



**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. 741-24  
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 your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 13 August 2024. The names and votes of the members of the panel 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 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD)/mental health condition (MHC) (Hagel Memo), the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta 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). In addition, the Board considered the 18 July 2024 advisory opinion (AO) furnished by a Licensed Clinical Psychologist, which was considered favorable toward your case.

The Board carefully considered your request to correct your DD Form 214, Certificate of Release or Discharge from Active Duty by changing your pay grade to E-5 and reentry code to RE-1A. You also request to remove your 26 April 2012 unit punishment book/non-judicial punishment (NJP), compensation for lost income, and repayment of your reenlistment bonus. The Board considered your contention that the command entered into a pretrial agreement that violated your right to due process in order to obtain a guilty plea. You claim that you agreed to plead guilty and waive the administrative separation board (ASB) hearing based on an understanding that you would avoid court-martial and serve the rest of your enlistment with a reduction of rank to E-4. You assert that the incoming commanding officer (CO) materially altered this understanding constituting a failure of mutual assent. You also contend the CO's actions prevented you from filing a timely appeal and the CO erroneously reduced you in rank more than authorized by policies in effect at the time of the punitive action. Assuming, arguendo that the NJP is valid, the CO that processed you for separation

exceeded his authority provided by the Manual of Court Martial (MCM) (2012 ed.) and the Manual of the Judge Advocate General (JAGMAN). You further contend that neither the RE-4B nor RE-4 reentry codes are appropriate considering the previous discharge upgrade by the Naval Discharge Review Board (NDRB). Based on the NDRB decision, your Honorable service demonstrates that RE-4 is in error. You also assert that you should be properly compensated for the rank and pay reduction from the date of your NJP to the date of discharge.

Because you claimed a mental health condition should mitigate your misconduct, the Board considered the AO. The AO stated in pertinent part:

There is evidence that the Petitioner sought Mental Health treatment for personal/family/work issues in 2006 and 2010 and was diagnosed with Adjustment Disorder, Anxiety and Depression. Following his last deployment, a PTSD diagnosis was added to his chart and he was started on antidepressant medication. He was referred for ongoing individual therapy as well as group therapy.

The AO concluded, “it is my considered clinical opinion there is sufficient evidence of a mental health condition (PTSD, Anxiety, Depression) that may be attributed to military service. There is sufficient evidence that his misconduct could be attributed to a mental health condition.”

The Board noted that you tested positive for “THC 46.” On 24 April 2012, you were offered the Fast Track Disposition of Article 112a Allegation (Fast Track) notifying you that the CO was prepared to refer the allegation against you for trial by Special Court-Martial. However, if you pleaded guilty to the allegation and waive your ASB “hearing . . . non-judicial punishment would be appropriate.” The Fast Track Disposition also advised you to consult with defense counsel prior to making a decision. As evidenced by your initials and signature, you chose to be considered for a disposition that would include pleading guilty to the allegation at NJP and to waive your ASB hearing. In keeping with your election, on 26 April 2012, you received NJP for violating Article 112a, Uniform Code of Military Justice (UCMJ) for the wrongful use of marijuana. The Board also noted that you accepted NJP, certified you were given the opportunity to consult with a military lawyer, acknowledged your Article 31, UCMJ Rights, and you acknowledged your right to appeal. The Board noted, too, that you pleaded guilty and elected not to appeal the CO’s finding of guilt.

The Board determined that your NJP is valid. In this regard, your CO conducted your NJP and awarded your punishment, specifically your reduction in grade to E-4 according to the MCM (2012 ed.). The Board also determined that your CO acted within his discretionary authority and relied upon a preponderance of evidence that included a positive urinalysis and your guilty plea when finding you guilty at NJP.

Concerning your contention that the incoming CO violated mutual assent, the Board noted that mutual assent is applicable when there is a contractual agreement between two parties. In your case, the Board found no evidence of a contractual agreement between you and the CO that guaranteed your retention on active duty until the end of your enlistment or the retention of your paygrade. The Board also noted the correspondence provided by your former CO to the NDRB, and determined that despite his intent, the Marine Corps Separation and Retirement Manual (MARCORSEPMAN) requires mandatory administrative separation processing for confirmed illegal drug use. Moreover, once your former CO changed command, he was not positioned to provide a recommendation regarding the disposition of your separation. Even if he was, the Commanding General, Marine Corps Recruit Depot/Western Recruiting Region was the disposition authority and made the final decision. The Board opined that the ASB hearing would have provided you an opportunity to present

matters in support of your retention in the Marine Corps; however, your voluntarily agreement to waive your ASB hearing eliminated that as an option. The Board noted, too, that you were notified of the CO's intent to recommend you be discharged by reason of misconduct due to drug abuse, you acknowledged the CO's recommendation that you receive the least favorable characterization of service of under other than honorable conditions, and you acknowledged your rights as a result of the separation proceedings. The Board determined your reduction in rank at NJP was in accordance with the applicable MCM and proportionate to the UCMJ violation. Further, the Board determined you were afforded the required due process pursuant to applicable regulations and found no evidence of error in the processing of your NJP or administrative separation.

Concerning your administrative reduction to E-3, according to paragraph 8311.8 of the MARCORSEPMAN, "[w]hen a Marine serving in pay grade E-4 or above is administratively separated with an other than honorable characterization of service, the Marine shall be administratively reduced to pay grade E-3 with such reduction to become effective upon separation." Based on the quoted regulation, the Board determined that your reduction to E-3 is valid. Your reduction was based upon your under Other Than Honorable characterization of service due to substantiated misconduct for drug use. Because your reduction in rank was administrative, there was no violation of the MCM or JAGMAN.

The Board noted that the NDRB approved a correction to your record by changing your discharge characterization to Honorable, narrative reason for separation to Secretarial Authority, separation code to JFF1, and reentry code to RE-4. The Board determined that the NDRB correction to your discharge characterization as a matter of equity does not invalidate NJP or any of the properly executed administrative actions. The NDRB did not find impropriety but determined your "discharge was proper but not equitable." The NDRB also determined that premeditated misconduct is not generally excused by mental health conditions, including PTSD and your discharge was proper.

The Board concurred with the AO that your misconduct could be attributed to a mental health condition; however, the Board determined that you already received sufficient clemency for your misconduct. Ultimately, the Board determined that any injustice in your record was adequately addressed by the NDRB action. As a result, the Board concluded that there is no probable material error, substantive inaccuracy, or injustice warranting further corrective action. 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,

9/11/2024

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