



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: 2796-22
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 29 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 an advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. Although you were afforded an opportunity to submit an AO 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 commenced active duty on 31 May 1994. Your pre-enlistment physical examination, on 4 June 1993, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. As part of your enlistment application, on 28 August 1993, you signed the "Statement of Understanding Marine Corps Policy Concerning Illegal Use of Drugs," where you acknowledged and expressly understood that the illegal distribution, possession, or use of drugs is not tolerated in the USMC.

On 29 February 1996, your command issued you a "Page 11" warning (Page 11) documenting your untimely return from the expiration of liberty. The Page 11 expressly advised you that a failure to take corrective action may result in administrative separation or limitation on further service. You did not submit a Page 11 rebuttal statement.

On 19 May 1997, you received non-judicial punishment (NJP) for two separate specifications of failing to obey a lawful order. You appealed your NJP but higher authority denied it.

On 28 May 1997, your command issued you a Page 11 documenting your administrative removal from your assigned parachute rigger MOS for a period of six months. On 23 October 1997, your command issued you another Page 11 documenting your recent involvement with civilian authorities and for displaying a lack of judgment, discipline, and self-control. The Page 11 also noted that you were removed from your primary MOS and reassigned because your credibility and reliability were in question. The Page 11 warned you that a failure to take corrective action may result in administrative separation or limitation on further service. You did not submit a Page 11 rebuttal statement.

On 14 November 1997, you received NJP for failing to obey a lawful order. You did not appeal your NJP.

On 17 November 1997, the suspended portion of your last NJP was vacated and ordered executed due to your continuing misconduct. On 17 November 1997, you commenced a period of unauthorized absence (UA) that terminated after twenty-eight (28) days, on 15 December 1997, with your surrender to military authorities.

On 28 January 1998, pursuant to your guilty pleas you were convicted at a Special Court-Martial (SPCM) of your UA, the willful disobedience of a superior commissioned officer, the wrongful possession of a controlled substance, adultery, and the wrongful solicitation to commit an offense when you solicited steroids. You were sentenced to confinement for sixty days, forfeitures of pay, and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). On 23 April 1998, the Convening Authority approved the SPCM sentence. On 9 September 1998, the Navy-Marine Corps Court of Criminal Appeals affirmed the SPCM findings and sentence. Upon the completion of appellate review in your case, on 30 November 1998, you were discharged from the Marine Corps with a BCD and assigned an RE-4B reentry code.

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) you suffered from undiagnosed PTSD on active duty, (b) during a deployment you suffered a lower leg injury that left you with horrible bouts of anxiety, paranoia, and dissociative amnesia, (c) you continued to excel in the USMC with meritorious promotions, meritorious masts, and your selection as Marine of the Quarter for the second quarter of fiscal year 1997, (d) a combination of factors led you down a black hole of alcoholism and misconduct from trauma suffered on your Adriatic/Bosnian theater deployment, (e) since your BCD you have had numerous civilian arrests all involving alcohol and substance abuse, (f) today you are sober and have been so for over ten years, (g) you have earned a bachelor's degree, master's degree, and a juris doctor degree (JD), but you cannot use any of your degrees because of your mental health issues, (h) you desperately need mental health help that only the Department of Veterans Affairs can provide, and (i) you seek relief because you are suffering in the job market and your BCD makes finding gainful employment almost impossible. 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 6 May 2022. The Ph.D. stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. He has provided limited medical evidence of a diagnosis of GAD that is temporally remote from military service, and there is no evidence this diagnosis is related to his military service. Unfortunately, the Petitioner's personal statement is not sufficient to establish a clinical diagnosis or provide a nexus with his misconduct. Additionally, it is difficult to consider how steroid distribution and adultery are related to symptoms of unrecognized PTSD, as his own statement is that these behaviors were related to a desire for social acceptance and maladaptive coping. 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 Ph.D. concluded, "[b]ased on the available evidence, it is my clinical opinion that there is insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence that of his misconduct may be attributed to PTSD."

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. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, 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 cumulative 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. Additionally, the Board concluded that the specific steroid-related misconduct you committed would not 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 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 3.3 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 cumulative misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your serious misconduct.

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 and/or remove any derogatory materials from a service record solely for the purpose of facilitating certain veterans'

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 serious misconduct and disregard for good order and discipline clearly merited your receipt of a BCD.

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 SPCM of serious misconduct, and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. The Board carefully considered any matters submitted regarding your character, post-service conduct, and personal/professional accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board concluded insufficient evidence of an error or injustice exists to warrant 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.

Lastly, the Board noted that any requests to have certain awards and ribbons added to your record was moot. The Board observed that in March 2011 you submitted a package to Navy Personnel Command requesting that certain additional awards, ribbons, and insignia be included in your record. The Board also observed that on 1 May 2012 a DD Form 215 was issued documenting any/all of your additional missing awards, ribbons, and badges you were entitled to receive.

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,

8/2/2022

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Deputy Director

Signed by: █