



**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: 4272-22

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 9 September 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 qualified mental health provider and your response to the AO.

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 28 November 2005. Your pre-enlistment physical examination, on 31 August 2005, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 11 May 2006, your command issued you a "Page 11" counseling warning (Page 11) noting certain deficiencies relating to your failure to obey a lawful order regarding alcohol consumption on certain days of the week for entry level students. The Page 11 expressly 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 22 May 2006, your command issued you a Page 11 noting certain deficiencies relating to your dereliction of duty regarding alcohol consumption within a certain time before assuming fire watch. The Page 11 expressly 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 20 June 2006, you received non-judicial punishment (NJP) for two separate specifications of violating a lawful order. You did not appeal your NJP. The same day your command issued you a Page 11 noting certain deficiencies relating to your failing to obey a lawful order involving alcohol consumption on certain days of the week for entry level students. The Page 11 expressly 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 10 August 2006, your command issued you a Page 11 noting certain deficiencies relating to providing adequate and continuous support to your dependent family members. The Page 11 expressly 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 26 September 2007, a Navy Drug Screening Laboratory message indicated you tested positive for marijuana (THC) above the testing cutoff level for the THC metabolite. On 4 December 2007 your command issued you a Page 11 noting certain deficiencies involving the wrongful use of a controlled substance. The Page 11 notified you that processing for administrative separation is mandatory for drug abuse. You did not submit a Page 11 rebuttal statement.

On 22 May 2008, contrary to your plea, you were convicted at a Special Court-Martial of the wrongful use of a controlled substance (marijuana). You were sentenced to confinement for thirty days, forfeitures of pay, and a reduction in rank to the lowest enlisted paygrade (E-1).

On 3 November 2008, your command issued you a Page 11 noting certain deficiencies relating unauthorized absence. The Page 11 expressly warned you that future Uniform Code of Military Justice violations may result in judicial action. You did not submit a Page 11 rebuttal statement. On 5 January 2009 your command issued you a Page 11 noting certain deficiencies relating to violating base housing policies resulting in you being terminated from government quarters. You did not submit a Page 11 rebuttal statement.

On 23 January 2009, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct, and misconduct due to drug abuse. You consulted with military counsel and elected your right to request an administrative separation board (Adsep Board).

On 28 January 2009, an Adsep Board convened in your case. At the Adsep Board you were represented by counsel. Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined that you committed the misconduct as charged. Subsequent to the misconduct finding, the Adsep Board members unanimously recommended that you be separated from the Marine Corps with an Other Than Honorable (OTH) characterization of service. Ultimately, on 3 April 2009, you were separated from the Marine Corps for misconduct with an OTH discharge characterization and assigned an RE-4B reentry code.

On 20 October 2011, the Naval Discharge Review Board (NDRB) denied your application for relief. The NDRB determined that your discharge was proper as issued and no change was warranted. On 13 February 2018, this Board denied your petition for relief.

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 suffering from PTSD from a combat deployment, (b) substance-seeking behavior and efforts to self-medicate mental health symptoms are the types of misconduct warranting discharge upgrade consideration, (c) your active duty PTSD diagnosis shows the severity of your PTSD, (d) you were discharged without your conduct being assessed under appropriate medical standards, (e) liberal consideration creates a presumption in favor of an upgrade, (f) post-discharge you have given yourself to your faith and your family, and (g) you have had to live without medical care and with an undeserved and painful social stigma of an OTH. For purposes of clemency consideration, the Board noted you provided advocacy letters but no supporting documentation describing post-service accomplishments.

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 July 2022. The Ph.D. stated in pertinent part:

Petitioner's OMPF did contain evidence of a diagnosis of a PTSD. Records did show in-service misconduct in 2006, as well as 2008/2009 after his return from deployment. In contrast, evidence submitted by Petitioner supported an in-service and post-service diagnosis of PTSD related to military service. Petitioner attributed his 2006 misconduct to the stress of his son's birth, as well as being away from his family. Petitioner attributed his marijuana use to his alcohol use. He denied knowingly ingesting marijuana; however, he acknowledged he could have unknowingly ingested it. He also described his alcohol use as "wanted to have a good time" and not as a method of self-medication. Petitioner did acknowledge PTSD symptoms of anxiety and nightmares upon return from combat. Although it cannot be said with absolute certainty, Petitioner's misconduct, after his return from combat, could be attributed to any of the reasons Petitioner described, including resorting to a maladaptive coping skills to deal with his purported PTSD symptoms.

The Ph.D. concluded, “[b]ased on the available evidence, it is my considered clinical opinion, there is sufficient evidence of PTSD that can be attributed to military service. There is insufficient evidence that all of his misconduct could be attributed to PTSD.”

In response to the AO, you provided additional arguments reiterating your belief that you are entitled to relief under existing policy guidelines based on the circumstances of your case.

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 SPCM, 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 concluded that there was no convincing evidence of any nexus between any mental health conditions and/or related symptoms and the majority of your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the majority of the misconduct that formed the basis of your discharge. As a result, the Board concluded that the majority 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 pattern of misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record reflected that your misconduct was intentional and willful 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 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. 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. 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 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 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 misconduct and disregard for good order in discipline clearly merited your receipt of an OTH. 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,

9/13/2022

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