



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: 6019-22

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 16 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 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 a qualified mental health provider. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the Marine Corps and entered active duty on 3 January 2005. Your pre-enlistment medical examination, on 25 October 2004, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. As part of your enlistment application, on 7 December 2004, you signed and acknowledged the "Statement of Understanding – Marine Corps Policy Concerning Illegal Use of Drugs," where you understood and acknowledged that the illegal distribution, possession, or use of drugs is not tolerated in the Marine Corps. You also disclosed pre-service marijuana usage from 1999 to August 2003.

On 1 May 2008, you received non-judicial punishment (NJP) for driving a vehicle under the influence of alcohol. You did not appeal your NJP. On the same day your command issued you a "Page 11" counseling warning (Page 11) documenting your NJP for driving with a 0.147 blood alcohol level. The Page 11 expressly warned you that a failure to take corrective action and any further violations of the Uniform Code of Military Justice may result in judicial or adverse administrative action, including but not limited to administrative separation. You did not submit a Page 11 rebuttal statement.

On 17 June 2008, a Navy Drug Screening Laboratory message indicated your urine sample tested positive for cocaine at 387 ng/ml, above the established testing cut-off level of 100 ng/ml. On 2 July 2008, a Navy Drug Screening Laboratory message indicated your urine sample tested positive for marijuana (THC) at 97 ng/ml, above the established testing cut-off level of 15 ng/ml.

On 23 July 2008, you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse and pattern of misconduct. You consulted with counsel and elected to waive your rights to submit a rebuttal statement and to request an administrative separation board. On 24 July 2008, you signed a pretrial agreement where you agreed to plead guilty to both instances of drug use and also waive your administrative separation board in exchange for your drug offenses to be adjudicated at a Summary Court-Martial (SCM) instead of a Special Court-Martial. On 28 July 2008, pursuant to your guilty plea you were convicted at a SCM of two separate specifications of the wrongful use of a controlled substance. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), and confinement for thirty days. On 4 August 2008, the Convening Authority approved the SCM sentence.

In the interim, on 29 September 2008, a Navy Drug Screening Laboratory message indicated your urine sample tested positive again for THC at 71 ng/ml, above the established testing cut-off level. Ultimately, on 21 October 2008, 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 reentry code.

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) you were suffering from undiagnosed PTSD on active duty, and (b) the Department of Veterans Affairs (VA) has granted you a service-connection for PTSD with a seventy percent disability rating. For purposes of clemency and equity consideration, the Board noted you provided your VA disability ratings.

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 25 October 2022. The Ph.D. stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He has provided post-service evidence of a diagnosis of service-connected PTSD. Although his misconduct occurred following his two combat deployments, available records are not sufficiently detailed to establish a nexus with his post-service PTSD diagnosis, given his pre-service substance use history. 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 post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence his misconduct may be attributed to PTSD."

After thorough 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 all of your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated any of 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 illegal drug use by a Marine is contrary to military 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. 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. Lastly, absent a material error or injustice, the Board generally will not 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 clearly merited your receipt of an OTH. While the Board considered the evidence you provided in support of your application, 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 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,

1/4/2023

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Executive Director

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