



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: 250-22

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 18 May 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 6 November 2002. Your pre-enlistment physical examination on 31 July 2002 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 1 December 2004, you received non-judicial punishment (NJP) for nine separate specifications of larceny involving credit card theft from a fellow Marine to access pornographic websites and chat rooms. You did not appeal your NJP. On 2 December 2004, you received a "Page 11" counseling sheet (Page 11) documenting your NJP. The Page 11 warned you that a

failure to take corrective action may result in judicial or adverse administrative action including, but not limited to, administrative separation. You did not make a Page 11 rebuttal statement. On 3 March 2005, the suspended portion of your NJP was vacated and ordered executed.

Based on a 21 December 2004 diagnosis of a personality disorder, your command notified you of administrative separation proceedings on 30 March 2005. You did not consult with counsel and elected your right to include a rebuttal statement. However, on 6 April 2005, you received NJP for the larceny of a digital camcorder from MCCS █ valued at approximately \$649.99. You did not appeal your NJP. On 7 April 2005, you received a Page 11 documenting your NJP. The Page 11 warned you that a failure to take corrective action may result in judicial or adverse administrative action including, but not limited to, administrative separation.

On 7 August 2005, you were subsequently notified that in lieu of a personality disorder you were now being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. You consulted with military counsel and waived your right to request an administrative separation board (Adsep Board). On 26 October 2005, the Separation Authority (SA) initially approved and directed your discharge for a pattern of misconduct with an Other Than Honorable conditions (OTH) characterization of service. However, on 8 November 2005 the SA rescinded the OTH discharge due to certain inaccuracies resulting in improper notification procedures. On 7 December 2005, a preliminary inquiry was conducted and the investigating officer recommended that you be permitted to consult with counsel and complete a new Adsep Board election of rights form. You subsequently elected your right to request an Adsep Board.

On 20 April 2006, an Adsep Board convened in your case. Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined that you committed the misconduct as charged. Subsequent to the misconduct finding, the Adsep Board members unanimously recommended that you be separated from the Marine Corps with an OTH characterization of service. Ultimately, on 5 June 2006, you were separated from the Marine Corps for misconduct with an OTH discharge characterization 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 4 February 2022. The Ph.D. noted in pertinent part:

Petitioner's OMPF did contain evidence of a diagnosis of a mental health condition (Adjustment Disorder related to marital discord) and ADHD, as well as a Borderline Personality Disorder. Although the testimony during the ADB referenced a sexual addiction, going to strip clubs, and watching porn, there was no evidence of a formal diagnosis or description of how he met the criteria for such a diagnosis within the OMPF. Petitioner submitted evidence of a postdischarge diagnosis of PTSD, chronic and ADHD. Petitioner's misconduct of theft is not the typical misconduct exhibited by a person who suffered from PTSD

or an adjustment disorder. Additionally, Petitioner provided alternative rationale for the theft of the video recorder, his second NJP.

The Ph.D. concluded, “[b]ased on the available evidence, it is my considered clinical opinion there is sufficient evidence Petitioner exhibited behaviors associated with a mental health condition during his military service; however, the preponderance of available objective evidence failed to establish his in-service 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: (a) your misconduct was not the result of your PTSD, but rather you believe your active duty medications played a role in your misconduct because you experienced thoughts and actions that were uncharacteristic of you while on such medications, (b) after no longer being prescribed such medications you have had no illegal encounters, (c) you struggled when you came back from your Iraq deployment and had good service until your returned from such deployment, and (d) none of the mental health treatment was really helping as you still found yourself struggling with combat-related PTSD daily. 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 or corresponding medications mitigated the misconduct that formed the basis of your discharge. The Board also concluded that although you have active duty and post-discharge mental health diagnoses, 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, 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. Moreover, the Board determined that intentional misconduct such as larceny would not be excused or mitigated by mental health concerns 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 otherwise 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. 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, your post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. 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 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,

6/10/2022

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Executive Director

Signed by: █