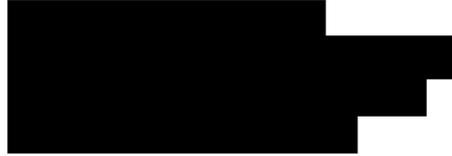




DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

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Docket No: 1277-22

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 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 17 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). Additionally, the Board also considered an advisory opinion (AO) furnished by a qualified mental health provider, one of which was previously provided to you. You were afforded an opportunity to submit an AO rebuttal and you did do so.

You originally enlisted in the Marine Corps and entered active duty on 7 August 1995. On 1 February 2004, you were honorably discharged at the rank of Staff Sergeant (E-6) in order to accept a commission. On 2 February 2004, you were commissioned as a Chief Warrant Officer in the Marine Corps under the "Enlisted to Warrant Officer (Regular) Program."

On 4 October 2011, pursuant to your guilty pleas, you were convicted at a General Court-Martial

(GCM) of the larceny of \$35,000 from Marine Aviation Training Support Group Twenty-Three and conduct unbecoming an officer and gentleman. You were sentenced to confinement for 120 days, a fine, and a dismissal from the Marine Corps. In accordance with the pre-trial agreement, the Convening Authority approved the sentence as adjudged, but suspended confinement in excess of 75 days and disapproved the fine.

On 15 May 2012, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the GCM findings and sentence. On 19 July 2012, the Court of Appeals for the Armed Forces affirmed the NMCCA opinion. On 7 January 2013, the Assistant Secretary of the Navy (Manpower & Reserve Affairs) approved your dismissal and ordered it executed. Ultimately, on 23 January 2013, you were dismissed from the United States Marine Corps.

On 4 March 2016, the VA granted you service-connection for PTSD with gambling disorder and alcohol use disorder with a 50% rating.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to: (a) a discretionary error was made when your many years of honorable service were disregarded when you were discharged, (b) your dedicated and honorable service should be taken into consideration and a discharge upgrade should be granted, (c) your discharge is disproportionate to your years of honorable service, and it robs you of your good name and injures your economic and social potential as a member of the general community, (d) on active duty you suffered from incidents causing PTSD, (e) your misconduct stemmed from your undiagnosed, service-connected PTSD, (f) your PTSD also includes a gambling disorder leading to your misconduct, (g) your PTSD compromised your judgment, allowing you to commit the misconduct underlying your dismissal, (h) your misconduct should be viewed under the Kurta Memo's standard for liberal consideration, (i) anything other than an honorable discharge dismissed both your seventeen years of service, as well as the success you have had post-discharge, (j) regardless of your past mistake, you do not deserve your disproportionately harsh punishment, (k) the character letters submitted praise and speak to your good character, regardless of your mistakes, (l) you served faithfully in the Marine Corps for over seventeen years and were awarded numerous decorations, you held many specialties, and were highly respected by your superiors, peers, and subordinates, (m) while theft may not be a typical PTSD symptom, the AO does not state that gambling is not a PTSD symptom, and logically there is a link between theft and gambling, and (n) the larceny serves as additional evidence of your gambling addiction which served a coping mechanism and/or form of self-medication to deal with your service-connected PTSD. For purposes of clemency consideration, the Board noted you provided supporting documentation describing post-service accomplishments and advocacy letters.

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 25 April 2022. The Ph.D. stated in pertinent part:

Among available records, there is no evidence of a mental health diagnosis in military service. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. There is no evidence that he was not competent or responsible for his behavior during his military service. Post-service, the VA has granted service connection for PTSD and has determined he is not competent to manage his finances. However, this determination is temporally remote from military service and theft is not a typical symptom of PTSD. Additional records (e.g., medical records describing the Petitioner's diagnosis, symptoms, and a specific link to his misconduct) are required to render an alternate opinion.

The AO concluded, “[b]ased on the available evidence, it is my clinical opinion that there is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to PTSD.”

In response to the AO, you provided medical evidence documenting your PTSD diagnosis, medical evidence pertaining to your PTSD and other conditions, and a character letter.

In accordance with the Hagel, Kurta, 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 observed that your available active duty records did not contain evidence of a mental health diagnosis or psychological/behavioral concerns indicating a mental health condition or warranting an evaluation referral. The Board concluded that although you have a post-discharge PTSD and gambling disorder 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, 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 concluded that the intentional misconduct you committed is not the type of misconduct that would be excused by mental health conditions 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 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. Additionally, absent a material error or injustice, the Board declined to summarily



upgrade a discharge solely for the purpose of facilitating certain 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 egregious misconduct and disregard for good order and discipline clearly merited your receipt of a dismissal.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. You were properly convicted at a GCM of serious misconduct, and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your dismissal. The Board carefully considered all matters submitted regarding your character, post-service conduct, and personal/professional/military accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that 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,

6/30/2022

