



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

█  
Docket No: 4424-22

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 16 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 21 June 2002. As part of your enlistment application, on 10 May 2002, you signed and acknowledged the "Statement of Understanding Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment

physical examination, on 11 May 2002, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 9 September 2003, you received non-judicial punishment (NJP) for failing to obey a lawful order. You did not appeal your NJP. On the same day your command issued you a "Page 11" counseling warning (Page 11) noting certain deficiencies related to failing to obey a lawful order for violating the leave and liberty policy. The Page 11 expressly advised you that a failure to take corrective action may result in administrative separation, judicial proceedings, or limitation on further service. You did not submit a Page 11 rebuttal statement.

On 16 December 2003, a Navy Drug Screening Laboratory message indicated you tested positive for marijuana (THC) well above the testing cutoff level for the THC metabolite. On 19 December 2003, the suspended portion of your NJP from September 2003 was vacated and enforced due to your continuing misconduct.

On 1 April 2004, you signed a pretrial agreement (PTA) wherein you agreed to plead guilty to your drug use at a Summary Court-Martial and waive your right to an administrative separation board in exchange for your command withdrawing such drug charges from a pending Special Court-Martial. On 21 April 2004, you pleaded guilty to 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 the same day, your command issued you a Page 11 documenting your drug abuse. The Page 11 expressly advised you that the command intended to process you for an administrative separation. On 21 April 2004, you also declined drug rehabilitation treatment prior to your administrative separation.

On 21 April 2004, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. Pursuant to the PTA, you waived your right to request an administrative separation board. Ultimately, on 27 May 2004, you were discharged from the Marine Corps for misconduct with an under Other Than Honorable (OTH) conditions characterization of service and assigned an RE-4B reentry code.

On 24 February 2011, the Naval Discharge Review Board denied your initial 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, your desire for a discharge upgrade and contentions that: (a) you had issues with medical, your back injury, hearing, nerve damage, and mental disorders, and (b) you were repeatedly hazed and humiliated at the █  
█ 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 29 July 2022. The Ph.D. stated in pertinent part:

Petitioner's OMPF did not contain evidence of a mental health diagnosis; however, Petitioner provided documentation he was diagnosed with Pain Disorder with both Psychological Factors and a General Medical Condition during his military service. Petitioner did not provide details regarding his hazing or humiliation (i.e., what was done/said to him) or why he feared for his life. Petitioner had a prior-service drug use waiver for marijuana. He stated in-service his use was one-time because of "depression and poor judgment." His statement to the Board indicated he used more than once as a means to self-medicate, given his prescribed medications were not alleviating the pain. Petitioner consulted with counsel regarding his pretrial agreement and there were no indications a mental health evaluation was considered. Petitioner explained his UA was an effort to remove himself from the hazing and humiliation he received at his barracks. Although Petitioner's UA could be attributed to the perceived treatment he received and his substance use may have been a means to self-medicate his physical pain, it is difficult to make this attribution given his pre-service substance use history. There is no evidence Petitioner was unaware of his misconduct or not responsible for his behavior. Additional records (e.g., additional in-service and/or 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, "it is my considered clinical opinion, there is evidence Petitioner was diagnosed with a MHC during his military service. There is insufficient evidence of PTSD that can be attributed to military service, or that his in-service misconduct could be attributed to PTSD or another MHC."

In response to the AO, you provided rebuttal evidence that included a personal statement and additional medical documentation.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. 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 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 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, \_\_\_\_\_

9/26/2022

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Executive Director

Signed by: █