



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

█
Docket No: 4622-22

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 the 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 chose not to do so.

You enlisted in the Marine Corps and commenced active duty, on 7 September 2000, under your given name █. In January 2009, you legally changed your name in █ to █.

Your pre-enlistment physical examination, on 5 April 2000, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 3 August 2001, you

received non-judicial punishment (NJP) for willfully disobeying a lawful order or regulation. You did not appeal your NJP. Subsequently, you received a "Page 11" counseling warning (Page 11) documenting the following deficiencies: unauthorized absence (UA) on several occasions, falling asleep in class and not paying deb, and a general lack of motivation and slowness accomplishing the simplest of tasks. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation.

On 17 January 2002, you received a Page 11 warning for UA lasting ten (10) days. On 18 January 2002, you received NJP for your ten-day UA. You did not appeal your NJP.

On 19 September 2002, you received NJP for failing to obey a lawful order. You did not appeal your NJP. You were subsequently issued a Page 11 that expressly warned you that a failure to take corrective action may result in adverse administrative action or judicial proceedings, including but not limited to administrative separation. On 18 November 2002, you received NJP for UA and for failing to obey a lawful order. You were issued a Page 11 that expressly warned you that a failure to take corrective action may result in adverse administrative action or judicial proceedings, including but not limited to administrative separation.

Your command initiated administrative discharge action by reason of misconduct due to a pattern of misconduct. Unfortunately, the administrative separation notification and statement of awareness/election of rights documentation is not in your service record. However, the Board relied on a presumption of regularity to support the official actions of public officers. In the absence of substantial evidence to rebut the presumption, to include evidence submitted by you, and given the narrative reason for separation and corresponding separation code as stated on your DD Form 214, the Board presumed that you were properly processed for separation and discharged from the Marine Corps for misconduct due to a pattern of misconduct after you waived your right to an administrative separation board. Ultimately, on 3 January 2003, you were discharged from the Marine Corps for misconduct with an Other Than Honorable (OTH) characterization of service and assigned an RE-4 reentry code.

On 30 August 2007, the Naval Discharge Review Board (NDRB) denied your discharge upgrade application. The NDRB determined that your discharge was proper and that no change was warranted. On 25 September 2020, BCNR denied your initial petition for relief.

The Board carefully weighed all potentially mitigating factors, such as your contentions that included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) you experienced the onset of mental health conditions and less than one month later were prescribed Zoloft for depression, anxiety, and PTSD, (b) you continue to receive treatment from your local hospital and VA hospital, and (c) your mental health issues and symptoms began on active duty and were present prior to all of your NJPs. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters with your current application. However, your previous application contained multiple 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 contain evidence of a diagnosis of a mental health condition. Records indicated he was prescribed Zoloft and was referred to mental health for an evaluation on more than one occasion, but there is no indication he followed up for the evaluation; however, records indicated he was seen at the Family Service Center. Anxiety and Depression was not diagnosed in the provided records, but listed as provisional (anxiety) and listed as a condition to be ruled out (depression). Provisional and rule-out diagnoses indicate further information is required to determine the presence or absence of the disorder. Unfortunately, information made available did not provide enough markers to establish an onset and development of mental health symptoms or identify a nexus with his misconduct. Additionally, documentation provided by Petitioner from the VA indicated Petitioner did not meet the criteria for a mental health condition through February of 2020. 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, "it is my considered clinical opinion, there is insufficient evidence of a MHC that can be attributed to military service, or that his in-service misconduct could be attributed a MHC."

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. 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. 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 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,

10/4/2022

