



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

█
Docket No. 7237-23
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 22 April 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 and your AO rebuttal submission.

You enlisted in the U.S. Marine Corps and began a period of active duty service on 27 November 2001. On 10 July 2001 you signed and acknowledged the "Statement of Understanding – Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment physical examination, on 12 July 2001, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms. You disclosed pre-service marijuana usage as part of your enlistment application which required an enlistment waiver.

In 2004, your command issued you a “Page 11” warning (Page 11) documenting that you were eligible, but not recommended for promotion to Corporal for the “July/3rdQtr” 2004 promotion period because of the misuse and abuse of your Government Travel Charge Card. You did not submit a Page 11 rebuttal statement.

On 4 March 2005, a Navy Drug Screening Laboratory message indicated you tested positive for marijuana at metabolite level of 61 ng/ml, above the Department of Defense testing cutoff of 15 ng/ml. On 3 June 2005, pursuant to your guilty pleas, you were convicted at a Summary Court-Martial (SCM) of: (a) two (2) separate specifications of insubordinate conduct, (b) violating a lawful general order, (c) reckless endangerment, (d) provoking speech, and (e) the wrongful use of a controlled substance (marijuana). You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), and confinement for thirty (30) days. On 16 June 2005, your command issued you two (2) separate Page 11 entries documenting your illegal drug involvement, and informing you that you were not recommended for and not eligible for reenlistment due to your drug use.

Consequently, your command notified you of administrative separation proceedings by reason of misconduct due to drug abuse. You consulted with counsel, and waived your right to present your case to an administrative separation board. In the interim, your Substance Abuse Counseling Center screening, on 21 June 2005, indicated: (a) that no treatment was required at this time, (b) you did not meet the criteria for marijuana abuse or dependency, and (c) you did meet some criteria for alcohol abuse. Ultimately, on 26 August 2005, you were discharged from the Marine Corps for misconduct with an OTH characterization of service and were assigned an RE-4B reentry code.

On 12 May 2011 the Naval Discharge Review Board (NDRB) denied you relief. The NDRB determined your discharge was proper as issued and no relief was warranted. On 6 February 2013 Headquarters, Marine Corps determined that your RE-4B reentry/reenlistment code was correctly assigned. On 28 January 2014 this Board denied your discharge upgrade petition.

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 a change to your narrative reason for separation and paygrade. You contend that: (a) it has been almost twenty (20) years since your discharge, (b) you still feel like with the proper leadership, this occurrence would not have happened had you received the proper remediation of what was happening, and (c) you were diagnosed with bereavement and alcohol abuse in service following the death of your mother. 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 1 March 2024. The Ph.D. stated in pertinent part:

The Petitioner was diagnosed with Bereavement and Alcohol Abuse while in service. A separate provider diagnosed him with PTSD while hospitalized, however

his symptoms appear to be much more consistent with Bereavement and Alcohol Abuse diagnoses. His using alcohol to cope with bereavement and the stressors of returning to theatre shortly after his mother's death would be expected. However, given his waiver for pre-service marijuana use and signing acknowledgement that illegal substances are grounds for separation, his use of THC falls outside the scope of bereavement. Additionally, disrespect, violating general orders and reckless endangerment cannot be said to be caused by bereavement. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is sufficient evidence of diagnoses of bereavement and alcohol abuse that may have been exacerbated by service. There is insufficient evidence that all of his misconduct could be attributed to his mental health condition of bereavement."

Following a review of your AO rebuttal submission, the Ph.D. noted their original typographic error regarding an entry date but did not change or otherwise modify their original AO.

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 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 3.5 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 cumulative misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your serious misconduct and further justified your OTH characterization.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge or reentry code to be automatically upgraded after a specified number of months or years. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. 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 characterization under OTH conditions is generally warranted for misconduct and 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. 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 also 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, reentry code, narrative reason for separation, and terminal rank and concluded that your misconduct and disregard for good order in discipline clearly merited your misconduct discharge and RE-4B reentry code. 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,

4/25/2024

