



Docket No. 6611-24
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 16 December 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.

You enlisted in the Marine Corps after disclosing pre-service marijuana use and commenced active duty on 10 November 2003. On 5 July 2004, you commenced a half-day period of unauthorized absence (UA) because you were denied permission to go to [REDACTED] on leave. You were counseled and given extra military instruction (EMI). On 30 July 2004, you were issued an administrative remarks (Page 11) counseling concerning deficiencies in your performance and/or conduct; specifically, a civilian reckless driving charge. You were advised that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative discharge. Your unit deployed to Iraq in August 2004 and your vehicle was struck by an Improvised Explosive Device (IED) on 6 November 2004. There is no evidence in your record that you required any medical care following the incident. In December

2004, you were counseled for disrespect and lying to a non-commissioned officer. You then assaulted another Marine during a Patrol brief, were counseled for disobeying a lawful order and assault, and reassigned to work in the mess hall. Subsequently, you became a suspect and were questioned about a missing ■. You initially denied stealing the pistol and claimed you returned it to its owner after borrowing it, but then showed your platoon sergeant where you had hidden the pistol under a freezer. On 27 December 2004, you requested to see a chaplain or psychologist and were seen by the combat stress team, on 28 December 2004, who diagnosed you with Anti-social Personality Disorder. It was noted that you had a long history of behavior similar to your recent maladaptive behavior with your current command. The Staff Psychologist recommended administrative separation. Your Company Commander noted that deployment operational tempo precluded administrative separation at that time.

Your unit returned from Iraq in March 2005 and commenced post-deployment leave. While returning from leave, you were stopped at the gate for an identification check and found to be in possession of marijuana. On 15 May 2005, you received non-judicial punishment (NJP) for wrongful use of marijuana due to positive urinalysis 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 waived your rights to consult counsel, submit a statement, or have your case heard by an administrative discharge board. On 2 June 2005, you received Page 11 counseling for failure to be at appointed place of duty and sleeping during working hours. On 22 June 2005, you refused substance abuse screening. Ultimately, the separation authority approved your discharge with an OTH characterization of service and you were so discharged on 21 July 2005.

Post-discharge, you applied to the Naval Discharge Review Board (NDRB) for a discharge upgrade. The NDRB denied your request for an upgrade, on 21 May 2015, 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 and your contentions that you were a good Marine prior to the IED attack on 6 November 2004 that caused traumatic brain injury (TBI) and PTSD, you began getting in trouble and used drugs as a result of the TBI and PTSD, you were offered counseling but did not think there was anything wrong because you had been trained to be a fighter and inflict violence, and the TBI and PTSD have ruined your life and eventually led you to prison. For purposes of clemency and equity consideration, the Board considered the Department of Veterans Affairs (VA) decision letter you provided and 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 11 October 2024. The AO stated in pertinent part:

Petitioner contends he incurred Post Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), which may have contributed to the circumstances of his separation from service.

In July 2004, the Petitioner was formally counseled regarding reckless driving. “Roughly a month prior to deploying to Iraq...[his] girlfriend called the...[unit] and reported that he was threatening to go UA [unauthorized absence] and that he was doing drugs among other criminal acts...[He denied] these allegations. He added that she being [sic] vindictive because he was breaking up with her...[T]he next day...[he] went UA for half the day.”

In November 2004, the Petitioner’s “vehicle was struck by an IED [improvised explosive device] in vicinity ■ [Iraq].”

In December 2004, the Petitioner command reported that he began to digress in his decision-making ability and maturity level...After being caught in a lie by an NCO [senior enlisted leader],...[he] was assigned to a working party where he talked to the NCO in a disrespectful manner...A week later, after showing up late to a patrol brief,...[the Petitioner] exchanged words with another Marine,...and struck him in the face [twice and he was]...accused of stealing an ■...[He] had it hidden underneath the freezer...[after he] had lied to two officers and two Staff Noncommissioned Officers [NCO] when they questioned him.

The Petitioner was evaluated by two military psychologists with the unit combat stress team and recommended for administrative separation. He “was diagnosed with Anti-Social Personality Disorder as well as possible homicidal ideation...He meets criteria for Anti-Social Personality Disorder due to his failure to conform to social and military norms and regulations, deceitfulness, impaired impulse control, lack of remorse, difficulty controlling anger and aggressiveness, and disregard for the safety of others.”

Petitioner has been granted service connection for treatment purposes for TBI and PTSD, effective May 2024.

Petitioner was appropriately referred for psychological evaluation and properly evaluated during his enlistment. His personality disorder diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluations performed by the mental health clinicians. Temporally remote to his military service, he has received service connection for TBI and PTSD. Unfortunately, available records are not sufficiently detailed to establish error in his in-service diagnosis, particularly given his pre-deployment history.

The AO concluded, “it is my clinical opinion that there is post-service evidence from the VA of diagnoses of PTSD and TBI that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD, TBI, or another mental health condition, other than personality disorder.”

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

After thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct 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 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. Additionally, the Board concurred with the AO and determined that, while there is post-service evidence from the VA of diagnoses of PTSD and TBI that may be attributed to military service, there is insufficient evidence to attribute your misconduct to PTSD, TBI, or another mental health condition, other than personality disorder. As explained in the AO, your VA diagnoses are too temporally remote to serve as evidence of a nexus to your misconduct. 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. The Board also considered the likely negative impact your repeated misconduct had on the good order and discipline of your command. The Board noted that you were given multiple opportunities to address your conduct issues but you continued to commit misconduct; which led to your discharge for drug abuse.

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.

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,

1/16/2025

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Executive Director

Signed by: ■