



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: 5923-22

Ref: Signature date



Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 5 December 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 the 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, 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). The Board also considered the advisory opinion (AO) furnished by a qualified mental health professional, dated 7 October 2022, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issue(s) 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 with a waiver for previous marijuana usage and began a period of active duty on 29 May 2002. On 28 April 2003, you tested "positive" during an urinalysis for

use of a controlled substance-marijuana. On 4 May 2003, you began a period of unauthorized absence (UA) which lasted nine days. On 27 August 2003, you were convicted by special court martial (SPCM) for wrongful use of a controlled substance, consuming alcohol while underage, and altering a military ID card. On 26 September 2003, you were notified of the initiation of administrative separation proceedings by reason of misconduct due to drug abuse. After you waived your rights associated with your administrative separation, on 20 October 2003, your administrative separation proceedings were determined to be sufficient in law and fact. On 22 October 2003, your commanding officer recommended an Other Than Honorable (OTH) discharge characterization of service by reason of misconduct due to drug abuse. On 3 November 2003, you were discharged with an OTH characterization of service.

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 you were recently diagnosed with Post Traumatic Stress Disorder (PTSD) and you did not receive proper mental health care while in service. For purposes of clemency and equity consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board's review, the Board considered the AO. The AO stated in pertinent part:

There is no evidence that the Petitioner was diagnosed with PTSD or any other mental health condition while in service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He has provided medical evidence in support of a post-service diagnosis of PTSD of which the examining psychologist did attribute to his time in service. Although it is possible that his post-service diagnosis could be due to his experiences working riot control while on active duty, there is insufficient evidence that his PTSD caused his misconduct. The Petitioner admitted to using illegal drugs or abuse of prescription drugs on his enlistment paperwork, DD Form 2807. Thus his post-service diagnosed PTSD cannot be said to have solely caused his misconduct. Furthermore, there is no evidence that he ever mentioned any mental health symptoms throughout his discharge processing.

The AO concluded, "it is my considered clinical opinion there is sufficient evidence of a mental health condition (PTSD) that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition (PTSD)."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your SPCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included a drug offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. 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. Additionally, the

Board concurred with the AO that there is insufficient evidence that your misconduct could be attributed to a mental health condition. As pointed out by the AO, the fact you entered the Marine Corps with a drug waiver lessened the possibility that a mental health condition caused the misconduct that formed the basis for your discharge. Finally, 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 concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. Even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting an upgraded characterization of service as a matter of clemency or equity. 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 the 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,

1/3/2023

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Executive Director

Signed by: █