



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. 8873-22

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 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 a qualified mental health provider and your response to the AO.

You enlisted in the Marine Corps and entered active duty on 15 April 2002. As part of your enlistment application, on 23 December 2001, you signed and acknowledged the "Statement of Understanding - Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment physical examination, on 26 December 2001, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You disclosed pre-service marijuana usage

during your enlistment physical examination.

On 18 March 2004, you received non-judicial punishment (NJP) for larceny and wrongful appropriation from the Main Exchange at █. You did not appeal your NJP.

On 10 January 2005, you commenced an unauthorized absence (UA) shortly after receiving a lawful order to appear for a urinalysis test. Your UA terminated after twenty-seven days on 6 February 2005. On 10 February 2005, you received NJP for UA, and for failing to obey an order or regulation. You did not appeal your NJP. On the same day, your command issued you a "Page 11" counseling warning (Page 11) documenting your NJP. The Page 11 expressly advised you that a failure to take corrective action and any further Uniform Code of Military Justice violations may result in judicial or adverse administrative action, including but not limited to administrative separation.

However, on 29 April 2005, you commenced a period of UA that terminated after twelve days on 11 May 2005. You commenced another UA period, on 26 May 2005, that terminated after twenty-seven days on 22 June 2005.

On 21 July 2005, pursuant to your pleas you were convicted at a Special Court-Martial (SPCM) for both of your UA periods. You were sentenced to confinement for 120 days and forfeitures of pay. Pursuant to a pretrial agreement, the Convening Authority suspended all confinement in excess of seventy-five days.

On 8 September 2005, pursuant to your pleas you were convicted at a second SPCM for the wrongful use of a controlled substance (cocaine). You were sentenced to confinement for sixty days, forfeitures of pay, and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). On 8 January 2006, the Convening Authority approved the SPCM sentence as adjudged. On 16 May 2006 the U.S. Navy-Marine Corps Court of Criminal Appeals affirmed the SPCM findings and sentence. Upon the completion of appellate review in your case, on 27 July 2006, you were discharged from the Marine Corps with a BCD and assigned an RE-4B 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 Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) at the time of the misconduct underlying your discharge you were suffering from PTSD symptoms resulting from back-to-back combat tours, (b) you otherwise had honest and faithful service and successfully completed two combat tours between 2003-2004 in support of OIF and OEF, (c) when you returned to the U.S. from your last combat tour you began experiencing PTSD symptoms related to your deployments leading you to self-medicate with drugs and alcohol, (d) your use of a controlled substance flowed directly from the impact of PTSD symptoms, (e) you deserve clemency because of the relationship between your misconduct and your PTSD, the many years that have passed since your misconduct, the relative severity of your misconduct, your otherwise honest and faithful service, your post-service

accomplishments, and your efforts to seek treatment for your addiction and underlying PTSD, and (f) your discharge characterization was inequitable as a matter of law based on a liberal consideration of the causal relationship between your combat-related PTSD and your misconduct. 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 5 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. Post-service, he has provided evidence of a diagnosis of PTSD that is temporally remote to military service and has been attributed to military service. He has also provided post-service evidence of a substance use disorder diagnosis. Substance use is incompatible with military readiness and discipline and there is no evidence he was unaware of his misconduct or deemed not responsible for his behavior. While some of his UA could be attributed to PTSD avoidance, it is difficult to attribute larceny to PTSD symptoms. Given his pre-service substance use history that appears to have continued in service, it is difficult to attribute in-service substance use and avoidance of urinalysis to symptoms of PTSD. 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 post-service evidence of a diagnosis of PTSD that has been attributed to military service. There is insufficient evidence to attribute all of his misconduct to symptoms of PTSD."

In response to the AO, you provided another brief with additional arguments in support of your application for relief.

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 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 cumulative misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board

determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. The Board also concluded 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 3.8 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 misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your cumulative misconduct.

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. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge for the purpose of facilitating certain veterans' benefits, or enhancing educational or employment opportunities. The Board noted that Department of Veterans Affairs (VA) eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes and are not binding on the Board. Accordingly, 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 serious misconduct and disregard for good order and discipline clearly merited your receipt of a BCD.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. The Board determined that illegal drug use 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. You were properly convicted at two separate SPCMs of serious misconduct and the Board did not find any evidence of an error or injustice in this application that warrants upgrading the BCD awarded at the second SPCM. 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,

2/17/2023

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Executive Director

Signed by: █