



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: 1862-22

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 24 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 considered an advisory opinion (AO) furnished by a qualified mental health provider. Although you were afforded an opportunity to submit an AO rebuttal, you did not do so.

You enlisted in the Marine Corps and commenced a period of active duty on 20 October 2003. As part of your pre-enlistment application, on 21 February 2003, you signed and acknowledged the "Statement of Understanding – Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment physical examination on 28 February 2003 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 6 July 2005, a Navy Drug Screening Laboratory message confirmed your urine sample tested positive for amphetamine/methamphetamine at a level of 10,353 ng/ml, well above the testing cutoff level of 300 ng/ml. On 9 September 2005, you received non-judicial punishment (NJP) for violating a lawful written order prohibiting the possession of any live ordinance in the barracks when you had possession of an M69 practice grenade in the barracks. You did not appeal your NJP.

On 22 September 2005, pursuant to your guilty plea, you were convicted at a Summary Court-Martial (SCM) of the wrongful use of a controlled substance (methamphetamine). As punishment you were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), forfeitures of pay, and confinement for thirty days. The Convening Authority approved your SCM sentence as adjudged. On 2 December 2005, you refused a Medical Officer's Evaluation for possible substance abuse.

On 13 December 2005, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with counsel and waived your rights to request an administrative separation board. Ultimately, on 22 March 2006, you were separated from the Marine Corps for misconduct with an Other Than Honorable (OTH) discharge characterization and assigned an RE-4B reentry code.

On 4 April 2017, the Naval Discharge Review Board determined that, despite your PTSD contention, your 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 0311 Rifleman in a combat zone, (b) you were engaged in life-saving heroics in combat when you saved your team leader under suppressed fire, and (c) you are regretful for your separation reason. 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 licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 17 May 2022. The Ph.D. noted in pertinent part:

Petitioner's OMPF did not contain evidence of a diagnosis of a mental health condition. Unfortunately, Petitioner did not provide medical evidence to support his claim of PTSD and his personal statement was not sufficiently detailed to establish manifestation of purported symptoms during his military service. The lack of clarifying information made available did not provide enough markers to establish an onset and development of mental health symptoms or identify a nexus with his misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The AO concluded, “[b]ased on the available evidence, it is my considered clinical opinion, there is insufficient evidence to attribute the Petitioner’s purported PTSD diagnosis to military service, or that his in-service misconduct could be attributed to PTSD or another 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 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 also concluded that 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 serious 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.

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 concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. Moreover, the Board determined that illegal drug use by a Marine is contrary to USMC core values and policy, renders such Marines unfit for duty, and poses an unnecessary risk to the safety of their fellow Marines. 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. As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your serious misconduct clearly merited your receipt of an OTH. 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. 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,

7/5/2022

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