



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: 0565-22
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 6 June 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). The Board also considered an advisory opinion (AO) from a qualified mental health professional, which was previously provided to you. Although you were afforded an opportunity to submit a rebuttal, 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 and began a period of active duty on 18 June 2002. On

15 April 2002, you signed a statement of understanding regarding the Marine Corps Policy concerning Illegal Use of Drugs. On 14 January 2003, you received your first nonjudicial punishment (NJP) for violating a lawful order. On 30 May 2003, you were found guilty at a summary court-martial (SCM) for failing to obey a lawful order and for breaking restriction. You were sentenced to be confined for 30 days. On 7 August 2003, you received administrative remarks documenting you were counseled concerning numerous violations of unauthorized absence (UA) and advised further violations may result in disciplinary action, administrative reduction, administrative separation and/or limitation of further service. On 21 November 2003, you received a second NJP for being UA from your appointed place of duty and for treating a Sergeant with contempt by repeatedly yelling and attempting to come at him. On 19 January 2005, you were found guilty at a second SCM for the wrongful use of marijuana and sentenced to be confined for 30 days, to forfeit \$617.00 pay per month for one month and to be reduced in rank to E-1. On 27 January 2005, you were notified of your pending administrative separation as a result of misconduct due to drug abuse, at which time you elected your right to consult with military counsel and waived your right to have your case heard at an administrative discharge board. On 14 March 2005, your commanding officer (CO) recommended to the separation authority that you be discharged with an Other Than Honorable (OTH) for misconduct due to drug abuse. On 23 March 2005, the separation authority directed you be discharged with an OTH for misconduct due to drug abuse and, on 1 April 2005, you were so discharged.

In connection with your assertion that you suffered from PTSD, the Board requested, and reviewed, the AO. The AO reviewed your service record as well as your petition and the matters that you submitted. According to the AO:

Petitioner's OMPF did not contain evidence of a diagnosis of a mental health condition. His DD 214 indicated he served in Iraq during Operational Iraqi Freedom and his chronological record indicates he was likely in Iraq after June of 2003. Evidence submitted by Petitioner supported post-discharge diagnoses of PTSD and TBI. In regards to his misconduct, his breaking restriction and wearing an earring occurred prior to the purported trauma. Additionally, Petitioner's statement regarding his misconduct of breaking restriction and wearing an earring provided alternative reasoning for his misconduct. In contrast, his misconduct of unauthorized absence (UA), treating a Sgt with contempt (yelling) and marijuana use appear to have occurred after the purported trauma. This behavior is consistent with symptoms of PTSD and/or TBI. For example, his yelling may be a sign of irritability and his UA and marijuana use may be his way of attempting to avoid triggers/symptoms of his PTSD/TBI.

The AO concluded, "[b]ased on the available evidence, it is my considered clinical opinion Petitioner's PTSD and TBI can be attributed to his military service. Additionally, some misconduct can be attributed to PTSD and TBI."

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo. These included, but were not limited to, your contentions that, "this request should be made mainly due to the circumstances I was injured in Iraq and nobody to include myself checked on me mentally,

in honesty I was totally not myself, I was untreated and diagnosed with PTSD, the attached documents will show my character during combat and after, please to whom it may concern have mercy on me this has ruined my life.” For purposes of clemency consideration, the Board noted you provided supporting documentation describing post-service accomplishments and an advocacy letters.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs and SCMs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included a drug offense. Further, 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. Finally, despite the AO findings that some of your misconduct could be attributed to a mental health condition, they concluded the seriousness of your misconduct outweighed this mitigation evidence. Ultimately, the Board determined you were mentally responsible for your conduct and it showed a complete disregard for military authority and regulations. As a result, the Board concluded your conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH characterization. Finally, after applying liberal consideration, 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. While the Board commended your post-discharge good character, it determined it was also insufficient to overcome the seriousness of your misconduct that included more than marijuana use. While your marijuana use may have triggered your administrative separation, the Board felt your entire record of misconduct earned you the OTH characterization. Accordingly, given the totality of the circumstances, the Board determined that 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,

6/22/2022

