



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. 8624-22
Ref: Signature Date

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Dear █

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 17 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 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 and your response to the AO, dated 6 March 2023.

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 enlisted in the United States Marine Corps and commenced a period of service on 10 March 2009. You deployed to Afghanistan as a combat engineer from March 2010 to October 2010.

On 7 April 2011, you received non-judicial punishment (NJP) for violation of Uniform Code of Military Justice (UCMJ) Article 92, for two specifications of disobeying a lawful order by speeding and abusing a narcotic, Article 111, for two specifications of speeding and operating a vehicle after consuming a narcotic, and Article 112(a), for wrongfully using a controlled substance. Specifically, you were observed swerving while driving your car by an ambulance crew. You appeared to be under the influence and were transported to the hospital, where blood testing revealed that you had methamphetamine, marijuana, and opiates in your system. You did not appeal this NJP.

On 23 May 2011, you knowingly and voluntarily entered into a pretrial agreement wherein you waived your right to an administrative separation board and accepted an Other than Honorable (OTH) discharge in exchange for your command dismissing the Special Court Martial (SPCM) charges pending against you and referring your misconduct to NJP.

On 24 May 2011, you received your second NJP for violating UCMJ Article 92, for violating restriction, and Article 112(a), for wrongfully using a controlled substance (spice). You did not appeal this NJP. That same day, you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. After consulting with qualified counsel, you waived your right to present your case at an administrative separation board in accordance with your PTA.

Prior to your separation, you were screened and evaluated for Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI). The evaluation stated that you had “not been diagnosed with, reported, nor exhibits any symptoms consistent with PTSD or TBI.” It also noted your deployment to Afghanistan and that you did not sustain any injuries or report any issues consistent with PTSD or TBI. On 21 July 2011, you were discharged from the Marine Corps for misconduct, drug abuse, with an OTH characterization of service and assigned an RE-4B reenlistment code.

Your case was previously reviewed by the Navy Discharge Review Board (NDRB), and you were denied relief on 24 May 2022. Specifically, the medical review stated “[t]he applicant had a negative screen for PTSD-TBI during his final physical. Additionally, I do not find evidence of mental health diagnoses or treatment (counseling or pharmacologic) in the applicant's military treatment records. Though I acknowledge the letter from the applicant's counselor stating a diagnosis of PTSD, I don't find sufficient evidence that mental health significantly impacted the applicant's ability to make correct decisions (e.g... driving under the influence, wrongful use of a controlled substance, violated restriction to use a controlled substance, etc.)” NDRB determined that no change was warranted and your discharge was proper.

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 and change your narrative reason for separation and reentry code, (b) your contention that you were struggling with undiagnosed PTSD, and (c) the impact that your mental health had on your conduct during service. For purposes of clemency and equity

consideration, the Board noted you did provide documentation related to your post-service accomplishments and character letters.

In your request for relief, you take responsibility for your misconduct, but argue that the punishment is too harsh in light of mitigating factors, including your deployment to Afghanistan, your service-connected PTSD diagnosis, and your post-service accomplishments. 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 1 March 2023. The Ph.D. noted in pertinent part:

There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service. It is possible that he was using substances to avoid possible symptoms of PTSD, however he did screen negative for PTSD symptoms in July 2011. He has provided post-service accomplishments, personal statement, letter from his father, multiple character references, and a brief summary letter from Dr. █ of █ Dr. █ indicated that she did treat the Petitioner in the context of therapy for PTSD between February and March 2013. Unfortunately, the letter does not include any etiology, or rationale, symptoms etc. for his diagnosis. The Petitioner's personal statement is not sufficiently detailed to provide a nexus between a mental health condition and his misconduct. The Petitioner mentions that he also saw a Dr. █ also from █ These records and any additional records (e.g., post-service or active duty 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 reviewing your rebuttal to the AO, the Ph.D. did not change the AO's conclusion.

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about mental health and the possible adverse impact your mental health had on your conduct during service. Specifically, the Board felt that your misconduct, as evidenced by your two NJPs, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved a numerous drug offenses. 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 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.

In making this determination, the Board concurred with the advisory opinion 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. You were screened for PTSD and TBI prior to your discharge and it was noted that you were not diagnosed with, reported, nor exhibited any symptoms consistent with PTSD or TBI. You did not raise any such issues during your discharge process, even after speaking with qualified counsel and entering into a PTA. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms.

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 considered that you were already given clemency by entering into a PTA, thereby avoiding a possible court martial conviction and punitive discharge. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. 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,

4/21/2023

