



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. 10469-23
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 17 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). The Board also considered the advisory opinion (AO) furnished by a qualified mental health professional, and your response to the AO.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You enlisted in the Marine Corps and commenced active duty on 29 May 1996. Prior to enlisting, you received a waiver for pre-service, one-time, use of marijuana. On 19 April 2000, you were honorably discharged, followed by immediate reenlistment.

On 3 April 2001, you were issued an administrative remarks (Page 11) counseling concerning your use of drugs, as evidenced by a positive urinalysis for THC, documented by naval message on 16 January 2001. On 5 November 2001, your commanding officer (CO) recommended you be separated by reason of drug abuse, with an Other Than Honorable (OTH) characterization of service. On that same date, you were notified of pending administrative separation processing with an OTH discharge by reason of misconduct due to drug abuse. You elected to consult with legal counsel, but waived your right to submit a statement or have your case heard by an administrative discharge board (ADB). Your discharge was suspended until 1 March 2002.

Less than a year after this suspension expired, you had a second positive urinalysis for THC, as evidenced by naval message dated 13 January 2003.

On 11 April 2003, you entered into a pre-trial agreement to plead guilty to drug abuse at Summary Court-Martial (SCM). On 30 April 2003, pursuant to your pre-trial agreement, you were found guilty at SCM of violating Article 112a of the Uniform Code of Military Justice, as evidenced by the positive urinalysis. You were sentenced to reduction to paygrade E1, forfeiture of 2/3 pay per month for one month, and 30 days confinement.

Consequently, you were notified of pending administrative separation processing with OTH discharge by reason of misconduct due to drug abuse. You elected to consult with legal counsel, but again waived your right to have your case heard by an ADB. The Separation Authority directed your discharge with an OTH characterization of service and you were so discharged on 17 June 2003.

Post-discharge, you applied to the Naval Discharge Review Board (NDRB) for a discharge upgrade. On 12 November 2004, the NDRB directed correction of your DD Form 214 to reflect your continuous Honorable active duty from 29 May 1996 until 9 April 2000, but denied your request for an upgrade based on their determination that your discharge was proper as issued.

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 Memo. These included, but were not limited to, your desire to change your discharge characterization of service, and your contentions that, while in service, you were young and immature, in the past 20 years you have matured tremendously, gained knowledge, built courage, and can now make mature decisions, and you were a victim of aggressions taken against you that influenced you to make bad decisions, resulting in your negative discharge. For purposes of clemency and equity consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board's review process, a qualified mental health professional reviewed your contentions and the available records and issued an AO dated 6 May 2024. The AO noted in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for

evaluation. He has provided no medical evidence in support of his claims. Unfortunately, the available records are not sufficiently detailed to provide a nexus with his misconduct, particularly given pre-service substance use behavior that appears to have continued in service. 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 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, another mental health condition, or MST."

In response to the AO, you provided a personal statement that supplied additional clarification of the circumstances of your case. The AO remained unchanged after a review of your rebuttal evidence.

After thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your two positive urinalyses for marijuana and SCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it involved drug offenses. 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. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. The Board also considered the likely negative impact your repeated misconduct had on the good order and discipline of your command. Further, the Board noted that you were given multiple opportunities to address your conduct issues, including a suspension of discharge, but you continued to commit misconduct, which ultimately led to your unfavorable discharge. The Board believed that considerable clemency was extended to you when your discharge was originally suspended.

Additionally, the Board concurred with the AO and determined that there is insufficient evidence of a diagnosis of PTSD or another mental health condition that may be attributed to military service, and there is insufficient evidence to attribute your misconduct to PTSD or another mental health condition. The Board agreed that the available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with your misconduct. Furthermore, the Board 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. Finally, the Board noted that apart from your rebuttal to the AO, you provided no evidence to substantiate your contentions, or evidence to support approving your request as a matter of clemency.

As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Wilkie Memo 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.

In reviewing your record, the Board believes that you may be eligible for veterans' benefits which accrued during your prior period of Honorable service. However, your eligibility is a matter under the cognizance of the Department of Veterans Affairs (VA). In this regard, you should contact the nearest VA office concerning your rights, specifically, whether or not you are eligible for benefits based on your prior period of Honorable service.

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,

6/28/2024

