



**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. 9863-23  
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, considered your application on 14 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 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 the advisory opinion (AO) furnished by a qualified mental health provider. Although you were provided an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the U.S. Marine Corps and began a period of active duty service on 21 July 1999. On 4 May 2000, you received non-judicial punishment (NJP) for the failure to obey a lawful order. You did not appeal your NJP.

On 21 March 2001, your command issued you a "Page 11" counseling warning (Page 11) documenting your unauthorized absence (UA) from your appointed place of duty. The Page 11

advised you that that any further incidents can result in administrative separation, judicial proceedings, or limitations of further service. You did not elect to submit a Page 11 rebuttal statement.

On 11 April 2001, you were involved in a motor vehicle accident (MVA). You suffered an epidural hematoma and brain injury resulting in a coma that lasted in excess of two (2) weeks.

On 30 October 2001, your command preferred Special Court-Martial charges against you for the wrongful distribution of methamphetamine, the wrongful use of methamphetamine, and the conspiracy to engage in the wrongful distribution of a controlled substance. All of the misconduct, as charged, occurred in February 2001, approximately two (2) months prior to your MVA.

On 19 November 2001, you submitted a voluntary written request for an administrative discharge for the good of the service under Other Than Honorable conditions (OTH) to escape trial by court-martial for your drug-related offenses. As a result of this course of action, you were spared the stigma of a court-martial conviction for your crimes, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge. Prior to submitting this voluntary discharge request, you conferred with a qualified military lawyer, at which time you were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. You noted that your counsel had fully explained the elements of the offenses for which you were charged and that you understood the elements of the offenses. You admitted guilt of the conspiracy-related charge. You further certified a complete understanding of the negative consequences of your actions, and you acknowledged that if your request was approved, your characterization of service will be OTH.

On 6 December 2001, the Separation Authority approved your voluntary discharge request for the good of the service in lieu of trial by court-martial. Ultimately, on 17 May 2002, you were separated from the Marine Corps in lieu of a trial by court-martial with an OTH discharge characterization and were assigned an RE-4 reentry code. On 3 March 2004, the Naval Discharge Review Board (NDRB) denied your initial discharge upgrade application.

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 change to your narrative reason for separation. You contend that: (a) your discharge process did not fully address your traumatic brain injury (TBI), (b) the purpose of your petition is to demonstrate that your rights were prejudiced by the failure of the Marine Corps to ensure your full comprehension of the matters at hand, (c) in addition to the overwhelming medical evidence you have presented, the NDRB noted in their decision that you highlighted the fact that you had cognitive limitations from the time of the auto accident and continuing after your discharge, up to and including when you petitioned NDRB, (d) your petition requests consideration based on outstanding post-service conduct that may provide a basis for a more thorough understanding of the your active duty performance during the period of service that is the subject of the discharge review, (e) your personal record of post-service achievement has been stellar, (f) the structure you learned in the Marine Corps helped you achieve what you have accomplished in the last

twenty (20) years, (g) it was incredible that you could have been expected to be able to cooperate with your counsel or make intelligent decisions considering your documented mental/medical condition, and (h) any discharge-related papers you signed or were expected to understand during such time were highly suspect. 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 11 April 2024. The Ph.D. stated in pertinent part:

Petitioner contended his TBI following the car accident “raises doubts as to whether he was mentally capable in aiding in his own defense.” He provided a May 2023 letter that he is receiving treatment for Post-concussive syndrome. He submitted evidence of character and post-service accomplishment.

Petitioner was diagnosed with TBI during military service and there is evidence that he continues to require treatment. Unfortunately, his misconduct can not be attributed to TBI, as it occurred prior to the accident. There is no evidence of a diagnosis of PTSD. 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 TBI and other mental health concerns that may be attributed to military service. There is insufficient evidence of a diagnosis of PTSD. There is insufficient evidence to attribute his misconduct to PTSD, TBI, or another mental health condition.”

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 TBI, mental health conditions and/or related symptoms and your misconduct and determined that there was insufficient evidence to support the argument that any such TBI and/or mental health conditions mitigated the misconduct forming the basis of your discharge. As a result, the Board concluded that your serious misconduct was not due to TBI and/or other mental health-related conditions or symptoms. The Board determined the record reflected that your misconduct was intentional and willful and demonstrated you were unfit for further service. The Board also concluded 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 determined that your contentions surrounding your capacity to understand and/or appreciate the nature and wrongfulness of your offenses, and ability to meaningfully participate and/or cooperate intelligently in your defense at the time of your voluntary separation request and discharge to be without merit. The Board noted that you consulted with counsel prior to submitting your voluntary discharge request. Under the Rules for Court-Martial, a person is

presumed to have the capacity to stand trial unless the contrary is established. The Board also noted that such presumption continues until an accused establishes, by clear and convincing evidence, that they were not mentally responsible. Available records indicate your counsel fully explained the elements of the offenses you were charged with, and that you understood the elements of the offenses. Additionally, you admitted guilt of some of your charged offenses, and you indicated you had a complete understanding of the negative consequences of your actions. Throughout the entire discharge process, you had the benefit of legal counsel to guide and advise you. Had there been any concerns concerning your physical or mental capacity at such time, it was incumbent upon your counsel to object and raise the issue with the Court-Martial Convening Authority. Absent substantial evidence to the contrary, the Board relied upon the presumption of regularity to determine you possessed the capacity to understand the nature of the proceedings against you and made an informed decision to request a discharge in lieu of trial by court-martial.

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 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.

As a result, the Board determined that there was no impropriety or inequity in your discharge and concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. While the Board carefully considered the evidence you submitted in mitigation and commends you for your post-discharge accomplishments, 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,

6/24/2024

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