

DEPARTMENT OF THE NAVY

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

> Docket No. 0284-23 Ref: Signature Date



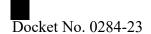
Dear Petitioner:

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 17 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 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). The Board also considered the advisory opinion (AO) furnished by a qualified mental health professional, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

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 Marine Corps and began a period of active duty on 24 July 2000. During the period from 17 December 2001 to 26 November 2002, you received three instances of non-judicial punishment (NJP) for two specifications of disobeying a lawful order, three



specifications of false official statement, failure to go at the time prescribed to your appointed place of duty, and failure to go to your appointed place of duty.

On 9 January 2003, you were convicted by a summary court-martial (SCM) of wrongful use of marijuana. Based on a command referral, on 21 January 2003, you presented yourself to the Substance Abuse Rehabilitation Program (SARP) for evaluation. On 26 March 2003, it was determined that based on your lack of desire to participate in SARP you were refusing the opportunity for treatment.

On 6 May 2003, you were notified that you were being recommended for administrative discharge from the Marine Corps by reason of misconduct due to drug abuse. You were advised of your procedural rights; you waived your right to consult with military counsel and to present your case to an administrative discharge board (ADB). Your commanding officer (CO) then forwarded your administrative separation package to the separation authority (SA) recommending your administrative discharge from the Marine Corps with an Other Than Honorable (OTH) characterization of service. The SA approved the recommendation for administrative discharge and directed your OTH discharge from the Marine Corps. On 16 June 2003, you were discharged from the Marine Corps with an OTH characterization of service by reason of misconduct due to drug abuse.

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 change your discharge character of service to a "Medical Discharge" and contentions that: (1) after your lower back injury you were unable to perform your duties, you feel that the people who were supposed to look out for you failed, and assumed that you were "quitting" or "giving up," (2) you felt that your brothers had turned their backs on you, you tried your best to redeem yourself, with injury and all and you were still looked upon as someone who had given up, and (3) before the injury you were one of the best in the world at your job and performed your duties to the letter. For purposes of clemency and equity consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board's review process, a qualified mental health professional reviewed your contentions and the available records and issued an AO dated 24 March 2023. The AO noted in pertinent part:

There is no in-service evidence of a head injury or on-going symptoms consistent with a Traumatic Brain Injury (TBI). The Petitioner's claims regarding the nature of his head injury are not specific to establish a nexus with his misconduct. There is no evidence of a diagnosis of PTSD or another mental health condition during military service, other than alcohol use disorder. Problematic alcohol use is incompatible with military readiness and discipline and does not remove responsibility for behavior. The Petitioner has provided no medical evidence in support of his claims. Additional records (e.g., active duty or complete 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 or PTSD incurred during military service. There is insufficient evidence his misconduct could be attributed to TBI, PTSD, or another mental health condition, other than his diagnosed alcohol use disorder."

After 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 three NJPs and SCM conviction, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it involved a drug offense. 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. Additionally, the Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. Further, the Board considered the likely negative effect your misconduct had on the good order and discipline of your unit. Furthermore, the Board concurred with the AO and determined that there is insufficient evidence of TBI or PTSD incurred during military service, and there is insufficient evidence your misconduct could be attributed to TBI, PTSD, or another mental health condition, other than your diagnosed alcohol use disorder. Finally, the Board 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. Therefore, based on your administrative separation processing for misconduct that resulted in an OTH characterization, the Board determined that you were ineligible for disability processing even if there was evidence to support your referral to the Disability Evaluation System. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant your discharge for drug abuse and an OTH characterization. Even in light of the Wilkie Memo and reviewing the record liberally and 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 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.

