



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

█
Docket No. 3523-23
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 Board waived the statute of limitation 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 20 November 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 to 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) of a qualified mental health provider and your response to the AO.

You enlisted in the Marine Corps after receiving a drug use waiver and began a period of active duty on 17 July 2000. You missed a dental appointment and were administratively counseled, on 11 June 2001, for failure to be at your appointed place of duty. On 13 July 2001, you were subject to nonjudicial punishment (NJP) for a violation of the Uniform Code of Military Justice (UCMJ) under Article 112a due to wrongful use of marijuana and cocaine. You were also counseled in July and August of 2002 that you were not recommended for promotion in August 2002 due to a suspended administrative separation and pending legal action. Subsequently, you deployed in support of Operations ENDURING FREEDOM and IRAQI FREEDOM from March

– October of 2003. During your deployment, on 30 August 2003, you were subject to a second NJP. You were later counseled in December 2003 for having arrived late to your place of duty and having been in an unauthorized absence (UA) status for an entire day. A third NJP, on 5 March 2004, included two specifications of violations under Article 86 of the UCMJ for absences without leave, a violation of Article 92 for failure to obey an order after being told by an E-6 to get a flak jacket, and Article 117 for provoking speech or gestures toward several noncommissioned officers who had directed you to get out of your rack to report to the motor pool.

On 3 August 2004, you were tried by Special Court-Martial (SPCM) and convicted, consistent with your pleas, for a violation under Article 92 of the UCMJ, due to wrongful possession of drug paraphernalia, and for six specifications of violations under Article 112a. The Article 112a violations included wrongful possession of methamphetamine, wrongful use of methamphetamine, wrongful possession of marijuana, two counts of wrongful distribution of marijuana, and wrongful introduction of methamphetamine onto a military installation. You were sentenced to 12 months confinement and a Bad Conduct Discharge (BCD). Your BCD was ordered executed following completion of appellate review, and you were discharged on 7 September 2006.

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 to “Honorable,” to change your narrative reason for separation to “Secretarial Authority” with a less derogatory separation code, to change your reentry code of “RE-4B” to a less derogatory code, and your contentions that you suffered from post-traumatic stress disorder (PTSD) following your combat deployment but that you were not aware of it at the time and self-medicated with illegal drugs. You also assert that the circumstances of your drug distribution offense were due to having used drugs with another person who also used drugs, without any actual sale or formal distribution. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application including documentation describing post-service accomplishments or advocacy letters.

Because you contend that PTSD affected the misconduct circumstances which resulted in your discharge, the Board also considered the AO. In addition to noting your post-discharge diagnoses of Anxiety, Opioid Abuse, and PTSD, the AO advised that:

“given his personal statement and time and place deployed to combat, it is possible that he was suffering from symptoms of PTSD during service. Some types of substance abuse are often comorbid with PTSD, however knowingly distributing and bringing marijuana and methamphetamines on base are not typical behaviors associated with someone who is suffering from PTSD. At least part of his misconduct and substance use (marijuana and cocaine) preceded his combat deployment, thus it cannot be said that PTSD caused all of his misconduct that led to his discharge.”

The AO concluded, “it is my considered clinical opinion there is sufficient evidence of a post-service diagnosis of PTSD that may be attributed to military service. There is insufficient evidence that all of his misconduct could be attributed to PTSD.”

You submitted a rebuttal in response to the AO which asserts that the AO has cited incorrect dates regarding your NJP for drug use, asserting that this NJP was instead for failing to be at your appointed place of duty. As argument in favor of this factual interpretation, you assert that you would have been administratively discharged if you had tested positive before any of your deployments.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJP and SPCMs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included multiple drug offenses. 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. Further, the Board expressly rejected your argument regarding your NJP for drug abuse based on clear evidence of record within your official military personnel file (OMPF); specifically, your NAVMC 118-12 (Offenses and Punishments) contains an entry dated "010713" which records your NJP for a "Violation of Article 112a of the UCMJ: In that SNM did on or about December 2000 - 10 June 2001, on or around [REDACTED] and [REDACTED], wrongfully use of Marijuana, Cocaine, a controlled substance." The entry specifies that your punishment for the offense was awarded at Battalion Commanding Officer's NJP on 13 July 2001, then reported on unit diary on 2 August 2001. Additionally, your record reflects that you were assigned at [REDACTED] from 12 November 2000 until being transferred to [REDACTED] on 28 February 2001, indicating that the referenced offense(s) could not have occurred after your deployment in 2003. Additionally, the Board noted that the records regarding your offenses and punishments as well as your dates and locations of assignments were included with your application and, therefore, available for your review to confirm the facts prior to submitting a wholly incorrect assignment of error to the AO's review of the chronology of your drug abuse misconduct. Furthermore, with respect to your assertion that you would have been administratively separated if you had a positive urinalysis, the Board does not presume to know whether your first NJP for drug abuse resulted from a positive urinalysis or by some other means. However, your record clearly shows that, as of July 2002, you were not recommended for promotion due to a suspended administrative separation. Given that your record is devoid of evidence of additional subsequent misconduct after your drug abuse NJP, under a presumption of regularity, the Board found that you were, in fact, subject to mandatory administrative separation processing for drug abuse with a result which recommended your discharge, but that this recommendation was suspended for reasons significant to the acting decision authority at that time.

In light of the above facts, the Board concluded that your matters in rebuttal were insufficient to negate the chronology addressed within the AO. In addition to concurring with the AO that at least part of your substance abuse misconduct occurred prior to your combat deployment and, therefore, cannot be said to have contributed to all of your misconduct, the Board placed significant weight on the fact that you began abusing drugs prior to potentially incurring PTSD. Furthermore, you also were given a unique opportunity at a second chance but elected not only to abuse illegal drugs again, whether for self-medication or not, but also to involve another Marine in your misconduct. Observing that you could not have pleaded guilty providently to an offense of distribution if you had not, at the very least, handed drugs to the other Marine, the Board rejected your characterization of your drug distribution offense as the mere act of using drugs with another Marine. Based on your conviction, you presumptively distributed illegal

drugs to another Marine who might not have had access to said substance absent your criminal action. As the AO pointed out, giving drugs to other people is not typically a behavior which is a symptom of PTSD. Not only did the Board concur in this regard, the Board also noted that you presented no evidence of record from your SPCM proceedings to provide context or substantiate your bare assertion that the distribution offense is misleading. Finally, although not expressly addressed within the AO, the Board also found it unconvincing that you claim to have used both methamphetamines and marijuana to self-medicate symptoms of PTSD. The Board observed that these two substances have disparate systemic effect on the drug abuser, and your supporting documentation lacks sufficient evidence to reconcile this discrepancy against your claim of self-medication.

As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant a BCD. Therefore, 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 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.

Sincerely,

12/7/2023

[REDACTED]

Executive Director

Signed by: [REDACTED]