



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

█  
Docket No. 7455-22  
Ref: Signature Date



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 17 February 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 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 and your response to the AO.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You originally enlisted in the Marine Corps and entered active duty on 22 August 2000. As part of your enlistment application, on 26 June 2000, you signed and acknowledged the "Statement of

Understanding - Marine Corps Policy Concerning Illegal Use of Drugs.” Your pre-enlistment physical examination, on 28 June 2000, and self-reported medical history both noted no psychiatric or neurologic conditions, symptoms, or treatment/counseling history. You disclosed pre-service marijuana use to a Medical Officer on your self-reported medical history.

On 17 April 2003, your command issued you a “Page 11” counseling warning (Page 11) for unauthorized absence (UA). The Page 11 noted that you were previously counseled numerous times for your deficiencies. The Page 11 expressly advised you further Uniform Code of Military Justice (UCMJ) violations could result in limitation of service or an administrative separation. You did not submit a Page 11 rebuttal statement.

On 11 December 2003, you received non-judicial punishment (NJP) for being UA from a “PT” formation. You did not appeal your NJP.

On 5 January 2004, your command issued you a Page 11 warning for UA. The Page 11 expressly advised you that a failure to take corrective action and any further UCMJ violations could result in limitation of service or an administrative separation. You did not submit a Page 11 rebuttal statement

On 8 January 2004, your command issued you a Page 11 documenting your assignment to the Marine Corps Body Composition Program (BCP) for failing to maintain the proscribed Marine Corps height and weight standards. The Page 11 advised you that you have six months to conform and meet the USMC height/weight standards. The Page 11 expressly advised you that if you failed to meet such height/weight standards with the six months that you could be subject to an administrative reduction or an administrative discharge. You did not submit a Page 11 rebuttal statement.

On 21 April 2004, your command issued you a Page 11 documenting your satisfactory progress and good performance to date in attempting to meet the USMC height/weight standards. The Page 11 again advised you that if you failed to meet such height/weight standards with the time proscribed you could be subject to an administrative reduction or an administrative discharge. You did not submit a Page 11 rebuttal statement. However, on 10 July 2004 your command issued you a Page 11 noting that you were eligible, but not recommended for promotion to Lance Corporal (E-4) for the month of September due to your failure to stay within USMC height/weight standards. You declined to submit a Page 11 rebuttal statement.

On 15 September 2004, your command issued you a Page 11 warning for being UA from two recent “PT” formations. The Page 11 noted that you were previously counseled numerous times for your deficiencies. The Page 11 expressly advised you that a failure to take corrective action may result in judicial or adverse administrative action, including but not limited to an administrative separation. You did not submit a Page 11 rebuttal statement.

On 8 December 2004, you were convicted at a Summary Court-Martial (SCM) for the wrongful possession of a controlled substance, violating a lawful order or regulation by possessing drug paraphernalia, wrongfully engaging in extramarital sexual conduct with a married Marine, and for committing an indecent act with the same married Marine. You were sentenced to

confinement for thirty days, a reduction in rank to the lowest enlisted paygrade (E-1), and forfeitures of pay. Following the SCM, your commanding officer (CO) recommended your administrative separation to the General Court-Martial Convening Authority (GCMCA) due to your pattern of misconduct. In his recommendation, your CO stated, in part:

During his enlistment SNM has received 2 NJP's and 6 6105 entries and found guilty at a Summary Court Martial for illegal drug use, adultery x 2 and possession of drug paraphernalia. █ has been counseled, given every opportunity to correct his deficiencies, and has failed to do so. SNM has resisted all efforts aimed at helping him overcome his deficiencies. This Marine has proven without a doubt that he does not believe in the "Corps Values" that all Marines live by. I would not want this Marine with me or any other Marine in peacetime or in war.

On 24 February 2005, your command issued you a Page 11 warning for your pattern of misconduct. You acknowledged that you were being processed for an administrative separation due to your pattern of misconduct. You declined to submit a Page 11 rebuttal statement.

On 2 March 2005, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. You consulted with counsel and waived your rights to submit written rebuttal statements and to request a hearing before an administrative separation board. On the same day, your CO recommended to the GCMCA that your discharge be under Other Than Honorable (OTH) conditions. In his endorsement, your CO noted that your adultery offense was committed with the married spouse of a deployed Marine. Ultimately, on 25 March 2005, you were discharged from the Marine Corps for misconduct with an OTH characterization of service and assigned an RE-4 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 change to your narrative reason for separation. You contend that: (a) you seek discharge upgrade relief in light of your years of decorated post-9/11 service, your post-discharge success in education, employment, and mental health treatment, and mitigating circumstances surrounding your non-violent mistakes during service, (b) your claim of in-service mental health struggles is rooted firmly in both the evidence of record and Department of Defense guidance, (c) despite your achievements on active duty you suffered from undiagnosed and untreated mental health conditions - namely, depression stemming from the sudden death of your little sister and the separation from your first wife at a relatively young age, (d) your decorated service, substantial post-discharge rehabilitation, and the mitigating factors surrounding your misconduct from nearly two decades ago all favor the granting of relief, (e) exemplary post-service conduct and achievements, (f) prior to December 2003 when you separated from your wife you had only a single cited instance of negative performance; yet after your separation you became increasingly depressed and received several negative performance actions, (g) you readily accept responsibility for your past conduct, yet you also maintain your indiscretions took place during a time of relative youth and immaturity, and thus do not reflect your true character, (h) you

attribute such indiscretions, in part, to severe depression you suffered in the latter part of your service, following the sudden death of your little sister and the separation from your young wife and child, and (i) Department of Defense guidance when applied to the facts of your situation overwhelmingly favors the granting of equitable relief. For purposes of clemency and equity consideration, the Board noted provided supporting documentation describing post-service accomplishments and advocacy letters.

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 9 January 2023. The Ph.D. stated in pertinent part:

There is no evidence 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 in service. Post-service, he has provided an opinion from a family member trained in mental health that he was likely experiencing a mental health condition during military service. He has submitted no independent medical evidence in support of his claims. Unfortunately, available records are not sufficiently detailed to establish a nexus with his misconduct, as he claims his misconduct was either minor (late to formation) or he was innocent (drug and adultery charges). 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 considered clinical opinion there is some post-service evidence from the Petitioner's step-brother that he may have been experiencing a mental health condition during military service. There is insufficient evidence his misconduct could be attributed to a mental health condition."

In response to the AO, you submitted additional evidence in support of your application. Following a review of your AO rebuttal submission, the Ph.D. did not change their overall AO. However, the Ph.D. noted that it was possible your minor misconduct may be attributed to a mental health condition, but concluded that it was difficult to attribute your SCM misconduct to a mental health condition given your continued professions of innocence.

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 there was absolutely no nexus between any mental health conditions and/or related symptoms and the overwhelming majority of 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 the majority of your misconduct was not due to mental health-related conditions or symptoms. Additionally, even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board concluded that the severity of your misconduct outweighed any and all mitigation offered by such mental health conditions.

Moreover, the Board concluded that certain misconduct you committed, particularly your SCM offenses, were not the types of offenses that would be excused by mental health conditions even with liberal consideration when applied to your particular factual situation. 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 concluded your arguments regarding the relative severity of certain misconduct changing over time were not persuasive and without merit. The Board determined that illegal drug use and possession by a Marine is contrary to USMC 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 possession and use in any form is still against Department of Defense regulations, and marijuana usage is still not permitted for recreational use while serving in the military today. The Board also concluded your “changes in policy” argument regarding the extramarital sexual misconduct charge was fundamentally flawed. The Board determined the 2019 UCMJ amendments would still render your extramarital sexual misconduct illegal today, because such amendments stated any affirmative defense based on legal separation did not apply unless all parties to the conduct were either legally separated or unmarried at the time of the misconduct. Moreover, the Board determined that any mistake of fact about the female Marine’s marital status at all relevant times was not an honest and reasonable belief on your part.

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 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 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,

2/24/2023

[REDACTED]

Executive Director

Signed by: [REDACTED]