



**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. 5246-23  
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, initially considered your application on 20 June 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 Office of the Secretary of Defense concerning discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), and the 24 February 2016 guidance from the Principal Deputy Under Secretary of Defense concerning discharge upgrade requests by PTSD or TBI (Carson Memo), (collectively "the Clarifying Guidance"). The Board also considered the 15 May 2024 advisory opinion (AO) and your response to the AO.

A review of your record shows that you enlisted in the Marine Corps and commenced active duty on 26 May 1999. On 25 January 2000, you received nonjudicial punishment for failing to obey an order by drinking in the barracks. On 1 March 2001, you received nonjudicial punishment and a written counseling for disobeying an order from a noncommissioned officer (NCO). On 17 January 2002, you received a written warning for disrespect and disobeying a lawful order. On 24 April 2002, you received a written warning for disrespect and a variety of other deficiencies. On 6 December 2002, you were convicted by a summary court martial for disrespect to an NCO and for disobeying an order of another NCO.

You served in Iraq from February 2003 to May 2003, where you were awarded a Combat Action Ribbon among other campaign medals and awards. On 23 October 2003, you received nonjudicial punishment for two instances of disobeying orders: (1) not to drive a car while under the influence of alcohol, and (2) not to drive a car without a valid license.

On 30 December 2003, you were evaluated for substance abuse, which found that you required intensive outpatient treatment. That report also noted that you should be strictly accountable for your actions. On 28 January 2004, you received nonjudicial punishment for disobeying an order not to drive your car under the influence. You appealed this nonjudicial punishment and this NJP was set aside. On 28 January 2004, you were notified of the initiation of administrative separation processing and requested an administrative discharge board (ADB). On 6 April 2004, the ADB found that you committed misconduct and recommended you be discharged under Other Than Honorable (OTH) conditions. Ultimately, you were so discharged on 27 April 2004.

Available documentation reflects that, post-discharge, you received a bachelor's degree from █ University in computer science and that you worked in that field from 2011-2012 and 2014-2016. On 31 March 2013, you were hospitalized and diagnosed with schizophrenia, paranoid type, after acting irrationally. On 27 June 2015, you were admitted to a hospital for delusions and paranoia.

In the meantime, in 2012, you filed an application with the Navy Discharge Review Board (NDRB) requesting that your discharge characterization be upgraded in order to obtain benefits in light of your bipolar disorder and post-service accomplishments. On 3 June 2013, NDRB denied your application.

In 2017, you filed a petition with this Board in which you sought to have your discharge upgraded to Honorable and be granted a medical retirement. The Board granted your relief in part based on their finding that the Marine Corps failed properly to treat your alcohol abuse before your administrative separation. According to the Board, this was an error that mitigated the characterization of your service. In reaching its decision, the Board expressly found that you were criminally responsible for your misconduct and that you were properly processed and separated in accordance with applicable regulations. Nevertheless, the Board found that sufficient mitigation evidence existed to upgrade your characterization of service to General (Under Honorable Conditions). The Board further reasoned that an Honorable characterization was not appropriate in light of the misconduct that resulted in your administrative separation.

The Board next addressed your request for a disability retirement, and explained that it denied your request because it found there was insufficient evidence to find that you were unfit for continued naval service due to a qualifying disability at the time of your discharge. In reaching this decision, the Board explained:

The Board considered the evidence that Petitioner successfully completed a difficult course of study at █ University after his discharge from the Marine Corps. This was convincing evidence that Petitioner was not suffering from a disability that caused him a substantial occupational impairment at the time of his discharge. The Board lacked evidence that he was unable to perform the duties of

his office, grade, rank or rating because he was able to earn a college degree after he was discharged. Further, the Board concluded that he was ineligible for disability processing at the time of his discharge due to his misconduct that resulted in an Other than Honorable characterization of service. The Board considered the 2016 change in dual processing policy as mitigation evidence for upgrading Petitioner's characterization of service but felt the Marine Corps applied the existing disability policy properly at the time of Petitioner's discharge. Therefore, they concluded no error or injustice exists with Petitioner's discharge for misconduct.

Finally, the Board considered the arguments whether the 2004 misconduct was properly used as a basis for his discharge. The Board concluded the Marine Corps acted properly administratively separating the Petitioner for his pattern of misconduct. The Board noted that Petitioner was involved in a serious driving under the influence incident prior to the 5 March 2004 non-judicial punishment that Petitioner argues was improper. In the Board's opinion, this offense, combined with prior non-judicial punishment and Summary Court-Martial, were sufficient evidence to administratively separate him for pattern of misconduct. However, the Board felt Petitioner was properly punished for his 2004 driving under the influence incident since he violated a direct order that was issued to reinforce the severity of his previous misconduct and need to abstain from alcohol while operating his vehicle. The Board felt this was a proper use of authority by Petitioner's chain of command in light of the second chance they were giving the Petitioner after his first driving under the influence incident. The Board also did not find persuasive Petitioner's argument that he was not guilty of driving under the influence in 2004 since he was eventually acquitted by civilian authorities. The Board noted that Petitioner admitted to his chain of command that he drank alcohol and operated his vehicle prior to being found guilty at his non-judicial punishment hearing. This was sufficient evidence for the Board to find Petitioner was in fact guilty of his misconduct and the Marine Corps properly used this misconduct to separate him from the Marine Corps.

In your current petition, you seek reconsideration of the Board's denial of your request for a medical retirement, or, in the alternative, to be placed in the Legacy Disability Evaluation System. In support of your request, you contend that you were diagnosed with alcohol dependence, yet you were discharged before completing the necessary treatment, which you assert was a clear violation of established protocols. You further assert that this action prevented you from receiving the appropriate medical evaluation and the potential for a medical evaluation board to assess your overall condition. In reviewing your petition, the Board observed that you did not cite the prior petition that you filed with the Board, which included similar relief, nor did you identify, or provide, any new matter to be considered by the Board on reconsideration.

In order to assist it in reviewing your petition, the Board obtained the AO, which was considered unfavorable to your request. According to the AO, your new petition did not include any new clinical evidence. The AO described that medical records relating to your hospitalization relating to psychiatric hospital admissions and diagnoses of Schizophrenia and Alcohol Use

Disorder, among other documents, were available for the prior Board's deliberations. According to the AO:

After review of all available objective clinical and non-clinical evidence, in my medical opinion, at the time of discharge from military service, Petitioner did not suffer from any medical or mental health conditions that prevented him from reasonably performing the duties of his office, grade, rank, MOS, or rating that should have resulted in a referral to a Medical Evaluation Board for evaluation and consideration of referral to the Physical Evaluation Board for concerns about Fitness to continue with military service.

The AO concluded, "in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner's contention that at the time of his discharge he was unfit for continued military service and should have been medically retired."

The Board initially convened to consider your petition on 20 June 2024 and, after reviewing all available documentation, the Board rendered a vote to deny your petition. The Board was informed on 21 June 2024 that you had filed a response to the AO. Each Board member was provided a complete copy of your response to the AO, dated 18 June 2024. In your response to the AO, you argued that that AO improperly highlighted the misconduct that followed the development of your injuries and illnesses, and that the AO was confused as to the order of relevant facts. In support of this assertion, you argued that your commanding officer believed that you were no longer fit for continued service and that it was astonishing that you were not referred for evaluation. In addition, you argued it is clear that you sustained multiple unfitting medical conditions prior to your release from active duty orders, and you were erroneously denied a referral into the medical evaluation board (MEB) process. Despite the AO's explanation that you did not provide any new clinical evidence, the Board observed that your response to the AO did not include any new clinical evidence. In particular, your response did not include any documentation contemporaneous to your service that tended to demonstrate that you had an unfitting condition and should have been referred to a MEB. After the Board members had a chance to carefully review your response, they voted again, and concluded that your response to the AO did not change their decision denying your requested relief.

The Board carefully reviewed your petition and the material that you provided in support of your petition, and disagreed with your rationale for relief. In keeping with the letter and spirit of the Clarifying Guidance, 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 reaching its decision, the Board observed that, in order to qualify for military disability benefits through the Disability Evaluation System with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or the member or to the welfare or safety of other members; the member's disability imposes unreasonable requirements on the military to maintain or protect the member; or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting.

In reviewing your record, the Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the disability evaluation system at the time of your discharge. Despite its application of special and liberal consideration, the Board observed no evidence that you had any unfitting condition while on active duty. As an initial matter, in its application of the Clarifying Guidance, the Board acknowledged that you had a condition or experience that may excuse or mitigate your discharge, which, at least for the sake of argument, occurred, or was worsened, during your naval service. Next, the Board analyzed whether your condition actually excused or mitigated your discharge. On this point, the Board observed, as it had before, that you had at least a condition relating to alcohol abuse. The Board further acknowledged that it had previously found that this condition mitigated your discharge characterization and it had previously recommended that your discharge be upgraded to General (Under Honorable Conditions).

Despite this condition, as it had explained before, the Board did not observe any indication that any provider contemporaneous to your service found that you had any condition that warranted referral to a medical board for a determination of fitness for duty within the disability evaluation system. At the outset, the Board concurred with the findings of the AO, and determined that its conclusion was rational and based on substantial facts in the record. By contrast, the Board observed that your response reiterated contentions found in your petition but did not provide additional clinical evidence. The Board further reasoned a diagnosis of an alcohol use disorder itself does not result in an unfitting condition. Many Marines serve with a variety of conditions, including those who are recovering from alcohol use disorders. In your case, the Board observed that the proximate reason for your discharge was that you had repeatedly engaged in misconduct despite written warnings. Finally, inasmuch as your petition seeks reconsideration of an issue this Board addressed fulsomely in 2018, the Board found that you provided insufficient new matter for the Board to change its decision. Therefore, in its review and liberal consideration of all of the evidence and its careful application of the Clarifying Guidance, the Board did not observe any error or injustice in your naval records. 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,

7/1/2024

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