



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

█
Docket No. 10614-23
Ref: Signature Date

█
█
█
█
█

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.

Because your application was submitted with new evidence not previously considered, the Board found it in the interest of justice to review your application. A three-member panel of the Board, sitting in executive session on 19 July 2024, has carefully examined your current request. 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 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (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 professional and your response to the AO.

You previously requested relief from this Board and were denied on 11 January 2023 and 28 April 2023. The facts of your case remains substantially unchanged.

You have previously sought review by the Naval Discharge Review Board (NDRB). Initially, when the NDRB considered your application on 26 November 1985, you sought a clemency-based review contending your youth at the time, your four years of service and attainment of the

rank of E-4, and the isolated nature of the incident which resulted in your discharge. However, as the NDRB noted at that time, your record of bad conduct and misconduct hardly constituted “one isolated incident” in light of your five NJPs which preceded your SPCM conviction, to include breaking into a military dining facility and attempting to steal hamburgers.

In addition, this Board also previously considered your two previous applications. In your initial application, you again contended that you had served honorably for four years, with the situation which resulted in your SPCM convicting occurring just before your end of obligated service. You argued that you had been driving someone else’s car which had a “small amount” or approximately \$20 worth of marijuana in it. You further claimed that you only initially said it was yours to avoid other people getting into trouble, since it was merely a few days prior to your end of service discharge. You also submitted evidence of post-discharge character for consideration of clemency. However, the Board found the evidence insufficient to outweigh the totality of your misconduct or the seriousness of the drug-related offenses for which you were convicted.

In your subsequent application, you expressed regret with respect to your in-service misconduct and attributed your first three NJPs to being a young Marine with a wife and new infant. You then denied having stolen anything or having had the intent to “steal” hamburgers at the time you broke into the dining facility. You also denied that you had sold marijuana or that you had been charged with doing so, and you disputed the volume. Although, or perhaps because the Board’s previous denial reiterated that “drug offenses are contrary to military core values and policy,” you additionally added to recent marijuana reform and the Presidential Pardon issued with respect to federal convictions for marijuana-related offenses. However, the Board’s subsequent denial clarified that the President’s decision to pardon individuals for simple possession of marijuana does not apply to distribution or attempted distribution in any form. Further, regardless of the impact of this policy on federal civil offenses, illegal drug possession and attempted distribution by a military service member remains contrary to military core values and policy.

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, as well as your augmented contentions of clemency and new contentions that your diagnosis of post-traumatic stress disorder (PTSD) or other mental health conditions warrant liberal consideration with respect to the circumstances of your discharge. Specifically, with respect to your offenses, you continue to contend that the drug offense of your SPCM resulted from driving someone else’s car which, unknown to you, had a small amount of marijuana in it, for which you claim that you took the blame due to only having a few days of service left and did not wanting to get anyone into trouble. You also claim to have lost track of time during one of your UA periods and to have had difficulties managing family responsibilities, to include your new baby. You attribute your extended UA period to caring for your family and deny that you or the other cooks unlawfully entered the dining facility; instead arguing that you were trying to prepare food for the Marines because the MRE rations had not arrived “and everyone was starving.” With respect to the “theft of hamburgers” offense, you claim that you had believed your Gunnery Sergeant cleared up the issue after his returned to the unit, notwithstanding that your record reflects a documented NJP and punishment in the form of two months forfeiture of \$302 pay per month and a suspended reduction to the paygrade of E-3.

You again submitted evidence of post-service behavior and accomplishments for consideration of clemency. However, the Board noted that your clemency documents are the same as those previously considered with the exception of a statement from a former chaplain. The Board further noted that this letter addresses your conduct prior to enlisting in the Marine Corps and your current medical struggles, but fails to address your post-service character or accomplishments in any meaningful way with respect to consideration of new clemency matters. For purposes of clemency and equity consideration, the Board considered the evidence you submitted in support of your application.

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

He submitted May 2023 evidence of a civilian psychologist evaluation “to assist him with coping with his medical circumstances which include ongoing treatment” for cancer. He reported a history of brief medication treatment for anxiety “20 years ago from his primary care physician after his daughter’s death in a motor vehicle accident.” The psychologist concluded that the Petitioner “is experiencing a mixture of anxious and depressed mood...secondary to psychosocial stress of his medical circumstances.” No previous history of mental health counseling or treatment was reported. He was diagnosed with Adjustment Disorder, Mixed Anxiety and Depression.

Petitioner provided November 2023 follow-up records in which his civilian psychologist noted, “[I]n the time that has transpired between today in [sic] our prior appointment [the Petitioner] has researched the diagnosis of Posttraumatic Stress Disorder and has concluded that he has many symptoms consistent with this diagnosis. Indeed, upon review of his significant history of childhood trauma...and ongoing current reexperiencing symptoms...he meets criteria for this diagnosis. Additionally,...[he] reports symptoms consistent with Panic Disorder with Agoraphobia.”

Petitioner submitted a November 2023 evaluation by a civilian mental health provider regarding childhood traumatic precipitants, including being kidnapped by his ex-step-father at age 8 and the death of a close family friend in a fire. He was diagnosed with Generalized Anxiety Disorder, Persistent Depressive Disorder with persistent major depressive episode, and PTSD.

Records indicate the Petitioner was properly evaluated during his enlistment and received no mental health diagnosis. This absence of diagnosis would be based on observed behaviors during his period of service, the information he chose to disclose, and the psychological evaluation performed. He has submitted evidence of a civilian diagnoses of PTSD and other mental health concerns that are temporally remote and attributed to childhood experiences prior to service. Unfortunately, available records are not sufficiently detailed to establish a nexus with his misconduct. The Petitioner denies the majority of his misconduct. Additionally, it is difficult to consider potential interference of mental health symptoms that did not require treatment for an extended period following his military service. In considering the totality of the evidence, more weight has been

given to the Petitioner's report of error and misunderstanding and the absence of mental health services until 2023. Additional records (e.g., postservice 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 post-service evidence from a civilian mental health provider of diagnoses of PTSD and other mental health concerns that may have been present during military service. There is insufficient evidence to attribute his misconduct to PTSD or another mental health condition."

You provided additional arguments in response to the AO. After reviewing your rebuttal 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 NJPs and SPCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included a drug offense. The Board determined that illegal drug possession and attempted distribution 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. In addition, the Board concurred with the AO regarding the lack of nexus between your contended mental health concerns and your misconduct, not only because you deny a large majority of your misconduct or otherwise provide alternative explanations, other than mental health concerns, to justify your misconduct, but also because the misconduct which primarily resulted in your punitive discharge was of such a nature as would not normally be attributable to a mental health condition. Specifically, the Board found that distribution or attempted distribution of illegal drugs is not an offense normally mitigated by either PTSD or another mental health condition, nor is it similar to personal drug abuse for purposes of self-medication of symptoms.

More importantly, however, the Board was not persuaded by your claims regarding your drug-related offenses. The Board observed that you were convicted based on evidence which, upon appellate review, was affirmed to have substantiated the findings of guilt beyond a reasonable doubt. The Board found no evidence that NMCCA addressed an assignment of error with respect to the specified volume of the marijuana and, therefore, concluded that the amount in the automobile was, in fact, 31.8 grams – in excess of 1 ounce, which constitutes a large enough volume that could reasonably have been determined to have been intended for distribution. The Board was not persuaded by your claim to have accepted responsibility, in the form of a permanent criminal record for conviction of drug possession and distribution, simply to help some unidentified individual, who you purport to have actually committed the offense.

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, 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.

In the absence of sufficient new evidence for reconsideration, the decision of the Board is final, and your only recourse would be to seek relief, at no cost to the Board, from a court of appropriate jurisdiction.

Sincerely,

8/7/2024

