



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

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Docket No. 5137-23
Ref: Signature Date

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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 1 March 2024. 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. Although you were afforded an opportunity to submit an AO rebuttal for consideration, you chose not to do so.

You enlisted in the U.S. Marine Corps and entered active duty on 11 December 2000. On 4 October 2000, you signed and acknowledged the "Statement of Understanding – Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment physical examination, on 18 October 2000, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms. You disclosed pre-service marijuana use on your enlistment application.

On 28 October 2003, you commenced a period of unauthorized absence (UA) that terminated on 4 November 2003. On 18 March 2004, you were convicted at a Special Court-Martial (SPCM) of both your 7-day UA, and for the wrongful use of a controlled substance (methamphetamine). You were sentenced to confinement for eighty-six (86) days, and a reduction in rank to Private First Class (E-2).

On 29 October 2004, pursuant to your guilty pleas, you were convicted at a second SPCM of both the wrongful use of methamphetamine, as well as the wrongful use of marijuana. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1) and a Bad Conduct Discharge (BCD) from the naval service. On 28 March 2005, the Convening Authority (CA) approved the SPCM sentence as adjudged.

On 29 July 2005, the U.S. Navy-Marine Corps Court of Criminal Appeals affirmed the SPCM findings and sentence as approved by the CA. Ultimately, upon the completion of SPCM appellate review in your case, on 6 December 2006, you were discharged from the Marine Corps with a BCD and assigned an RE-4B reentry code.

On 27 January 2016, this Board denied your initial petition for a discharge upgrade.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) you feel like the Marine Corps did not afford you the opportunity to seek treatment for your issues as you were going through marital problems, (b) you currently have a PTSD diagnosis after you came back from deployment, (c) you were a good Marine who was meritoriously promoted to Corporal, (d) you made a mistake when you and your wife started having marital problems and you started self-medicating to deal with it, (e) after you got back from your deployment you had PTSD and were diagnosed after you were separated, (f) you were a great Marine while on deployment and received awards even after being told you failed a urinalysis test before the deployment, and (g) you feel like you should be afforded the opportunity to have your records reevaluated since you now suffer from PTSD from your time in service. 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 11 December 2023. The Ph.D. stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. His post-service medical evidence is temporally remote to military service and appears unrelated. Unfortunately, his personal statement is not sufficiently detailed to establish

clinical symptoms in service or provide a nexus with his misconduct, particularly given substance use that preceded deployment and appears to have continued upon return. Additional records (e.g., 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 Ph.D. concluded, "it is my clinical opinion there is insufficient evidence a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD."

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 that there was no convincing evidence of any nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, 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 drug-related 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. 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 also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this was not a case warranting any clemency as you were properly convicted at two separate SPCMs of serious misconduct. The Board determined that characterization with a BCD is appropriate when the basis for discharge is the commission of an act or acts constituting a significant departure from the conduct expected of a Marine. The Board determined that illegal drug use is contrary to Marine Corps core values and policy, renders such service members unfit for duty, and poses an unnecessary risk to the safety of their fellow Marines. The Board noted that marijuana use in any form is still against current Department of Defense regulations and not permitted for recreational use while serving in the military.

As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board 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 and commends you for your post-discharge accomplishments, 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,

3/7/2024

