



Docket No. 5306-24
Ref: Signature Date

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 12 November 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. Although you were provided an opportunity to respond to the AO, you chose not to do so.

You enlisted in the Marine Corps after receiving a waiver for pre-service marijuana use and commenced active duty on 28 April 1997.

On 16 April 1998, you were issued an administrative remarks (Page 11) counseling concerning deficiencies in your performance and/or conduct, specifically unauthorized absence (UA), underage drinking, and straggling. You were advised that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative discharge.

On 26 December 1982, you received non-judicial punishment (NJP) for wrongful use of a controlled substance after your urinalysis tested positive for tetrahydrocannabinol (THC). Consequently, you were notified of pending administrative separation processing with an Under Other Than Honorable conditions (OTH) discharge by reason of misconduct due to drug abuse. You elected to consult with legal counsel and subsequently waived your rights to submit a statement or have your case heard by an administrative discharge board. On 28 May 1998, you received a substance abuse evaluation and were determined to be a drug user and not dependent. The Separation Authority subsequently directed your discharge with an OTH characterization of service, and you were so discharged on 2 July 1998.

Post-discharge, you applied to the Naval Discharge Review Board (NDRB) for a discharge upgrade. The NDRB denied your request for an upgrade, on 3 October 2003, 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 Memos. These included, but were not limited to, your desire to change your discharge characterization of service to obtain veterans' benefits and your contentions that you suffered PTSD as a result of being hazed, assaulted, and bullied by members of your command and you suffered retaliation after you reported those incidents to your chain of command. For purposes of clemency and equity consideration, the Board noted the advocacy letter and post-service medical records you submitted.

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 24 September 2024. The AO stated in pertinent part:

Petitioner contends he incurred mental health concerns (PTSD) during military service, which might have mitigated his discharge characterization of service.

The Petitioner joined active-duty Marine Corps service in April 1997 with a waiver for preservice marijuana use. He was counseled in April 1998 for underage drinking, "straggling," and unauthorized absence (UA). In May 1998, he received NJP for wrongful use of marijuana. He was provided a substance abuse evaluation by medical staff and deemed not dependent on marijuana based on Petitioner's answers to query. He was separated from service in July 1998 with an Other than Honorable characterization of service due to drug abuse.

The Petitioner submitted post-service psychiatric records noting several inpatient hospitalizations in April 2004 and December 2004/January 2005. The notes from ■■■■■ Medical Center, and ■■■■■ Medical Center are consistent in that they both note psychiatric hospitalizations for psychotic behaviors and substance use. Both facilities diagnosed the Petitioner with Psychosis NOS [Not otherwise specified], Cannabis and PCP use. His discharge summary dated April 9, 2004 noted diagnoses of Psychotic Disorder NOS, and Rule-out Substance-induced

Psychosis.” In addition to inpatient records, the Petitioner submitted a letter from his mother in support of his claim.

There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service, or that he exhibited any symptoms of a mental health condition. The Petitioner admitted to substance use prior to the military and continued to use, as evidenced by his post-service psychiatric records submitted. He admitted in his discharge proceedings that he opted to smoke marijuana while out with a group of friends and did not report any mental health issues at that time. His misconduct is more likely due to substance use, rather than to a mental health condition. Although the Petitioner appeared to experience severe psychotic symptoms post-service (in conjunction with marijuana and PCP use), there is no evidence that the Petitioner was suffering from any psychosis while in service.

The AO concluded, “it is my considered clinical opinion there is sufficient evidence of a post-service mental health condition (Psychosis) that is unrelated to service. There is insufficient evidence that his misconduct could be attributed to a mental health condition.”

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 NJP, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it involved a drug offense. 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 also noted inconsistencies between your NDRB contentions that you had never been around any type of drugs and succumbed to peer pressure while out with friends, with both your waiver for pre-service drug use and your current contention that your positive drug test was a result of PTSD and/or retaliation. Additionally, the Board concurred with the AO and determined that while there is sufficient evidence of a post-service mental health condition, it is unrelated to service and there is insufficient evidence that your misconduct could be attributed to a mental health condition. Therefore, the Board determined 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. Finally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans’ benefits or enhancing educational or employment opportunities.

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 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.

The Board thus determined there was insufficient evidence to conclude you were the victim of reprisal in violation of 10 USC 1034. 10 USC 1034 provides the right to request Secretary of Defense review of cases with substantiated reprisal allegations where the Secretary of the Navy's follow-on corrective or disciplinary actions are at issue. Additionally, in accordance with DoD policy you have the right to request review of the Secretary of the Navy's decision regardless of whether your reprisal allegation was substantiated or non-substantiated. Your written request must show by clear and convincing evidence that the Secretary of the Navy acted arbitrarily, capriciously, or contrary to law. This is not a de novo review and under 10 USC 1034(c) the Secretary of Defense cannot review issues that do not involve reprisal. You must file within 90 days of receipt of this letter to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Office of Legal Policy, 4000 Defense Pentagon, Washington, DC 20301-4000. Your written request must contain your full name, grade/rank, duty status, duty title, organization, duty location, mailing address, and telephone number; a copy of your BCNR application and final decisional documents; and, a statement of the specific reasons why you are not satisfied with this decision and the specific remedy or relief requested. Your request must be based on factual allegations or evidence previously presented to the BCNR, therefore, please also include previously presented documentation that supports your statements.

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,

12/3/2024

