



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: 5361-22

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. Although you were provided an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the Marine Corps and entered active duty on 8 January 1998. Your pre-enlistment physical examination, on 17 October 1997, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 12 May 1999, your command issued you a "Page 11" counseling warning (Page 11) documenting your violation of the station BEQ order by having inappropriate amounts of alcohol

in your BEQ room. The Page 11 expressly warned you that any further deficiencies in your performance and/or conduct may result in administrative separation or limitation of further service. You did not submit a Page 11 rebuttal statement.

On 27 June 1999, your command issued you a Page 11 documenting your failure to seek guidance from your chain of command when you did not find transportation from ██████████ to the PT field. The Page 11 expressly warned you that any further deficiencies in your performance and/or conduct may result in administrative separation or limitation of further service. You did not submit a Page 11 rebuttal statement.

On or about 4 April 2000, you were convicted by civilian authorities of driving under the influence of alcohol (DUI). On 7 June 2000, a Navy Drug Screening Laboratory message indicated your urine sample tested positive for methamphetamine, aka "meth." On 1 August 2000, as part of a pretrial agreement (PTA) you agreed to plead guilty to the drug use offense at a Summary Court-Martial (SCM) in exchange for not being charged at a Special Court-Martial.

On 16 August 2000, you were convicted at a SCM of the wrongful use of a controlled substance (meth). You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), forfeitures of pay, and confinement for thirty days. On 21 August 2000, the Convening Authority approved the SCM sentence.

On 21 August 2000, 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 rights to submit a written rebuttal statement and to request an administrative separation board. Ultimately, on 7 November 2000, 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 reenry code. Post-service, you were convicted by civilian authorities for multiple offenses including possession of methamphetamine, possession of stolen property, grant theft, and forgery.

On 10 February 2021, this Board granted you partial relief and upgraded your discharge characterization to General (Under Honorable Conditions) (GEN). The Board noted you did not submit any mental health-related contentions in 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) the Department of Veterans Affairs (VA) has not considered your upgrade to GEN to be honorable for VA purposes and you have been repeatedly denied your request for VA benefits, (b) you were diagnosed with a mental health disorder that went undiagnosed while on active duty and such disorder was likely the main contributing factor to your troubles and separation, and (c) while you have changed your life around you are still in need of support in the form of health care and employment services due to your disabilities. 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 14 September 2022. The Ph.D. stated in pertinent part:

During military service, he was evaluated and not diagnosed with a substance use disorder or another mental health condition. This absence of diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed by the mental health clinician as documented in his military records. Post-service, the VA has granted service connection for adjustment disorder and a civilian clinician has opined that his alcohol and substance use were related to the acute stress of his breakup. However, there is no evidence he was unaware of his misconduct or not responsible for his behavior. Additional records (e.g., complete post-service mental health records describing the Petitioner's mental health diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is post-service evidence of a mental health condition that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to a mental health condition."

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 whatsoever. Moreover, even if the Board assumed that your drug-related and cumulative 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 GEN or 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. 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. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge or change a narrative reason for separation solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. Additionally, the Board noted that VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only. Such VA eligibility determinations, disability ratings, and/or discharge classifications are not binding on the Department of the Navy and have no bearing on previous active duty service discharge characterizations. As a result, the Board determined that there was no impropriety or inequity in your narrative reason for separation and upgraded discharge, and the Board concluded that your serious misconduct clearly merited your receipt of a GEN characterization and no higher. 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,

10/27/2022

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Executive Director

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