



**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. 9516-23  
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 Board waived the statute of limitation 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 21 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 the 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 to 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). The Board also considered the advisory opinion (AO) of a qualified mental health provider and the rebuttal evidence you submitted in response to the AO.

You enlisted in the Marine Corps and began a period of active duty on 11 August 2003. You deployed in support of █ from 20 August 2004 through 27 February 2005, for which you were awarded a Combat Action Ribbon in addition to campaign awards. Three days before your return, you were administratively counseled for insubordinate conduct and poor judgment after addressing a noncommissioned officer in a disrespectful manner. You received a psychological evaluation, on 3 May 2005, which formally diagnosed you with post-

traumatic stress disorder (PTSD) due to stressors from your ██████████ deployment. You were prescribed medications to treat your symptoms and also scheduled for group therapy.

Approximately six weeks later, your follow-up appointed noted that you had continued acute, chronic PTSD but determined you were medically fit for full duty. Therefore, you deployed for a second combat tour to ██████████ from 3 September 2005 until 20 March 2006. You received your Good Conduct Medal (GCM) on 10 August 2006; however, you were administratively counseled, on 22 August 2006, for falsifying an official statement regarding your allegations of misappropriation of your vehicle and credit card crime.

You continued serving without further incident until your positive urinalysis on or about 27 December 2006. You maintained that you were innocent of the allegation of wrongful use of cocaine and requested a court-martial. Your Special Court-Martial (SPCM) proceeded on 23 May 2007 for a violation of Article 112a of the Uniform Code of Military Justice and you were found guilty for the offense of wrongful use of cocaine. In addition to reduction to the paygrade of E-1, 60 days of confinement, and 2 months forfeiture of \$867 pay per month, your punishment included a Bad Conduct Discharge (BCD). Upon completion all levels of review, you were so discharged on 8 October 2008.

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 to upgrade your discharge and change your narrative reason for separation to something less derogatory. You contend that you developed PTSD during your first combat tour in Iraq, which was diagnosed following your deployment, to include treatment with medication and therapy in addition to receiving shoulder surgery for an injury prior to deploying for a second combat tour. You believe that your PTSD substantially contributed to the drug abuse misconduct which resulted in your punitive discharge and warrants an upgrade under application of liberal consideration. Your counsel's brief states: (1) your second deployment exacerbated your PTSD, which had already been diagnosed and was still being treated at the time, and should be considered mitigating, your physical injury and shoulder surgery should be considered mitigating, (2) you denied used of illegal drugs and chose to contest the allegation against you, (3) you believe it was possible that your urinalysis was a false positive result due to being comingled with multiple other positive samples during that particular urinalysis, which resulted in several other Marines admitting wrongful use and accepting administrative discharge without contest, (4) your detailed military counsel informed you that your case was her last before getting out of the Marine Corps and would be over quickly, which left you with an impression that she did not put full effort into your defense because you barely heard from her prior to your trial, (5) your detailed counsel provided ineffective assistance by failing to inform you of the full consequences of your potential sentence, to the extent that it might also include confinement, and (6) your counsel argues that your denial of drug use should not be used against you with respect to the mitigating nature of your PTSD in spite of the fact that such denial might impact analysis of a nexus with your misconduct and your mental health concerns.

For purposes of clemency and equity consideration, the Board noted you submitted post-service medical records, a personal statement, a letter of reference from your former officer-in-charge,

and two letters of support attesting to your post-discharge character and accomplishments, which include being licensed in waste management since your discharge and volunteering as a youth hockey coach.

Because you also contend that PTSD or another mental health condition contributed to the circumstances of your punitive discharge, the Board also considered the AO. The AO stated in pertinent part:

There is in-service evidence that he was diagnosed with PTSD. There is post-service evidence from a civilian provider of another mental health condition that may be attributed to military service. Unfortunately, available records do not provide a nexus with his misconduct, as he denies engaging in substance use. It is possible that disrespect may be attributed to irritability associated with PTSD. Falsifying a document is not a typical symptom of a mental health condition. 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 AO concluded, "it is my clinical opinion there is in-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD or another mental health condition."

In response to the AO, you provided a letter of support from your spouse. After reviewing the evidence, the AO remained unchanged.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your SPCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it involved a drug offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. Further, the Board concurred with the AO that there is insufficient evidence to attribute your misconduct to PTSD or another mental health condition. As explained in the AO, you continue to deny that you used illegal drugs so, notwithstanding your arguments to the contrary, the drug abuse misconduct cannot be said to have been attributable to your PTSD.

To the extent that you contend ineffective assistance of counsel during your trial proceedings, the Board first observed that, absent evidence to the contrary, your detailed military counsel was licensed by a state bar, certified to practice as a judge advocate, and, therefore, presumed to be competent. Meanwhile, the only available evidence for the Board's review contradicts your contention, in light of the absence of evidence that your appellate defense counsel sought assignment of error based upon such claim. Likewise, you were tried before members who presumably heard all evidence which might support your contended defense of a false positive, and the members found sufficient evidence beyond a reasonable doubt that you had, in fact, wrongfully used cocaine and that your misconduct warranted a punitive discharge even after considering the mitigating factor of your combat record and PTSD diagnosis. The Board noted

you did not submit trial records which might contradict the propriety of the findings or sentence in that regard. Rather, the findings and sentence of your SPCM were affirmed upon appellate review without assignment of error, to include the assessment of the severity of the punishment even after reviewing all evidence in mitigation and extenuation. Although the Board noted that it is compelling that you had served in combat and incurred PTSD, the Board was not persuaded by your candor, especially given the counseling you received within that same year for making a false official statement for a self-serving purpose. Therefore, the Board determined you were appropriately convicted, sentenced, and discharged based on your drug abuse.

As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant a BCD. While the Board carefully considered the evidence you submitted in mitigation and commends you for your post-discharge rehabilitation, 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 the 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 is attached 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,

7/3/2024

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