



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: 6977-21
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 18 March 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 an advisory opinion (AO) furnished by a qualified mental health provider, one of 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 and commenced a period of active duty on 9 July 1997. Your

pre-enlistment physical examination on 24 July 1996 and self-reported medical history both noted no psychiatric or neurologic issues or symptoms.

On 26 March 1999, you were convicted at a Summary Court-Martial (SCM) of making a false official statement, and larceny. You received as punishment a reduction in rank to the lowest enlisted paygrade (E-1), and confinement for one month. The Convening Authority approved the SCM sentence as adjudged.

On 5 April 2001, pursuant to your guilty pleas, you were convicted at a Special Court-Martial (SPCM) of conspiracy to commit larceny, the wrongful sale/disposition of military property, and the larceny of three computers, military property of the U.S. Government. You received as punishment a reduction in rank to the lowest enlisted paygrade (E-1), confinement for ninety (90) days, and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). The Convening Authority approved the SPCM sentence, but suspended the confinement in excess of fifty days. On 4 December 2001, you were placed on involuntary appellate leave awaiting discharge. On 24 June 2002, the Navy-Marine Corps Court of Criminal Appeals affirmed the SPCM findings and sentence. Upon the completion of appellate review in your case, on 25 September 2002, you were discharged from the Marine Corps with a BCD and assigned an RE-4 reentry code.

On 11 April 2016, the Naval Discharge Review Board (NDRB) denied your application for relief. The NDRB determined that your discharge was proper as issued and no change was warranted.

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 16 December 2021. The Ph.D. initially observed that your in-service records did not contain evidence of a mental health diagnosis or reported psychological symptoms/behavioral changes indicative of a diagnosable mental health condition. The Ph.D. noted that although you submitted evidence supporting a post-discharge PTSD diagnosis, that there was no nexus established between PTSD and your misconduct. The Ph.D. also determined that your specific misconduct was not the typical type of misconduct/behavior typically associated with PTSD. The Ph.D. concluded by opining that although you have a post-discharge mental health diagnosis, the preponderance of available objective evidence failed to establish you suffered from a service-connected mental health condition on active duty, or that your misconduct could be mitigated by a mental health condition. Following receipt of the AO, you submitted an AO rebuttal response. After reviewing your rebuttal submission, the Ph.D. again noted that misconduct such as conspiracy and larceny were not the typical types of behavior exhibited by someone who suffers from PTSD. The Ph.D. determined that there still remained a lack of objective evidence your misconduct arose from your PTSD. The Ph.D. similarly concluded that the evidence still failed to establish your misconduct was mitigated by PTSD.

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: (a) anthrax injections affected your state of mind, (b) you are currently engaged in individual therapy and receiving VA treatment for combat PTSD related to service in the Persian Gulf, (c) while you were in boot camp multiple suicides occurred in the barracks, (d) while you were in the Middle East with the ██████████ you witnessed some very disturbing experiences, (e) you still cannot sleep through the night without having horrific flashbacks, (f) when you returned back home you continuously suffered sporadic twitching and developed an awful skin disorder, (g) you have expressed great remorse for your actions resulting in your BCD, (h) after your discharge you fell into a horrible depression, and (i) since your discharge you have lead an exemplary life. 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 a mental health diagnosis or psychological/behavioral concerns indicating a mental health condition. The Board concluded that although you have a post-discharge PTSD diagnosis and are receiving VA treatment, 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 conditions or 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 determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. Moreover, the Board concluded that the specific misconduct you committed was not the type of misconduct that would be excused by mental health conditions even with liberal consideration. 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 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. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating certain VA benefits, or enhancing educational or employment opportunities. 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 serious misconduct and disregard for good order and discipline clearly merited your receipt of a BCD.

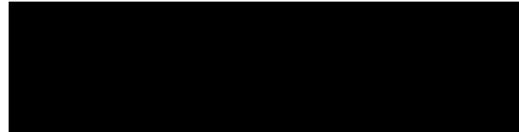


The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. You were properly 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. The Board carefully considered any matters submitted regarding your post-service conduct and accomplishments and any character reference letters, 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,

3/24/2022



Executive Director

