



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: 4427-22

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 23 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. You were afforded an opportunity to submit an AO rebuttal for consideration and you did do so.

You enlisted in the Marine Corps and commenced active duty on 3 December 2001. As part of your enlistment application, on 15 November 2001, you signed and acknowledged the "Statement of Understanding Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment physical examination, on 16 November 2001, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 11 December 2002, you received non-judicial punishment (NJP) for insubordinate conduct for failing to obey a lawful order. You did not appeal your NJP.

On 29 July 2003, your command issued you a "Page 11" counseling warning (Page 11) noting certain deficiencies related to failing to obey an order or regulation for using a racial slur. The Page 11 expressly advised you that this type of behavior would not be tolerated and that further violations may result in you being processed for administrative separation under other than honorable conditions (OTH). You did not submit a Page 11 rebuttal statement.

On 15 January 2004, you received NJP for disrespectful behavior toward a superior commissioned officer. You did not appeal your NJP.

On 27 January 2005, your command issued you a "Page 11" counseling warning (Page 11) noting certain deficiencies related to three separate instances of unauthorized absence (UA). The Page 11 expressly warned you that further deficiencies in performance and/or conduct may result in disciplinary action and processing for administrative discharge. You did not submit a Page 11 rebuttal statement.

On 7 February 2005, a drug lab report indicated you tested positive for marijuana (THC). On 29 April 2005, you were convicted at a Special Court-Martial (SPCM) of UA, the wrongful use of marijuana and for assaulting another Marine. You were sentenced to a reduction in rank to Private First Class (E-2), forfeitures of pay, and confinement for sixty days.

On 18 May 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 right to request an administrative separation board. On 23 June 2005, your commanding officer (CO) recommended that you be separated with an OTH characterization. In his endorsement, your CO stated:

In December 2002, Private First Class █ received his first NJP for disobeying a lawful order. In February 2003, he deployed with Battery █ in support of Operation Iraqi Freedom where he had an average performance, but was not recommended for promotion on several occasions for his failure to meet basic Marine Corps standards. As his battery was preparing to deploy to Iraq in support of OIF II, he received his second NJP for disrespect to a commissioned officer. He deployed with Battery █ in February 2004, where his performance was once again average, and once again he was not recommended for promotion. Following their return, the battery was administratively attached to █ Battalion, █ Marines due to █ Battalion's deployment to Iraq. In February 2005, Private First Class tested positive for marijuana use and was awarded a special court-martial.

Prior to the court-martial, while on pre-trial restriction, Private First Class █ assaulted a fellow Marine, missed muster and conspired to be UA from a

training evolution. He was found guilty at a special court-martial on 25 April 2005 but was not discharged. He was reassigned to █ Battalion, █ Marines on 9 May 2005.

Private First Class █ performance over the past three years has been poor at best. He displays no remorse for his previous actions and has a complete disregard for the consequences of his actions. His chain of command and peers have zero confidence in his trustworthiness or self-discipline, and he has become a negative influence on his peers. In my opinion, this individual will neither change his attitude nor put forth any effort to correct his deficiencies or turn himself around, and therefore, has no potential for further service. Accordingly, I recommend that Private First Class █ be discharged with an Other Than Honorable characterization of service, with the following separation proficiency and conduct marks: 2.5/1.0.

Ultimately, on 23 September 2005, 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.

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 were discharged for smoking marijuana and not anything else, (b) because you are an African-American, your use of a racial slur was not the same as if it came from a Caucasian male, (c) you are unable to access VA benefits, (d) you are entitled to a discharge upgrade under the Fairness of Veteran's Act, (e) you suffered from undiagnosed PTSD which caused you to smoke marijuana, (f) you served faithfully in Operation Enduring Freedom, and (g) an upgrade would allow you to receive compensation for your war disabilities which have prevented you from working on a consistent basis. 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 27 July 2022. The Ph.D. stated in pertinent part:

There is no evidence Petitioner was diagnosed with a mental health condition during his service. In contrast, he provided documentation of a post-service diagnosis of PTSD related to his military service, noting the misconduct began after his deployment. The OMPF described other misconduct (disrespect, UA, failure to obey an order), some of which occurred prior to the purported traumas. Petitioner attributed his misconduct after his second deployment (smoking marijuana) to his purported symptoms of undiagnosed PTSD. Although the Petitioner's marijuana use could be attributed to a maladaptive coping skill to deal

with his purported PTSD symptoms (“to help sleep and relax”); however, misconduct prior to the purported traumas would not be attributed to PTSD. Additionally, it is difficult to consider how use of racial slurs would be attributed to PTSD.

The Ph.D. concluded, “it is my clinical opinion there is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence that all of his misconduct.”

In response to the AO, you provided a rebuttal statement reiterating your arguments from your application.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First and foremost, the Board unequivocally determined that a racial slur coming from anyone in the military is unacceptable. The Board concluded that any argument or rationale to the contrary, based on the race of the offender, was entirely without merit. The Board also noted that you were not simply separated based on drug abuse alone. While drug abuse was the primary stated basis for separation processing, your OTH characterization was based on the entirety of your service record which included multiple other serious offenses including, but not limited to, assault, insubordination, and disrespect toward a superior commissioned officer. The Board observed that while your command chose not to list all relevant bases for separation, you also met the criteria for misconduct due to a pattern of misconduct, and misconduct due to the commission of a serious offense, either of which would have certainly led to an OTH characterization in your case.

Second, 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 all of 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 all of 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.

Third, 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.

Fourth, 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. 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 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,

10/2/2022

