



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

█
Docket No. 3946-23
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 29 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.

You enlisted in the U.S. Marine Corps and began a period of active duty service on 7 February 2002. Your pre-enlistment physical examination, on 1 May 2001, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. As part of your enlistment application, on 8 January 2002 you acknowledged and signed the "Statement of Understanding - Marine Corps Policy Concerning Illegal Use of Drugs."

On 6 January 2004, your command issued you a "Page 11" counseling warning (Page 11) documenting your illegal drug use. The Page 11 informed you that you were being processed for

an administrative separation. You did not submit a Page 11 rebuttal statement. On 7 January 2004, you noted on your medical assessment that compared to your last medical assessment/physical examination your overall health had been the same. You also noted you were not currently taking any medications, and that since your last medical assessment/physical examination you had not been seen by or treated by a health care provider, admitted to a hospital, or had surgery. Lastly, during your medical assessment a Medical Officer offered you combat stress group therapy but you declined to participate.

On 9 January 2004, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse after testing positive for “MDMA,” aka “ecstasy.” You waived your right to request an administrative separation board.

In the interim, on 26 January 2004, you were convicted at a Summary Court-Martial (SCM) for your wrongful use of a controlled substance (MDMA) in early December 2003. You were sentenced to confinement, forfeitures of pay, and a reduction in rank to the lowest enlisted paygrade (E-1). On 25 February 2004, you refused a Medical Officer’s Evaluation related to your drug use.

On 22 March 2004, the Staff Judge Advocate for Marine Corps Base █ determined your separation was legally and factually sufficient. On 30 March 2004, the Separation Authority approved and directed your discharge under other than honorable conditions (OTH) for misconduct due to drug abuse. Ultimately, on 9 April 2004, you were discharged from the Marine Corps for misconduct with an OTH characterization of service and assigned an RE-4B reentry code.

On 2 August 2007, the Naval Discharge Review Board (NDRB) denied your initial discharge upgrade application. On 12 April 2021, the NDRB reviewed your case applying liberal consideration as to whether a mental health condition potentially contributed to the circumstances underlying your discharge. The NDRB found that your discharge was proper, but not equitable, and granted you a discharge upgrade to a General (Under Honorable Conditions) (GEN) characterization of service, but maintained your narrative reason for separation and RE-4B reentry code. The NDRB did not grant you full relief to an Honorable discharge, in part, because the NDRB found that the severity of your PTSD did not rise to a level as to completely absolve you of your misconduct.

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 for a discharge upgrade and contentions that: (a) you possessed an exemplary service record and combat experience prior to your misconduct, (b) the debilitating symptoms of PTSD you suffered as a result of your combat experience directly caused you to self-medicate with drugs, (c) you possess laudable and exemplary post-discharge conduct, (d) your case is nearly indistinguishable from previous cases which were granted full relief, and any discrepancy between the characterizations of service of those petitioners and yours is arbitrary and capricious, (e) you developed PTSD as a result of your combat experience in Iraq, and your combat-induced PTSD caused you to turn to drugs in an effort to self-medicate, (f) according liberal consideration to these facts, your otherwise

commendable service decidedly outweighs your relatively minor and infrequent misconduct, (g) the NDRB failed to accord proper weight to your mental condition, and (h) the NDRB also failed to consider your exemplary conduct before and after his discharge, which rendered your characterization of service fully honorable. 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 22 September 2023. As part of the Board's review, the Board considered the AO. The Ph.D stated in pertinent part:

Following a combat deployment, the Petitioner reported mental health symptoms and declined treatment services. Shortly following separation from service, he sought treatment for PTSD-related symptoms with the VA. Remotely post-service, a civilian psychologist has expressed the opinion that the Petitioner was suffering from PTSD following combat exposure and his substance use was an attempt to self-medicate his symptoms. It is possible that his misconduct could be attributed to PTSD symptoms.

The Ph.D. concluded, "it is my clinical opinion there [is] in-service, and post-service evidence from the VA and a civilian psychologist, of a diagnosis of PTSD that may be attributed to combat exposure. There is some post-service evidence to attribute his misconduct to PTSD."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief beyond what was granted by the NDRB. In accordance with the Hagel, Kurta, and Wilkie Memos (collectively, the "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.

In keeping with the letter and spirit of the Memos, the Board determined that your mental health conditions and experiences mitigated the misconduct used to characterize your original discharge. The Board concluded that your mental health-related conditions and/or symptoms as possible causative factors in the misconduct underlying your discharge and characterization were not outweighed by the severity of your misconduct. With that being determined, and while not condoning your wrongful drug use, the Board concluded that your discharge upgrade to GEN and no higher was all that was warranted and appropriate at this time. Additionally, in light of the Wilkie Memo, the Board still similarly concluded after reviewing the record holistically, and given the totality of the circumstances and purely as a matter of clemency, that a discharge upgrade to GEN and no higher was warranted.

The Board was not willing to grant an Honorable discharge and determined that the record reflected your drug-related misconduct was intentional and willful and demonstrated you were unfit for further service. The Board also determined 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 did not believe that your record was otherwise so meritorious as to deserve a further discharge upgrade to Honorable. 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 illegal drug use by a Marine is contrary to Marine Corps values and policy, renders such Marines unfit for duty, and poses an unnecessary risk to the safety of their fellow Marines. The Board noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. The Board determined that characterization under OTH or GEN 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. As a result, the Board determined that there was no impropriety or inequity in your upgraded discharge, and even under the liberal consideration standard, the Board concluded that your misconduct and disregard for good order in discipline clearly merited a GEN discharge characterization and no higher. In making such a decision the Board concluded they were in no way acting arbitrarily or capriciously when compared to previous BCNR decisions, and determined any such contention was not persuasive and without merit.

Lastly, the Board concluded you were originally assigned the correct narrative reason for separation, separation code, and reentry code based on your circumstances, and that such narrative reason for separation, separation code, and reentry code were proper and in compliance with all Department of the Navy directives and policy at the time of your discharge. 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,

10/2/2023

