



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. 1246-24
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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 6 September 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 your response to the AO.

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

You enlisted in the Marine Corps and began a period of active duty on 20 July 1998. You served for over 2.5 years without incident and had successfully attained the rank of corporal until, on 9 March 2001, you accepted to nonjudicial punishment (NJP) for violations of the Uniform Code of Military Justice to include Article 92, through willfully disobeying a lawful order by failing to sign out properly prior to commencing off-base liberty, and Article 107, for wrongfully altering the liberty logbook with the intent to deceive in regard to your failure to properly sign out. Mere

weeks later, on 26 March 2001, you received a second NJP for violation of Article 92 of the UCMJ due to willfully disobeying a lawful order by consuming alcohol while on restriction and while under the legal drinking age. You were issued administrative counseling advising you that further misconduct could result in administrative discharge and also documenting that you had been found wandering around and crawling instead of conducting your extra duties and that you had been uncooperative with the duty officer. You submitted a rebuttal to this counseling entry stating that you had felt disoriented and, due to being in a daze, had found the commands incomprehensible. You also asserted that you had received a blood test for intoxication which had proved that you were not under the influence at the time. You then received administrative counseling, on 7 April 2001, for an unauthorized absence from a restriction muster.

Although you were found not guilty of one charge and another charge was dismissed, you were tried and convicted by Special Court-Martial, on 22 June 2001, for two specifications of UCMJ offenses charged under Article 92 due to disrespect of a noncommissioned officer (NCO) and willfully disobeying the direct order of an NCO. After this initial cluster of disciplinary issues, you served approximately another six months without incident; however, you were again administratively counseled, on 30 October 2001, regarding the potential for administrative separation due to your pattern of misconduct.

On 16 November 2001, you received a third and final NJP for violation of Article 91 of the UCMJ after being disrespectful toward an E-5 in the execution of his office by yelling at him, raising your voice, and making gestures with your hands in a threatening and disrespectful manner. Following this NJP, you were notified of separation proceedings for the reason of pattern of misconduct. After consulting legal counsel, you elected to waive your right to a hearing before an administrative separation board and did not make a statement. The recommendation for your discharge under Other Than Honorable (OTH) conditions stated that you did not want to learn from your mistakes and had no potential for future service. You received a separation physical examination, on 13 December 2001, during which you reported being in good health and affirmed that you had no mental health concerns. The recommendation for your discharge received proper legal review and, after which it was approved, you were so discharged on 10 January 2002.

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 to remove all derogatory information from your DD Form 214. You contend that you were suffering from post-traumatic stress disorder and mental health issues due to stress during your military service which you believe were compounded by your youth, having enlisted at the age of 17. You also believe that your stand-out performance early in your career, in contrast with the misconduct which occurred prior to your discharge, reflects the impact your in-service stress had on your conduct; in this regard. You assert that you graduated at the top of your military occupational specialty (MOS) school, received three meritorious promotions, graduated from the NCO Academy, and were accepted for an enlisted-to-officer commissioning program in 2000. With respect to your mental health contentions, you state that you were raised primarily by your grandmother, who died while you were stationed in Japan, which you believe contributed to your mental health concerns. You also state that, at around the age of 19 years, you started to experience difficulty focusing, inability to understand commands, and blackouts. For purposes of clemency and equity consideration, you provided documents relating to several in-service

recognitions, a character letter, and post-service certifications as evidence for consideration of a potential grant on the basis of clemency factors.

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

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Following military service, he received education regarding alcohol use behavior and did not meet criteria for a mental health diagnosis. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct. 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 or another mental health condition."

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 found that your conduct showed a complete disregard for military authority and regulations. 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 chose not to submit any record of your post-service counseling or other medical diagnosis related to your mental health contentions. Additionally, although you make numerous claims regarding the quality of your service prior to your misconduct, which did not occur until nearly three years into your enlistment, the Board found no record of your proficiency and conduct marks and insufficient evidence of the numerous accolades and recognitions which you claim to have received; the certificates you submitted reflect that you completed expected courses of education during your enlistment. Furthermore, contrary to your contention regarding receipt of three meritorious promotions, your promotion to lance corporal occurred on the first day of the month, which reflects a regular promotion, whereas a meritorious promotion would have occurred on the second day of the month as directed by Marine Corps regulations. The Board noted that you, as the Petitioner, bear the burden of proof with respect to your contentions, to include your in-service performance to the extent that you claim recognition which is not contained therein. Therefore, the Board determined the presumption of regularity applies in your case.

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 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 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,

9/27/2024

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