



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

█
Docket No. 1098-23

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 15 September 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 and your response to the AO.

You enlisted in the U.S. Marine Corps and began a period of active duty service on 6 August 2001. Your pre-enlistment physical examination and self-reported medical history both noted no psychiatric or neurologic conditions, symptoms, or treatment/counseling history.

On 14 August 2002, you received non-judicial punishment (NJP) for both malingering, and for falsely altering a medical chit. You did not appeal your NJP.

On 2 April 2003, your command issued you a “Page 11” counseling warning (Page 11) for an unauthorized absence (UA) after you failed to report to your appointed place of duty and instead went to a tanning booth. You did not submit a Page 11 rebuttal statement.

On 15 May 2003, your command issued you another Page 11 documenting your failure to obey a lawful order when you entered a female shower facility on 4 May 2003 in violation of the base commander’s standing order. The Page 11 expressly advised you any further violations of the UCMJ and deficient performance may result in disciplinary action, administrative reduction, administrative separation, and/or limitation of further service. You did not submit a Page 11 rebuttal statement.

On 26 May 2003 you received NJP for your orders violation when you entered the female showers. You did not appeal your NJP. On 27 May 2003, your command issued you a Page 11 documenting the NJP. The Page 11 expressly advised you any further violations of the UCMJ and deficient performance may result in disciplinary action, administrative reduction, administrative separation, and/or limitation of further service. You did not submit a Page 11 rebuttal statement.

On 2 July 2003, your command issued you a Page 11 where you acknowledged you were being processed for an administrative separation. You did not elect to submit a Page 11 rebuttal statement.

On 18 December 2003, you were convicted at a Summary Court-Martial (SCM) for disobeying a lawful order not to enter any female heads or shower facilities without proper supervision, when you entered the female head in █ and peeked over the toilet stall at a female using the toilet. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), forfeitures of pay, and confinement for thirty (30) days. On 8 January 2004, the Convening Authority approved the SCM sentence.

Following your SCM conviction, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. The Staff Judge Advocate for █ determined that your administrative separation for a pattern of misconduct was legally and factually sufficient. On 12 March 2004, the Separation Authority approved and directed your separation from the Marine Corps for a pattern of misconduct with an under Other Than Honorable conditions (OTH) characterization of service. Ultimately, on 12 March 2004, you were discharged from the Marine Corps for misconduct with an OTH characterization of service and assigned an RE-4 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 Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire to change your characterization of service, reason for separation, separation code, and reentry code. You contend that: (a) you were affected while on active duty with a voyeuristic disorder for several months, (b) voyeurism is actually a paraphilic disorder, which, if serious enough and meeting very specific criteria, is a recognized mental health disorder under the DSM-V, (c) such a diagnosis was given to you on active duty, but, unfortunately, it had only been diagnosed after you had already engaged in acts

of voyeuristic behavior, (d) your mental health disorder was the direct and proximate cause of your misconduct, and had your condition been diagnosed earlier to allow you to immediately receive treatment, you would not have engaged in subsequent acts of similar misconduct, (e) fellow Marines and experiences while serving resulted in traumatic experiences and a hostile work environment, (f) the traumatic experiences and hostile work environment led to depression, anxiety, adjustment disorder, and/or PTSD, (g) the depression, anxiety, adjustment disorder, and PTSD aggravated and exacerbated the underlying paraphilic disorder, specifically, the symptoms of impulsivity and hyper sexuality which created uncontrollable urges, (h) the uncontrollable urges led to the misconduct that resulted in your discharge, (i) the evidence supports that you were a normal kid with no criminal record and no serious mental health issues prior to becoming a Marine, and that you just wanted to serve your country and be part of something great, (j) in addition to a number of extenuating factors that simply were not considered when you were initially discharged, you have since managed to survive and continue your journey towards personal and professional growth, and (k) you check a majority of the boxes the Board is instructed to consider via the Wilkie Memo, and the very specific and required boxes in order to fully apply the benefits instructed by the Kurta Memo. For purposes of clemency and equity consideration, the Board considered the entirety of 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 23 June 2023. The Ph.D. stated in pertinent part:

During military service, the Petitioner was appropriately referred and evaluated and diagnosed with voyeurism. Voyeurism is incompatible with military discipline and does not remove responsibility for behavior. There is no indication the Petitioner was not fit for duty, and his concealment of himself while engaging in the behavior indicates an awareness of right and wrong. This behavior began prior to his deployment and apparently stopped when he was separated from service. Post-service, the VA has granted service connection for depression and anxiety, and a civilian provider has diagnosed a trauma-related disorder. These diagnoses have been attributed to military service, including deployment stress and the consequences of an unfavorable discharge character of service. Additional records (e.g., complete in-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 post-service evidence from the VA of mental health concerns that may be attributed to military service. There is post-service evidence from civilian providers of a trauma-related disorder that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD or another mental health condition, other than voyeurism."

Following a review of your AO rebuttal submission, the Ph.D. did not change or otherwise modify their original AO.

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 your misconduct was not due to PTSD or other mental health-related conditions or symptoms. 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 pattern of 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. Moreover, the Board concluded that your intentional criminal offenses of malingering and altering a medical chit were not the types of misconduct that would be excused or mitigated by mental health conditions even with liberal consideration. 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.

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 approximately 3.4 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 conduct marks during your active duty career were a direct result of your pattern of serious misconduct which further justified your OTH discharge characterization.

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 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 concluded that your misconduct and disregard for good order and discipline clearly merited your discharge. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos 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. 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,

9/19/2023

