



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: 360-22
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 8 July 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. Although you were afforded an opportunity to submit an AO rebuttal, and you did not 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 at age seventeen and commenced active duty on 23 September 1986. Your pre-enlistment physical examination, on 5 March 1986, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 20 November 1987, your command issued you a “Page 11” counseling sheet (Page 11) documenting your non-promotion to Lance Corporal due to your deficiencies in maturity, responsibility, listening to instruction, and obeying orders. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation and/or judicial proceedings. You did not submit a Page 11 rebuttal statement.

On 17 March 1988, you received non-judicial punishment (NJP) for the wrongful use of a controlled substance (cocaine). You did not appeal your NJP. On 18 March 1988, you received a Page 11 documenting your drug use and deficiencies in maturity, judgement, the ability to adhere to Marine Corps standards, a sense of responsibility, integrity, and a desire to improve oneself and take life seriously. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation and/or judicial proceedings. You did not submit a Page 11 rebuttal statement.

On 20 April 1988, you received a Page 11 documenting that you missed a drug and alcohol appointment without any apparent reason. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation with an other than honorable discharge, a competency review board, or possible judicial proceedings. You did not submit a Page 11 rebuttal statement.

On 2 May 1988, you received NJP for insubordinate conduct toward a Gunnery Sergeant and for failing to obey a lawful order. You did not appeal your NJP.

On 30 June 1988, you received a Page 11 documenting deficiencies in: your irresponsibility, bad judgment, poor initiative, and lack of attention to detail. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation with an other than honorable discharge, a competency review board, or possible judicial proceedings. You did not submit a Page 11 rebuttal statement.

On 24 August 1988, you received a Page 11 documenting deficiencies in: failing to report to your appointed place of duty, desire to be a Marine, lack of attention to detail, being responsible for one’s actions, a careless attitude, being borderline belligerent. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation with an other than honorable discharge, a competency review board, or possible judicial proceedings. You did not submit a Page 11 rebuttal statement.

On 25 August 1988, your command vacated the suspended portion of your May NJP sentence and ordered it executed: a reduction in rank to the lowest enlisted paygrade (E-1).

On 23 September 1988, you received NJP for the wrongful possession of two military identification cards, and for failing to obey a lawful order by drinking underage. You did not appeal your NJP.

On 3 November 1988, you were notified that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. You waived your rights to consult with counsel, submit rebuttal statements, and to request an administrative separation board. Ultimately, on 15 November 1988, you were discharged from the Marine Corps for misconduct with an Other Than Honorable conditions (OTH) characterization of service and assigned an RE-4B reentry code.

On 19 October 1990, the Naval Discharge Review Board (NDRB) denied you any relief. The NDRB determined that your OTH discharge was proper as issued and no change was warranted.

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 a very young and immature man and unaware of the gravity and complex ramifications of an OTH discharge, (b) you have not been in trouble post-service, and (c) contaminated water at ██████████ may have caused brain damage on active duty. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments, or advocacy letters.

As part of the Board review process, the BCNR Physician Advisor who is a medical doctor and Fellow of the American Psychiatric Association (MD), reviewed your contentions and the available records and issued an AO dated 29 May 2022. The MD stated in pertinent part:

Petitioner's available in-service personnel and medical records contained a diagnosed Alcohol Use Disorder and Cocaine Use Disorder, but did not contain a diagnosis of TBI or other mental health conditions, nor did it contain a record of psychological symptoms or behavioral changes indicative of a diagnosable mental health condition or of behaviors attributable to a TBI or additional mental health conditions. Throughout his counselings, disciplinary, and administrative processing, there were no concerns raised of any issues warranting additional referral to mental health resources. Post-discharge, Petitioner provided no evidence of a mental health condition or TBI attributable to his military service. There were no in-service or post-discharge clinical records provided to clarify the clinical history or psychological symptoms, or establish a nexus between his in-service misconduct and his contended conditions. On his Release from Active Duty Physical Examination, the examining physician did not document any medical or mental health conditions and deemed Petitioner physically qualified for separation from service. Additional information, such as post-service treatment records describing the Petitioner's mental health diagnosis and its specific link to his misconduct, would assist in the review of his application for relief. Should the Petitioner choose to submit additional records, they will be reviewed in context of his claims.

The MD concluded, "[b]ased on the available evidence, it is my clinical opinion that there is insufficient evidence to support the contention of TBI or mental health conditions attributable to

Petitioner's military service. There is insufficient evidence to support Petitioner's contention that his in-service misconduct could be attributed to TBI or a mental health condition.

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 purported TBI or mental health conditions and/or their related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such TBI and/or mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, even under the liberal consideration standard for mental health conditions the Board concluded that your misconduct was not due to TBI or mental health-related conditions or symptoms. Moreover, the Board observed that you did not submit any clinical documentation or treatment records to support your TBI and mental health claims despite a request from BCNR on 21 March 2022 to specifically provide additional documentary material. Even if the Board assumed that your misconduct was somehow attributable to any TBI or 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 unequivocally 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 observed 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 calculated from your available performance evaluations during your enlistment was approximately 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 cumulative serious misconduct.

Regarding your contention you suffered from the effects of tainted water while stationed at █, the Board concluded that you did not submit any convincing evidence to support your claim. Notwithstanding, the Board noted that if you indeed experienced any health-related issues due to contaminated █ water, you are not prohibited from receiving Department of Veterans Affairs (VA) benefits due to your OTH discharge. As long as you did not receive a dishonorable discharge and meet certain qualifying criteria, you are eligible to potentially receive certain VA benefits related to tainted water at █.¹

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

¹ <https://www.va.gov/disability/eligibility/hazardous-materials-exposure/camp-lejeune-water-contamination/>

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. 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. 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.

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,

7/15/2022

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Executive Director

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