



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: 7230-21
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 4 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 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.

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 22 March 1993. Your pre-enlistment physical examination on 8 March 1993 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 17 October 1994 you received a "Page 11" counseling sheet (Page 11) noting your deficiencies involving your personal financial situation and the importance of being at the appointed place of duty at the prescribed time. The Page 11 warned you that a failure to take corrective action may result in administrative separation or judicial proceedings. You did not make a Page 11 rebuttal statement. On 18 November 1994 a Navy Medical Officer at Naval Hospital ██████████ diagnosed you with an adjustment disorder due to marital and financial stress.

On 29 December 1994 you received two separate Page 11 counseling sheets noting your deficiencies of failing to maintain personal financial obligations resulting in a letter of indebtedness, and unauthorized absence (UA), respectively. Each Page 11 expressly warned you that a failure to take corrective action may result in administrative separation or judicial proceedings. You did not make a Page 11 rebuttal statements to either Page 11.

On 18 January 1995 you received non-judicial punishment (NJP) for three separate specifications of UA. You did not appeal your NJP. On 15 March 1995 the suspended portion of your NJP was vacated and ordered executed due to continuing misconduct.

On 15 March 1995 you received NJP for both UA and breaking restriction. You did not appeal your NJP.

On 17 March 1995 you received a Page 11 for failing to file a Child Care Plan. The Page 11 expressly warned you that a failure to take corrective action within a reasonable amount of time may result in administrative separation or judicial proceedings. You did not make a Page 11 rebuttal statement. On 19 June 1995 the suspended portion of your March NJP was vacated and ordered executed due to continuing misconduct.

On 8 November 1995, 5 January 1996, 26 February 1996, and 13 March 1996 you received Page 11 counseling sheets for a pattern of misconduct, not checking in and checking out of your work center, failing to pay just debts, and UA, respectively. You did not submit any Page 11 rebuttal statements.

On 11 June 1996 you received NJP for UA. You did not appeal your NJP. On 6 August 1996 you were notified that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. The basis for your separation was your discreditable involvement with authorities evidenced by your three NJPs, a failure to pay just debts, and multiple adverse entries contained on Page 11 of your service record. You elected your rights to consult with military counsel and to submit written rebuttal statement, but you expressly waived your right to request an administrative separation board. Your military counsel witnessed and signed your administrative separation election of rights form. Ultimately, on 18 December 1996

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 15 January 2022. The Ph.D. initially observed that your active duty records did not contain evidence of reported psychological symptoms/behavioral changes indicative of a diagnosable unfitting mental health condition. The Ph.D. observed that you submitted an active duty diagnosis of an adjustment disorder with a referral for counseling, but the Ph.D. noted that you provided alternative rationale for your misconduct in your personal statement. The Ph.D. concluded by opining that although you had an active duty mental health diagnosis, the preponderance of evidence failed to establish you mental health condition mitigated misconduct.

Following your AO rebuttal response that included post-service civilian medical records, the Ph.D. still determined that there was a lack of objective evidence to provide a nexus between your active duty misconduct and a mental health condition. The Ph.D. concluded by similarly opining that there was insufficient evidence your misconduct could be mitigated by a 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 your contentions that: (a) you were diagnosed with mental health issues one year into your service, but they were left untreated and left to fester; (b) if you were on active duty today your situation would have been handled differently; (c) had you been given proper legal counsel your situation could have ended up very differently; and (d) but for the lack of treatment you likely would not have received NJP and likely would have been discharged with something better than an OTH. 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. 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 pervasiveness and severity of your pattern of 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.

Additionally, the Board determined that no ineffective assistance of counsel (IAC) occurred. The Board noted there is absolutely no convincing evidence in the record to support your contention that you did not receive adequate representation. The Board unequivocally concluded that you failed to meet the burden to show that: (a) your defense counsels' performance was deficient and fell below an objective standard of reasonableness, and (b) but for the alleged deficiencies, there was a reasonable probability of a more favorable result. Accordingly, the Board concluded that no IAC occurred whatsoever, and any such suggestion or argument was entirely without merit and not persuasive. The Board also opined that given Petitioner's overall lackluster performance and cumulative misconduct, he would have likely received an OTH even if he presented his case to an administrative separation board.

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 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,

3/9/2022

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Executive Director
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