



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

█
Docket No. 5579-23

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 19 January 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.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You enlisted in the U.S. Marine Corps and began a period of active duty service on 17 December

1998. Your enlistment physical examination, on 11 September 1998, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 5 March 2001, your command issued you a “Page 11” counseling entry (Page 11) informing you that you were eligible, but not recommended, for promotion to Corporal (E-4) due to substandard performance and conduct. On 9 April 2001, your command issued you a Page 11 informing you that you were eligible, but not recommended, for promotion to Corporal (E-4) due to substandard performance, conduct, and initiative. On 9 May 2001, your command issued you a Page 11 informing you that you were eligible, but not recommended, for promotion to Corporal (E-4) due to “DUI/judgment.”

On 18 May 2001, you received non-judicial punishment (NJP) for being incapacitated for the proper performance of your duties due to wrongful previous overindulgence in intoxicating liquor. You did not appeal your NJP. On 4 October 2001, you received NJP for insubordinate conduct and failing to obey a lawful order. You did not appeal your NJP.

On 19 December 2002, pursuant to your guilty pleas, you were convicted at a Special Court-Martial (SPCM) for two separate specifications of the drunken operation of a vehicle. You were sentenced to confinement for 120 days, and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). On 5 June 2003, the Convening Authority approved the SPCM sentence as adjudged. Upon the completion of the lengthy SPCM appellate review in your case, on 18 April 2008, you were discharged from the Marine Corps with a BCD 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 Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) you had untreated and undiagnosed illness while in the Marines, (b) your illness led to an alcohol abuse disorder and exacerbated your existing stress levels, (c) you were never offered mental health treatment, (d) while on appellate leave you suffered a manic episode and diagnosed with bipolar disorder, and (e) in 2003 you realized the characterization of your discharge was BCD and you did not, at the time, have the energy to fight it due to your alcohol use disorder and mental health conditions. For purposes of clemency and equity consideration, the Board considered 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 1 December 2023. The Ph.D. stated in pertinent part:

Petitioner was appropriately referred for psychological evaluation during his enlistment and properly evaluated on multiple occasions, including during an inpatient hospitalization, which began after his appellate leave.

Although Bipolar Disorder was listed as a diagnosis, there is no record of the symptoms associated with this diagnosis, which appears to be largely based on the Petitioner's report. Additionally, it appears that symptoms initially conceptualized as Bipolar Disorder may have been more closely related to Alcohol Use Disorder.

While there is evidence of head injury associated with alcohol use, there is no evidence of ongoing symptoms of traumatic brain injury requiring intervention or treatment.

During his inpatient hospitalization, his providers noted Malingering symptoms based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluations performed by the mental health clinician. He was also evaluated in conjunction with his court martial trial, and it was deemed that any mental health concerns were not a factor in his misconduct, or ability to participate in his defense.

Provided post-service medical records are temporally remote to military service and appear unrelated. 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 in-service evidence of mental health concerns. There is insufficient evidence to attribute his misconduct to a mental health concern, other than an alcohol use disorder."

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 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 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 3.6 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 misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your cumulative misconduct that included your two NJPs and your SPCM.

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 a SPCM of serious misconduct. The Board determined that characterization with a BCD 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. 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, 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,

1/29/2024

