



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

■
Docket No. 2212-23
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 18 October 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 and your response to the AO.

You enlisted in the Marine Corps and began a period of active duty on 22 January 2002. From March 2003 to May 2003, you participated in support operations in Iraqi Freedom. On 17 September 2003, the Navy Drug Laboratory reported that your urine sample tested positive for THC (marijuana). On 1 October 2003, you were notified that you were being recommended for administrative discharge from the Marine Corps by reason of misconduct due to drug abuse as evidenced by your positive urinalysis sample for marijuana. You waived your procedural right to consult with military counsel and to present your case to an administrative discharge board (ADB). On 3 October 2003, you received non-judicial punishment (NJP) for wrongful use of marijuana. Subsequently, the commanding officer 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 by reason of misconduct due to drug abuse. On 18 December 2003, you were so discharged.

Post-discharge, you applied to the Naval Discharge Review Board (NDRB) for relief. On 28 August 2019, after liberally considering your mental health evidence, the NDRB upgraded your characterization of service to General (Under Honorable Conditions) (GEN).

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 and change your narrative reason for separation to disability with an associated separation code change. You contend that: (1) the original root cause of the actions that led to your discharge was caused by the “medical condition of PTSD,” (2) your current discharge character of service and narrative reason for separation are an injustice based upon your war time service, and the fact your health conditions were caused by your service, (3) your discharge character of service and narrative reason for separation has had an extremely negative effect when applying for employment and veteran specific benefits, and (4) you have been diagnosed with a variety of health issues through the Department of Veterans Affairs (VA), to include receiving several disability ratings. For purposes of clemency and equity consideration, the Board noted you provided a personal statement, health care documents, and documentation from the VA, but no supporting documentation describing post service accomplishments or advocacy letters.

As part of the Board’s review, a qualified mental health professional reviewed your request and provided the Board with an AO on 6 September 2023. The AO noted in pertinent part:

There is no evidence that the Petitioner was diagnosed with a mental health condition or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition while in service. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms 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) would aid in rendering an alternate opinion.

The AO 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.”

In response to the AO, you provided a personal statement on your behalf and supporting documentation that supplied additional clarification of the circumstances of your case. After reviewing your rebuttal evidence, the AO remained unchanged.

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 NJP, 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. The Board considered the likely negative effect your misconduct had on the good order and discipline of your unit. Further, the Board concurred with the AO that there is insufficient evidence of a mental health condition that may be attributed to military service, and there is insufficient evidence that your misconduct could be attributed to a mental health condition. As the AO explained, your personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with your misconduct, and there is no evidence that you were diagnosed with a mental health condition or that you exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition while in service. Therefore, 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. Finally, the Board determined you already received a large measure of clemency when the NDRB upgraded your characterization from OTH to GEN. In doing so, the Board considered that NDRB already liberally considered your mental health mitigation evidence. As a result, the Board concluded significant negative aspects of your service outweigh the positive aspects and continues to warrant a GEN characterization. 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.

Regarding your request for a disability discharge, the Board determined your assigned narrative reason for separation and separation code remains appropriate. The Board determined you were properly processed and discharged based on your drug abuse and, despite the application of liberal consideration, concluded that it should remain unchanged. As explained above, the Board took into consideration that you already received significant clemency from the NDRB based on your mental health condition. Clemency that allowed you to qualify for VA compensation and pension benefits exceeding \$4,000, despite your drug related misconduct and discharge. Finally, even if there was evidence that you were unfit due to your mental health condition at the time of your discharge, the Board determined you were ineligible for disability processing at the time due to your misconduct that resulted in an OTH. Ultimately, the Board concluded that any injustice in your case was adequately addressed by the relief granted by the NDRB and no additional changes to your record were required. 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.

Sincerely,

11/1/2023

█

Executive Director

Signed by: █