



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: 7097-21

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 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 11 February 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 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 and commenced a period of active duty on 18 August 2003. Your pre-enlistment physical examination on 12 February 2003 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 4 March 2004 you received non-judicial punishment (NJP) for disobeying a lawful order. You did not appeal your NJP. On 7 October 2004 you received NJP for three separate specifications of unauthorized absence (UA) and making a false official statement. You did not appeal your NJP.

On 3 February 2005 you received a "Page 11" counseling sheet (Page 11) noting your deficiencies involving UA. The Page 11 warned you that a failure to take corrective action may result in administrative separation or limitation of further service. You did not make a Page 11 rebuttal statement.

On 2 May 2005 you received a Page 11 noting your speeding on base. The Page 11 warned you that a failure to take corrective action may result in administrative separation or limitation of further service. You did not make a Page 11 rebuttal statement. On 11 May 2005 you received a Page 11 documenting your lack of judgment when you were cited on base for a domestic disturbance. The Page 11 warned you that a failure to take corrective action may result in administrative separation or limitation of further service. You did not make a Page 11 rebuttal statement.

On 19 August 2005 you received NJP for UA, insubordinate conduct, and two separate specifications of failing to obey a lawful order. You did not appeal your NJP. On 4 July 2006 you received NJP for disobeying a lawful order and insubordinate conduct. You did not appeal your NJP. On the same day you received a Page 11 documenting your NJP and warning you that any further UCMJ violations would immediately result in disciplinary action. You did not make a Page 11 rebuttal statement.

On 4 November 2006 you received NJP for dereliction of duty (failing to answer a radio check after at least five radio checks due to being asleep at your post aboard █), three specifications of UA, and three specifications of insubordinate conduct. You did not appeal your NJP. On the same day, you received a Page 11 documenting your NJP. You did not make a Page 11 rebuttal statement.

On 6 June 2007 you were 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 waive your rights to submit a written rebuttal statement and to request an administrative separation board. On the same day, you received a Page 11 where you acknowledged you were going to be administratively separated. You did not make a Page 11 rebuttal statement. Ultimately, on 3 August 2007 you were separated from the Marine Corps for a pattern of misconduct with an other than honorable conditions (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 initial AO dated 7 January 2022. The Ph.D. noted that there was no evidence you were diagnosed with a mental health condition on active duty. The Ph.D. determined that while you did deploy to Iraq, there was insufficient evidence to establish a nexus between an unfitting mental health condition and your misconduct because the majority of your misconduct occurred prior to your deployment, and your misconduct during and after deployment appeared to be a continuation of pre-deployment behavior. The Ph.D. concluded that there is insufficient evidence you incurred

an unfitting mental health condition on active duty, and that there was insufficient evidence your misconduct could be attributed to PTSD or another unfitting mental health condition.

Following your AO rebuttal response that included a 2020 VA decision documenting your service-connection for treatment purposes only for PTSD, the Ph.D. issued a second AO on 27 January 2022. The Ph.D. noted that your VA decision did not provide enough information to provide a nexus to your active duty misconduct as you had established a pattern of misconduct prior to your Iraq deployment, which was the presumed traumatic stressor. Contrary to the first AO, the Ph.D. determined that there was post-service evidence you incurred PTSD on active duty. However, the Ph.D. still concluded that there was insufficient evidence your misconduct could be attributed to PTSD or another unfitting 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: (a) you were diagnosed with PTSD with alcohol abuse, and (b) you had less than two weeks left on your active duty contract and instead of receiving the proper help you needed you were separated. 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 a post-discharge VA service-connection for PTSD, your 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. 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. 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 3.5 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 pattern of 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, post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded 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,

2/22/2022

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Executive Director
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