



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

█  
Docket No: 3116-22  
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 26 August 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 the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. You were afforded an opportunity to submit an AO rebuttal but chose not to 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 entered active duty on 13 November 1997. On 13 July 1999, your command issued you a "Page 11" counseling warning (Page 11) documenting your non-deployable status after a review of your current family/personal situations. You acknowledged that you were going to be transferred to another command until such time as your family situation was resolved and you were returned to a deployable status.

On 14 September 1999, you commenced an unauthorized absence (UA) that terminated after thirty-four days on 18 October 1999. On 2 December 1999, you received non-judicial punishment (NJP) for your UA. You did not appeal your NJP. On 20 March 2000, your command vacated the suspended portion of your December 1999 NJP and ordered it executed due to continuing misconduct.

On 27 March 2000, you commenced another UA that terminated after 201 days with your arrest by civilian authorities on 13 October 2000. On 28 March 2000, your command issued you a Page 11 warning documenting your illegal involvement with drugs following a positive urinalysis test for marijuana.

On 21 November 2000, you submitted a voluntary written request for an administrative discharge under Other Than Honorable (OTH) conditions in lieu of trial by court-martial for your long-term UA. Prior to submitting this voluntary discharge request you conferred with a qualified military lawyer, at which time you were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. You indicated you were entirely satisfied with the advice you received from counsel. You expressly admitted that you were guilty of your long-term UA. You acknowledged that with an OTH characterization of discharge, you may be deprived of virtually all veteran's rights otherwise provided to you under both federal and state law. You also understood that with an OTH you may expect to encounter substantial prejudice in civilian life in situations wherein the character of my service in, and subsequent discharge from, any branch of the armed forces may have a bearing. As a result of this course of action, you were spared the stigma of a court-martial conviction for your UA, as well as the negative ramifications of receiving a punitive discharge from a military judge. Ultimately, on 22 December 2000, you were separated from the Marine Corps with an OTH discharge characterization and assigned an RE-4 reentry code.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warranted relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to: (a) despite having family hardships the military discharged you instead of helping you, (b) you were diagnosed with HIV and the military discharged you as soon as you were diagnosed, and (c) you were going through a lot of mental issues due to your circumstances. 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 30 June 2022. The Ph.D. stated in pertinent part:

Among available records, there is no evidence of a mental health diagnosis during military service. The Petitioner has provided no evidence of in support of his claims. While his statement regarding personal stressors is consistent with the information in his record, there is insufficient evidence to establish clinical symptoms or a nexus with his misconduct, particularly given his statement in service that his UA was due to financial stressors and earn additional funds for his family. Additional records (e.g., 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 considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to a mental health condition.”

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 NJP and request to be discharged in lieu of trial by court-martial, outweighed these mitigating factors. 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 concurred with the AO and concluded that there was no convincing evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or 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, the Board observed that you did not submit any clinical documentation or treatment records to support your mental health claims despite a request from BCNR, on 3 May 2022, to specifically provide additional documentary material. 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. The Board also determined 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 also 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 in conduct from your available evaluations was approximately 3.60. 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 serious misconduct which further justified your OTH characterization of discharge.

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 determined that characterization under OTH conditions is generally warranted for misconduct and 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. The simple fact remains is that you left the Marine Corps while you were still contractually obligated to serve and you went into a UA status for approximately 200 days without any legal justification or excuse. Moreover, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. Lastly, the Board determined that illegal drug use by a Marine is contrary to Navy core values and policy, renders such Marine unfit for duty, and poses an unnecessary risk to the safety of their fellow Marines. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. As a result, 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 clearly merited your receipt of an OTH characterization and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge. Even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that 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.

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, \_\_\_\_\_

8/31/2022

[REDACTED]

Executive Director

[REDACTED]