



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: 7249-22

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

You originally enlisted in the Marine Corps and entered active duty on 7 January 2002. Your pre-enlistment physical examination, on 31 January 2001, and self-reported medical history both noted no psychiatric or neurologic conditions, symptoms, or treatment/counseling history. Specifically, on your medical history, you expressly denied ever being treated for a mental condition, and also denied ever consulting or been treated by clinics, physicians, healers, or other practitioners within the past five years for other than a minor illness.

On 29 May 2003, your command issued you a “Page 11” counseling warning (Page 11) noting your unauthorized absence (UA). The Page 11 expressly advised you that a failure to take corrective action may result in administrative separation or limitation on further service. You did not submit a Page 11 rebuttal statement.

On 11 July 2003, your command issued you a Page 11 documenting your professional incompetence and shortcomings in judgment, integrity, reliability, and obedience, specifically your failure to be at your appointed place of duty on two separate occasions. The Page 11 expressly advised you that a failure to take corrective action may result in administrative separation or limitation on further service. You did not submit a Page 11 rebuttal statement.

On 11 August 2003, you received non-judicial punishment (NJP) for communicating a threat when you picked up a tent peg in a threatening manner while directing verbal threats towards another Marine. You did not appeal your NJP. On 28 August 2003, you received another NJP for breaking restriction. You did not appeal your NJP.

On 3 November 2003, you underwent a mental health evaluation. During your evaluation you reported that, back in 1996, you were diagnosed with bipolar disorder and treated with ██████████ and ██████████ for three years. In addition, you reported being diagnosed, in 1991, with ADHD and treated with Ritalin. The Navy Medical Officer (NMO) diagnosed you with an anxiety disorder not otherwise specified, rule out depressive disorder, rule out ADHD. The NMO started medicating you with ██████████ and ██████████

On 16 December 2003, your command issued you a Page 11 documenting your professional incompetence and shortcomings in judgment, integrity, reliability, and obedience, specifically when you assaulted your roommate without justification. The Page 11 expressly advised you that a failure to take corrective action may result in administrative separation or limitation on further service. You did not submit a Page 11 rebuttal statement.

On 16 February 2004, you were arrested by civilian authorities and placed in jail pending adjudication for “injury to real property.” On 22 March 2004, you received NJP for failing to obey a lawful order. You did not appeal your NJP.

As a result of your continued misconduct, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. You waived your right to consult with counsel, but initially elected to request a hearing before an administrative separation board. On 5 May 2004, you waived your right to an administrative separation board. Ultimately, on 12 May 2004, you were discharged from the Marine Corps for misconduct with an under Other Than Honorable (OTH) conditions characterization of service and assigned an RE-4 reentry code.

Post-discharge, on 3 September 2004, you were admitted to a long-term structured residential program after being transferred from the ██████████ Hospital Behavioral Health Unit. You were diagnosed with schizoaffective disorder. In 2013, you were diagnosed with a history of schizoaffective disorder, depressive disorder, impulse control disorder, and cocaine abuse.

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) throughout your life you have suffered with mental health issues, (b) on active duty your bipolar disorder and schizoaffective disorder were too much to handle, (c) your chain of command was aware of your mental health issues, (d) although your chain of command allowed you to see a doctor, you received no support, (e) your mental health issues caused you challenges with adaptation to military life and the ability to perform your duties in a professional and respectful manner, and (f) you are requesting a discharge so you may apply for VA benefits to include mental health benefits. For purposes of clemency and equity consideration, the Board noted you provided documentation related to your medical history.

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 28 November 2022. The Ph.D. stated in pertinent part:

During military service, the Petitioner was evaluated and received a mental health diagnosis. He also reported a history of additional pre-service mental health concerns that had not been disclosed when he enlisted. If his pre-service involvement with mental health treatment had been disclosed during the enlistment physical, it is possible that he would not have been accepted into military service. He has provided evidence of post-service mental health diagnoses that are temporally close to the end of his military service. It is possible that his pre-service mental health concerns continued during military service, and his misconduct of disobedience, irritable aggression, and avoidance could be considered evidence of his continued experience of mental health symptoms during military service.

The Ph.D. concluded, “it is my considered clinical opinion there is evidence of a mental health condition that was experienced during military service. There is evidence his misconduct could be attributed to a mental health condition.”

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, notwithstanding the AO, there was no 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. 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 pattern of 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 observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average calculated from your available performance evaluations during your enlistment was approximately 3.8 in conduct. Marine Corps regulations in place at the time of your discharge required a minimum trait average of 4.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your pattern of serious misconduct which further justified your OTH characterization of discharge.

The Board noted that a fraudulent enlistment occurs when there has been deliberate material misrepresentation, including the omission or concealment of facts which, if known at the time, would have reasonably been expected to preclude, postpone, or otherwise affect a Sailor's enlistment eligibility. The Board determined you fraudulently enlisted when you intentionally failed to disclose your pre-service mental health counseling and treatment history. The Board determined that you had a legal, moral, and ethical obligation to remain truthful on your enlistment paperwork. Had you properly and fully disclosed your entire pre-service mental health history, you would have likely been disqualified from enlisting.

The Board further 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 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. Moreover, 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 determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your misconduct and disregard for good order in discipline clearly merited your receipt of an OTH. While the Board took into consideration your medical evidence, 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,

12/30/2022



Executive Director

