



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. 6025-23
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 limitations 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 4 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 service 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)/mental health condition (MHC) (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 an advisory opinion (AO) from a qualified mental health professional. Although you were provided an opportunity to respond to the AO, you chose not to do so.

You enlisted in the United States Marine Corps and commenced a period of service on 24 August 1994. On your enlistment application, you acknowledged preservice drug use (marijuana). On 12 December 1994, you received non-judicial punishment (NJP) for violation of Uniform Code of Military Justice (UCMJ) Article 128, for two specifications of assault. You did not appeal this NJP. On 20 January 1995, you were formally counseled for leaving your appointed place of duty and put on notice that continued misconduct could result in administrative or judicial processing. You submitted a response to the counseling, explaining that you had a cold and that you went to purchase cold medicine. On 28 September 1995, you were formally counseled for illegal use of a government telephone access code for personal reasons. You did not submit a rebuttal statement.

On 1 April 1996, you were again formally counseled related to a civilian arrest for shoplifting; a charge that was later dismissed. You submitted a statement explaining that the shoplifting was accidental due to your pregnant wife becoming ill while you were in the store and you accidentally left with the item before you had completed a purchase.

In February 1997, you sustained a knee injury while playing basketball. You began medical treatment related to this injury and were placed on two six-month periods of limited duty.

On 10 December 1997, you received your second NJP for violating UCMJ Article 112(a), for wrongful use of a controlled substance (marijuana). You did not appeal this NJP. On 21 January 1998, you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse and pattern of misconduct. After consulting with qualified counsel, you waived your right to present a case at an administrative separation board. On 6 March 1998, you were discharged from the Marine Corps for misconduct with an Other Than Honorable (OTH) characterization of service and assigned an RE- 4 reentry code.

The Board carefully considered all potentially mitigating and/or extenuating 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: (a) your desire to upgrade your characterization of service and rank, (b) your contention that you were suffering from undiagnosed mental health symptoms during your time in service, (c) the impact that your mental health had on your conduct, and (d) your post-service medical treatment associated with your knee injury. For purposes of clemency and equity consideration, the Board noted that you did not provide documentation related to your post-service accomplishments or character letters.

In your request for relief, you contend that you incurred Post Traumatic Stress Disorder (PTSD) and other mental health issues after injuring your knee during service, which caused you to use an illegal substance to cope with the depression, pain, and suicidal ideations. 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 24 January 2024. The Ph.D. noted 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. He has provided no medical evidence in support of his mental health claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service 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) may aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my clinical opinion there is insufficient evidence of a diagnosis of PTSD or another mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD or another mental health condition."

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave

liberal and special consideration to your record of service, and your contentions about undiagnosed mental health issues and the possible adverse impact on your service. Specifically, the Board felt that your misconduct, as evidenced by your NJPs and counseling warnings, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved an assault and a drug offense. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command. The Board determined that illegal substance abuse is contrary to Marine Corps values and policy, renders such Marine unfit for duty, and poses an unnecessary risk to the safety of fellow service members. Additionally, your repeated misconduct placed an undue burden on your chain of command and likely negatively impacted mission accomplishment.

In making this determination, the Board concurred with the advisory opinion that there was insufficient evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or mitigated the misconduct that formed the basis of your discharge. There was nothing in your official service records that indicated you sought mental health treatment, or that you raised such symptoms or concerns during your numerous disciplinary processing events. Further, while you provided evidence of medical treatment related to your physical injury, you did not provide any post-service medical evidence of mental health treatment. Lastly, the Board highlighted that your first NJP and all three counseling warnings occurred before your knee injury. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board determined the record clearly reflected that your active duty 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 otherwise not be held accountable for your actions. The Board concluded that your conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH characterization.

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 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,

3/11/2024

