



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. 6649-22

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 limitations 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 20 March 2023. 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 service 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)/mental health condition (MHC) (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 an advisory opinion (AO) from a qualified mental health professional. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the United States Marine Corps and commenced a period of service on 19 February 2002. On your enlistment application, you disclosed preservice drug use. From 21 March 2003 to 24 April 2003, you deployed to Iraq with the Marine Expeditionary Force as a Rifleman (0311) and awarded a Combat Action Ribbon and the Presidential Unit Citation.

On 14 October 2003, Special Court Martial (SPCM) charges were preferred against you on violations of Uniform Code of Military Justice (UCMJ) Article 112(a), for one specification of marijuana use, Article 80, for attempted marijuana use, Article 86, for three specifications of unauthorized absence (UA) by breaking restriction, and Article 134, for soliciting others to use marijuana. Prior to referral of charges, you were arrested by civilian authorities and placed in pretrial confinement on charges related to violation of California Codes 187 (Murder), 182 (Conspiracy to Commit Murder), 211A (Armed Robbery), and 451 (Arson).

On 6 January 2004, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to commission of a serious offense. You were notified of your right to consult with qualified counsel and your right to present your case at an administrative separation board. You did not reply to this notice and the command continued to process you for separation. Ultimately, on 17 March 2004, you were discharged from the Marine Corps for misconduct with an Other Than Honorable (OTH) characterization of service and assigned an RE- 4 reenlistment code.

The Board carefully considered all potentially mitigating and/or extenuating 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: (a) your desire to upgrade your characterization of service, (b) your contention that you were suffering from undiagnosed PTSD, and (c) the impact that your mental health had on your conduct during service. For purposes of clemency and equity consideration, the Board noted you did not provide evidence of post-service accomplishments or character letters in support of your request.

In your petition, you contend that you incurred Post Traumatic Stress Disorder (PTSD) during military service after deploying to Iraq, which might have mitigated your discharge character of service. You explain that you were only recently diagnosed with service connected PTSD and you highlight that your misconduct started after your return from Iraq. 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 10 February 2023. The Ph.D. noted in pertinent part:

There is no evidence he was diagnosed with a mental health condition in military service. Post-service, the VA has granted service connection for PTSD. Unfortunately, there is insufficient information regarding his symptoms to attribute his misconduct to PTSD. For example, he had a history of marijuana use prior to military service, and his in-service use may have been a continuation of pre-service behavior. While UA and breaking restriction could indicate avoidance related to PTSD symptoms, it is difficult to attribute murder, conspiracy, armed robber, and arson to PTSD. Additional records (e.g., active duty or post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my clinical opinion there is post-service evidence from the VA of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence that his misconduct may be attributed to PTSD."

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave liberal and special consideration to your record of service and your contentions about your mental health. Specifically, the Board felt that your misconduct, as evidenced by your SPCM preferred charges and civilian conviction, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the negative impact your conduct had on the good order and discipline of your command. Additionally, the Board noted the discrediting effect your arrest likely had on the Marine Corps. The Board determined that such misconduct is contrary to Marine Corps values and policy and calls into question your character. In making this determination, the Board concurred with the advisory opinion that there was no evidence that you suffered from any type of mental health condition while on active duty. Although there is post-service evidence of a service connected PTSD diagnosis, there is insufficient information regarding your symptoms to attribute your misconduct to PTSD. You disclosed a history of marijuana use prior to military service and your in-service drug use appears to be a continuation of pre-service behavior. The Board also agreed that while UA and breaking restriction could indicate avoidance related to PTSD symptoms, it is difficult to attribute murder, conspiracy, armed robbery, and arson to PTSD.

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 also found that your active duty misconduct was intentional and willful and demonstrated you were unfit for further service. The Board concluded that you were mentally responsible for your conduct, and therefore you should be held accountable for your actions. As a result, the Board determined your conduct constituted a significant departure from that expected of a Marine 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 granting you the relief you requested or granting relief 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,

3/22/2023

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Executive Director
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