

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

> Docket No. 8843-22 Ref: Signature Date



Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 1 May 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 the 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). As part of the Board's review, a qualified mental health professional reviewed your request and provided the Board with an Advisory Opinion (AO) on 15 March 2023. Although you were provided with an opportunity to submit a rebuttal to the AO, you chose not to do so.

You enlisted in the U.S. Marine Corps and began a period of active duty on 6 November 2002. On 10 June 2004, you were found guilty at a special court-martial (SPCM) of disobeying a lawful order and being drunk on post, and were sentenced to be reduced in rank to E-1, to forfeit \$50.00 pay per month for six (6) months, to be restricted for 60 days, and to be confined without hard labor for 60 days.

On 21 January 2005, you received your first nonjudicial punishment (NJP) for a period of unauthorized absence which lasted 13 days. You were issued administrative remarks documenting these infractions and advising you that failure to comply with the UCMJ (uniform

code of military justice), or to have any involvement of a discreditable nature and failure to take corrective action may result in administrative separation, judicial proceedings, or limitation on further service.

On 7 March 2005, you received a second NJP for failing to obey a lawful order by wrongfully consuming alcohol while on Battalion restriction and for two (2) specifications of failing to report to the Battalion Officer of the Day. Subsequently, you refused evaluation for a potential alcohol use disorder. As a result, on 9 March 2005, you were notified of your pending administrative separation by reason of pattern of misconduct (POM), at which time you waived your right to consult with military counsel and have your case heard before an administrative discharge board. The same day, your Commanding Officer (CO) also recommended to the separation authority that you be discharged with an Other Than Honorable (OTH) characterization of service by reason of POM. The CO noted that you endangered the life of 400 Marines when you consumed alcohol while on watch, during which the camp came under attack from Iraqi insurgents. On 25 April 2005, a staff judge advocate's review of your case found the proceedings were sufficient in law and fact. On 28 April 2005, the separation authority directed you be discharged with an OTH for POM. On 20 May 2005, you were so discharged.

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 your contentions that you incurred PTSD, traumatic brain injury (TBI), and mental health concerns (MHC) during military service and you would like to upgrade your discharge to receive Department of Veterans Affairs (VA) benefits and treatment. For purposes of clemency and equity consideration, the Board noted you did not provide documentation describing post-service accomplishments or advocacy letters.

Based on your assertions that you incurred PTSD, TBI and other MHC during military service, which might have mitigated the circumstances of your discharge, a qualified mental health professional reviewed your request for correction to your record and provided the Board with an AO. The AO stated in pertinent part:

There is no evidence of a Traumatic Brain Injury (TBI) incurred in service and the Petitioner has provided no medical evidence to support his claims. There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms 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 evidence of his mental health claims. Unfortunately, the Petitioner's personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a nexus with 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 AO concluded, "it is my considered clinical opinion there is insufficient evidence of TBI incurred during military service. There is insufficient evidence of a diagnosis of PTSD or

another mental health condition that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to TBI, PTSD, or another mental health condition."

After a thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs and SPCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. The Board noted the egregious nature of your misconduct that placed the lives of hundreds of Marines at risk. Additionally, the Board concurred with the AO that there is insufficient evidence that your misconduct could be attributed to PTSD, TBI or another MHC. Finally, 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 concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. Even in light of the Wilke 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 the 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 is attached 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.

	5/9/2023
Executive Director	
Signed by:	

Sincerely,