military service and result in administrative punishment and/or separation from the service. You did not submit a Page 11 rebuttal statement.

You were identified as being one of approximately twenty-four Marines who enlisted in the Marine Corps using fraudulent alien registration cards, fraudulent social security cards, and/or other false information regarding your citizenship status. On 28 February 2005 you were notified of administrative separation proceedings by reason of fraudulent entry into the Marine Corps. The least favorable eligible characterization you could have received was general (under honorable conditions) (GEN). On 1 March 2005 you waived your rights to consult with counsel and to submit written rebuttal statements to your proposed separation.

In the interim, on 4 March 2005 your command issued you a Page 11 documenting your driving under the influence of alcohol and driving on a suspended license in New York City on 5 December 2004. You did not submit a Page 11 rebuttal statement.

While your administrative discharge was pending, in April, October, and November 2005 you committed various additional misconduct that formed the basis for a Special Court-Martial (SPCM). On 27 July 2006 you were convicted at a SPCM for three specifications of insubordinate conduct, failing to obey a lawful order, two specifications of assault, drunk and disorderly conduct, and communicating a threat. You received as punishment confinement for 180 days, a fine, 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 21 December 2006 the Convening Authority approved your SPCM sentence. On 8 January 2007 your command placed you on involuntary appellate leave.

On 18 October 2007 the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed your SPCM findings and sentence. The NMCCA ruled that the SPCM findings and sentence

were correct in law and fact and that no error was committed materially prejudicial to your substantial rights. On 27 March 2008 the appellate review for your SPCM was completed and on 28 March 2008 a supplemental SPCM order directed the execution of your BCD. Ultimately, on 18 April 2008 you were discharged from the Marine Corps with a BCD and assigned an RE-4 reentry code.

On 20 August 2009 the Naval Discharge Review Board (NDRB) determined that your OTH discharge was proper as issued and no change was warranted. The NDRB specifically noted that there was no evidence in the record, nor did you provide any evidence, to support your contention that your command committed any form of discrimination against you, and the NDRB concluded that your statements alone do not overcome the government's presumption of regularity in your case. You did not make any contentions regarding mental health issues on your NDRB application.

On 11 April 2019 the Board denied your initial petition for relief. As part of the Board review process for your current petition, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 2 November 2021. The Ph.D. initially observed that your in-service records did not reveal any evidence of a mental health diagnosis, however, the Ph.D. did observe that there was evidence you were experiencing an alcohol use disorder on active duty. The Ph.D. noted that you provided post-service evidence stating you incurred a mental health condition in service. However, the Ph.D. determined that the opinion from the your examining clinician, rendered fifteen years after your discharge runs counter to the available objective evidence contemporaneous to your enlistment. The Ph.D. concluded by opining that there is post-service evidence you may have incurred a mental health condition on active duty, but there was insufficient evidence that all of your misconduct could be mitigated by a mental health condition other than alcohol use disorder. In response to the AO you argued, *inter alia*, that the AO offered a distorted timeline was contradicted by the record, and the Board should afford the AO little weight, but instead to further afford your evidence-based timeline liberal consideration and grant you relief.

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) the misconduct leading to your BCD was a direct result of your undiagnosed and untreated adjustment disorder and severe alcohol use disorder; (b) the alcohol use disorder was triggered by your unit's hazing of you after learning of your fraudulent enlistment; (c) your mental health conditions and personal problems mitigate your discharge; (d) you deserve clemency given the personal problems and mental health conditions you faced, your prior honorable conduct, your deep shame and regret for your misconduct, and the severe disproportionate punishment you have suffered for more than a decade; and (e) the AO was fundamentally flawed and offered a distorted timeline contradicted by the facts in the record. 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, 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 observed that your available active duty records did not contain evidence of an unfitting mental health condition or diagnosis. The Board noted that although you stated you were experiencing certain mental health symptoms and also have a post-service mental health diagnosis from early 2020, 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, the Board concluded that your misconduct was not due to mental health-related symptoms. Even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board also concluded that you did not provide convincing evidence to corroborate or substantiate your contention that you were ostracized or hazed by your command. 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 noted 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 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 3.7 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.

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. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating certain VA status or benefits, or enhancing educational, employment, or citizenship 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. You were properly convicted at a SPCM of serious misconduct, and the Board did

not find any evidence of an error or injustice in this application that warrants upgrading your BCD. Accordingly, 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,

2/3/2022

