



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

█
Docket No: 4683-22

Ref: Signature Date



Dear █:

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 2 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.

You enlisted in the Marine Corps and entered active duty on 19 July 1999. As part of your enlistment application, on 20 November 1998, you acknowledged and signed the "Statement of Understanding - Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment physical examination, on 21 November 1998, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 7 December 2001, you received non-judicial punishment (NJP) for unauthorized absence lasting twenty-six days, dereliction of duty when you fell asleep at your post, and failing to obey a lawful order by drinking underage. You did not appeal your NJP. On 29 March 2002, your command issued you a “Page 11” counseling sheet (Page 11) documenting an alcohol-related incident of underage drinking. 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 29 March 2002, your command issued you a second Page 11 documenting your illegal drug involvement confirmed by a positive urinalysis test for two different drugs. The Page 11 advised you that processing for administrative separation for drug abuse is mandatory. You did not submit a Page 11 rebuttal statement.

On 24 June 2002, pursuant to your guilty pleas, you were convicted at a Special Court-Martial (SPCM) of two separate specifications of the wrongful use of a controlled substance (marijuana and MDMA (“Ecstasy”), respectively). You received as punishment five days of confinement, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). On 14 June 2004, the Convening Authority approved the SPCM sentence as adjudged. On 22 July 2004, you were placed on involuntary appellate leave awaiting your punitive discharge.

On 23 September 2004, the Navy-Marine Corps Court of Criminal Appeals affirmed the SPCM findings and sentence. Upon the completion of appellate review in your case, on 3 January 2005, you were discharged from the Marine Corps with a BCD and assigned an RE-4B reentry code.

On 27 June 2008, the Naval Discharge Review Board denied your application for relief after determining your discharge was proper as issued.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to: (a) your chain of command made a material error when they assigned you to a 24-hour shift job knowing you had medical conditions preventing you from being able to stay awake for 24 hours, (b) you also have bipolar disorder which affected your decision-making ability, and (c) post-service you have constantly worked to improve yourself. For purposes of clemency consideration, the Board noted you provided supporting documentation describing post-service accomplishments and an advocacy letter.

As part of the review process, the BCNR Physician Advisor, who is also a medical doctor (MD) and a Fellow of the American Psychiatric Association, reviewed your contentions and the available records and issued an AO dated 30 June 2022. The MD stated in pertinent part:

Petitioner’s in-service records contain diagnoses of Primary Hypersomnia and Circadian Rhythm Sleep Disorder, which resulted in a chronically disrupted ability to attain adequate sleep, and were exacerbated by the shift work associated

with his military occupational specialty. However, there were no indications in the available health records that the Petitioner was placed on a light or limited duty status for his sleep disorder conditions, recommended for specific command actions to support his need for structured work schedules and rest, nor that he was ever deemed not responsible for his actions or unfit for continued service. These sleep disorder conditions may have contributed to the circumstances that led to his NJP charge of dereliction of duty for falling asleep on duty. However, it is unlikely that his misconduct behaviors of UA, underage drinking, or wrongful drug use could be attributed to his sleep disorder conditions.

The MD concluded, “[b]ased on the available evidence, it is my clinical opinion that there is sufficient evidence the Petitioner’s diagnosed mental health condition may be attributed to military service. There is insufficient evidence that the majority of his misconduct could be attributed to a mental health condition.”

In response to the AO, you provided a brief and evidence in support of your argument that a causal connection exists between your sleep disorder and misconduct.

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 or medical conditions you experienced and their possible adverse impact on your service. However, even under the liberal consideration standard, the Board concluded that there was no 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 your misconduct forming the basis of your discharge. As a result, the Board concluded that a majority of your misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that your SPCM 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 the overwhelming majority of your misconduct to include your drug abuse 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.

Further, 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. Additionally, 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. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration

standard for mental health conditions, the Board concluded that your serious misconduct and disregard for good order and discipline clearly merited your receipt of a BCD. The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. 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, after carefully considering any matters submitted regarding your character, post-service conduct, and personal/professional accomplishments, 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,

[REDACTED]

Executive Director

Signed by: [REDACTED]