



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. 7760-22

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 10 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 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.

You originally enlisted in the Marine Corps and entered active duty on 26 July 1993. Your pre-enlistment physical examination, on 29 September 1992, and self-reported medical history both noted no psychiatric or neurologic conditions, symptoms, or treatment/counseling history.

On 22 November 1994, your command issued you a "Page 11" counseling warning (Page 11) for your history of minor disciplinary infractions, to include: uttering bad checks to various merchants, failing to show up timely for work, unauthorized absences (UA) from your appointed place of duty, disobeying a direct order from an NCO and an SNCO, and failing to obey a direct order from a superior commissioned officer. The Page 11 expressly advised you that a failure to

take corrective action may result in administrative separation, judicial proceedings, or limitation of further service. You did not submit a Page 11 rebuttal statement.

On 23 November 1994, you commenced a period of UA that terminated after twelve days on 5 December 1994. On 9 December 1994, you received non-judicial punishment (NJP) for your UA. A portion of your awarded NJP was suspended. You did not appeal your NJP.

On 14 December 1994, your command issued you a Page 11 warning documenting your pattern of misconduct, specifically your breaking restriction and being caught shoplifting beer in San Clemente, California. The Page 11 expressly advised you that a failure to take corrective action may result in administrative separation, judicial proceedings, or limitation of further service. You did not submit a Page 11 rebuttal statement. On 23 December 1994 the suspended portion of your recent NJP was vacated and enforced due to your continuing misconduct.

On 27 December 1994, you received NJP for breaking restriction. You did not appeal your NJP. On 9 February 1995, you received NJP for two separate specifications of breaking restriction. You did not appeal your NJP.

On 24 February 1995, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. On 27 February 1995, you waived your right to consult with counsel, to submit written rebuttal statements, and to request a hearing before an administrative separation board. Ultimately, on 20 April 1995, you were discharged from the Marine Corps for misconduct with an under Other Than Honorable conditions (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 to upgrade your discharge and contentions that: (a) you were suffering from undiagnosed PTSD and uncharacterized mental disabilities when you committed the misconduct underlying your discharge, (b) your NJP stated you would not receive any other punishments, but you received an OTH discharge as punishment for your NJP, (c) you did not willfully commit any offenses, (d) you requested mental health counseling but were told to suck it up, (e) there were factual, legal, procedural, and discretionary errors with your OTH discharge, (f) there exists substantial doubt that your discharge would have remained the same if such errors had not been made, (g) there have been several Marine Corps policy changes requiring a change in your discharge, and (h) current Marine Corps policies represent a substantial enhancement of the rights afforded to service members such as you in such administrative separation proceedings. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

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

There is no evidence that he was diagnosed with a mental health condition, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition in military service. Post-service, he has provided evidence of diagnoses of PTSD and other mental health conditions that are temporally remote to his military service and appear to have become clinically interfering following a work injury in 2019/2020. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms during military service or a nexus with his misconduct, particularly given the nature of his misconduct. Additional records (e.g., 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 insufficient evidence of diagnoses of PTSD and other mental health conditions that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD or another mental health condition."

In response to the AO, you submitted additional medical evidence and a personal statement that provided additional arguments in support of your application. Following a review of your AO rebuttal submission the Ph.D. did not change or modify their original AO.

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 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 3.64 in conduct. Marine Corps regulations in place at the time of your discharge recommended 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 disagreed with your contention that any factual, legal, procedural, and discretionary errors with your OTH discharge existed. The Board determined that you clearly met the criteria for separation processing for a pattern of misconduct, and the Board concluded your command adhered to all relevant guidance and did not act in an arbitrary and capricious manner. Thus, the Board determined that your contention, that you would have not received the same discharge had such purported errors not been made, to be without merit. Additionally, the Board also noted that NJP and administrative separation processing are two mutually exclusive concepts, and the Board determined your separation processing was not an NJP punishment, but rather the function of your cumulative NJPs ultimately meeting certain criteria to begin separation processing.

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,

3/15/2023

