



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

█
Docket No. 8447-22

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 14 April 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. Although you were afforded an opportunity to submit an AO rebuttal for consideration, you chose not to do so.

You enlisted in the U.S. Marine Corps and entered active duty on 8 April 2003. On your enlistment application, you disclosed pre-service marijuana usage. On 19 Feb 2003, you acknowledged and signed the "Statement of Understanding - Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment physical examination, on 20 February 2003, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 24 July 2006, a Navy Drug Screening Laboratory message indicated you tested positive for marijuana above the established testing cut-off level. On 18 August 2006, you completed the two-day early intervention program held at the Substance Abuse Counseling Center.

On 29 November 2006, you were convicted at a Summary Court-Martial (SCM) of the wrongful use of a controlled substance (marijuana). You were sentenced to a reduction in rank to E-3 and restriction for forty-five days. As part of a pretrial agreement (PTA), you agreed to plead guilty at your SCM and waive the subsequent administrative separation board, in lieu of adjudicating your drug offense at a Special Court-Martial. On 13 December 2006, the Convening Authority approved the SCM sentence.

On 12 February 2007, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with counsel and, per the PTA, you waived your right to request an administrative separation board, and you did not submit written rebuttal statements. Ultimately, on 26 March 2007, you were discharged from the Marine Corps for misconduct with an under Other Than Honorable conditions (OTH) characterization of service and assigned an RE-4B reentry code.

On 12 March 2009, the Naval Discharge Review Board (NDRB) denied your initial application for discharge upgrade relief. The NDRB determined your discharge was proper as issued and no change was warranted.

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) you had a terrible defense attorney handling your case and she gave you terrible representation, and (b) with a discharge upgrade you will be able to “buy” your active duty time and retire sooner with the U.S. Postal Service. For purposes of clemency and equity consideration, the Board noted you did not provide documentation describing post-service accomplishments or 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 25 January 2023. The Ph.D. stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he demonstrated a clear pattern of psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. He has provided no medical evidence to support his claims. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct, particularly given pre-service behavior. 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 insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD.

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 that there was no convincing evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or 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 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.

Additionally, the Board determined that no ineffective assistance of counsel (IAC) occurred with your case. The Board noted there is no convincing evidence in the record to support your contention that you did not receive adequate representation. The Board unequivocally concluded that you failed to meet the burden to show that: (a) your defense counsel's performance was deficient and fell below an objective standard of reasonableness, and (b) but for the alleged deficiencies, there was a reasonable probability of a more favorable result. Accordingly, the Board concluded that no IAC occurred, and any such suggestion or argument was not persuasive.

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 illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. The Board noted that marijuana use in any form is still against current Department of Defense regulations and not permitted for recreational use while serving in the military. The Board also noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. 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 discharge. 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,

4/20/2023

█

Executive Director

█