



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

█  
Docket No: 5039-22

Ref: Signature Date

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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 21 October 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 3 July 1995. Your pre-enlistment physical examination, on 20 June 1995, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On or about 25 July 1996, you were arrested by █ for driving under the influence and for speeding in excess of 100 mph. On 16 October 1996, you received non-judicial punishment (NJP) for unauthorized absence (UA). You did not appeal your NJP. On 13 November 1996, the suspended portion of your NJP from October 1996 was vacated and enforced due to continuing misconduct.

On 14 November 1996, you received NJP for failing to obey a lawful order for non-compliance with the "liberty buddy" policy while overseas. You did not appeal your NJP. On 19 November 1996, your command issued you a "Page 11" counseling warning (Page 11) documenting your NJP and withdrawing your recommendation for promotion to Corporal. You did not submit a Page 11 rebuttal statement. On 12 March 1997, the suspended portion of your NJP from November 1996 was vacated and enforced due to continuing misconduct.

On 28 March 1997, your command issued you a Page 11 expressly warning you that a failure to take corrective action may result in administrative separation or limitation of further service. You did not submit a Page 11 rebuttal statement. On 31 March 1997, you received NJP for UA, and for again failing to obey a lawful order for non-compliance with the "liberty buddy" policy while overseas. You did not appeal your NJP. On 1 April 1997, your command issued you a Page 11 advising you that you were being administratively separated for misconduct.

On 28 April 1997, you underwent a psychiatric evaluation at █. You were diagnosed with an adjustment disorder not otherwise specified and alcohol dependence, but a Navy Medical Officer determined you were fit for full duty. On 4 June 1997, the suspended portion of your NJP from March 1997 was vacated and enforced due to continuing misconduct.

On 6 June 1997, you received NJP for two separate UA specifications. You did not appeal your NJP.

On 7 July 1997, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. You waived your rights to consult with counsel, submit rebuttal statements to the separation authority, and to request an administrative separation board. Ultimately, on 25 August 1997, 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 12 January 2006, the Naval Discharge Review Board denied your application for discharge upgrade 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) while on active duty you suffered from an unknown brain tumor, (b) periodically you experienced some headaches, loss of balance, impulse control issues, and you

angered easily, (c) you had little to no control of the symptoms experienced, and you know that without this tumor you would have served your complete enlistment, and (d) you are proud of the time you served and proud to be a Marine. 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 1 September 2022. The Ph.D. stated in pertinent part:

During military service, the Petitioner was diagnosed with mental health conditions, including alcohol use disorder and Adjustment Disorder. Problematic alcohol use is incompatible with military readiness and discipline and there is no evidence he was unaware of the potential for misconduct or not responsible for his behavior. There is insufficient evidence to attribute his misconduct to his in-service diagnosed mental health conditions, particularly given the nature of his misconduct. There is no evidence of a head injury or symptoms of an undiagnosed brain tumor during military service. Meningiomas commonly are slow-growing tumors and often do not cause noticeable symptoms until they are quite large. Given the time between his discharge from service and acute onset of symptoms, if the tumor was present during his military service, it is very unlikely to have caused behavior changes that would have contributed to Petitioner's misconduct, especially in the absence of the type of symptoms he presented for evaluation almost four years post-discharge. Post-service, he has provided evidence of treatment for a brain tumor in June 2001, with symptoms reported for "a few months" prior to his diagnosis and temporally remote from military service. Additional records (e.g., 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 of a diagnosis of a mental health condition that may be attributed to military service. There is insufficient evidence of a TBI or brain tumor that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to TBI or a mental health condition."

In response to the AO, you provided additional medical evidence and a letter from your family.

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 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 TBI or mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such TBI or 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 a TBI, brain tumor, and/or 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 pattern of 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 observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average calculated from your available performance evaluations during your enlistment was approximately 3.2 in conduct. Marine Corps regulations in place at the time of your discharge required a minimum trait average of 4.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your pattern of serious misconduct which further justified your OTH characterization of discharge.

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,

10/26/2022

[REDACTED]

Executive Director

Signed by: [REDACTED]