



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

[REDACTED]
Docket No. 6917-22
Ref: Signature Date

[REDACTED]

[REDACTED]

Dear **[REDACTED]**

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 9 January 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 provided the opportunity to respond to the AO, you chose not to do so.

You enlisted in the United States Marine Corps and commenced a period of service on 1 March 2006. On 20 July 2006, you received non-judicial punishment (NJP) for violation of Uniform Code of Military Justice (UCMJ) Article 92, for underage drinking and failing to sign out on liberty. On 5 December 2006, you were formally counseled due to your irresponsible use of alcohol. On 6 February 2007, you received your second NJP for violation of UCMJ Article 134, for an alcohol related incident whereby you disrespected a civilian police officer in a drunken and disorderly manner. On 26 March 2007, you received your third NJP for violations of UCMJ Article 92, for failure to obey a lawful order or regulation, Article 128, for assaulting a superior, and Article 134, for incoherent behavior leading to disorderly conduct. You did not appeal these NJPs.

On 22 June 2007, your command referred you to the Substance Abuse Rehabilitation Program (SARP). Your record indicated that you had previously completed substance abuse treatment in October 2006 at █, and was diagnosed with Alcohol Dependence.

On 25 November 2008, you were found guilty at Summary Court Martial (SCM) for violating UCMJ Article 112(a), for wrongful use of a controlled substance. On 6 January 2010, you were found guilty at Special Court Martial (SPCM) for violating UCMJ Article 91, for five specifications of disrespect towards a non-commissioned officer (NCO), Article 112(a), for two specifications of wrongful use of a controlled substance (Oxycodone and marijuana), Article 117, for verbal assaults, arm movements and an attempt to “stare down” a NCO, and Article 128, for assault. You were sentenced to 72 days of confinement, forfeitures of pay, and a Bad Conduct Discharge (BCD).

On 12 January 2010, you received a separation physical in which you deny any mental health symptoms and report that you are “in good health.” Ultimately, you were deemed medically fit for separation and discharged from the Marine Corps, on 6 October 2010, with a BCD as a result of SPCM and assigned an RE- 4 reentry 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 suffered from undiagnosed PTSD, and (c) your contention that you became addicted to opiates after their legal prescription during service, and (d) your desire to be eligible for Department of Veterans Affairs treatment. For purposes of clemency consideration, the Board noted you did not provide documentation related to your post-service accomplishments or character letters.

In your petition you contend that you suffered from undiagnosed PTSD while in service, which may have mitigated the circumstances of your discharge. You explain that you were suffering from physical injuries which occurred during service and were prescribed opiates, which created an addiction. In support of your application, you submitted a letter from █, partial in-service medical records, and several articles about substance abuse within military populations.

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 November 2022. The Ph.D. noted in pertinent part:

The Petitioner contends that he suffered from undiagnosed PTSD while in service which may have mitigated the circumstances of his discharge. He submitted a letter from █, partial in-service medical records, and several articles about substance abuse within military populations as evidence. 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, other than substance dependence. On a Report of Medical History dated October 2008, the Petitioner indicated that he had “received counseling on anger, drinking, drugs and PTSD,” however there are no medical records contained within his file that mention

counseling for anger or PTSD. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., active duty medical records, post-service 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 insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition."

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. Specifically, the Board felt that your misconduct, as evidenced by your three NJPs, SCM, and SPCM, outweighed these mitigating factors. In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave liberal and special consideration to your record of service and the medical issues that impacted your conduct. The Board considered the seriousness of your repeated misconduct and the fact that it involved drug use and assaults. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command. The Board determined that your conduct was contrary to Marine Corps values and policy and posed an unnecessary risk to the safety of fellow Marines.

In making this determination, the Board concurred with the advisory opinion that there is no evidence that you were diagnosed with a mental health condition in military service, or that you exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition, other than substance dependence. Review of your record shows significant pre-service substance abuse, with alcohol and weekly marijuana use beginning at age 15. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board noted that your separation physical noted no psychiatric or neurologic conditions or symptoms, and on the contrary, reported that you were in good health. Moreover, the Board observed that you did not submit any clinical documentation or treatment records, either in-service or post-service, to support your claims of PTSD. The Board found that your active duty 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 otherwise not be held accountable for your actions. The Board felt that you received advice from qualified counsel through the court martial process and were aware of your rights. As a result, the Board concluded that your conduct constituted a significant departure from that expected of a Marine and continues to warrant a BCD, as issued by the court.

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. While the Board carefully considered the evidence you submitted in mitigation, 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. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. 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,

1/24/2023

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Executive Director

Signed by: █