



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

██████████
Docket No. 7175-24
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 13 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 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.

You enlisted in the Marine Corps and began a period of active duty on 8 November 1995. On 17 November 1997, a Naval Drug Lab message reported your urinalysis test as positive for methamphetamine use. You negotiated a pre-trial agreement (PTA) in which the government agreed to withdraw certain charges and to suspend any adjudged confinement in excess of 60 days, as reflected by Special Court-Martial (SPCM) Order and Action Number 66-98 in your service records and by the appellate review of your SPCM proceedings. During your SPCM trial, you pleaded guilty to four charges and specifications of violation of Article 112a of the uniform code of military justice for three allegations of wrongful use of methamphetamine and one allegation of wrongful use of marijuana. Your pleas were found to be provident by the military judge, and you were found guilty consistent with your pleas. You were sentenced to 100

days of confinement, reduction to the paygrade of E-1, forfeiture of \$600 pay per month for six months, and a Bad Conduct Discharge (BCD). Of note, the military judge awarded you with 19 days credit for time already served during pre-trial confinement, with an additional 30 days of constructive credit due to a finding of illegal pre-trial punishment. As a result, you were credited with a total of 49 days of confinement toward your sentence. In light of this ruling and the provisions of your PTA, you had 11 days of confinement remaining at the conclusion of your SPCM trial. Of note, the NAVMC 118(13) Record of Conviction by Court-Martial for your SPCM reflects, in block 4A, that you waived representation by counsel at the proceedings. During appellate review of your SPCM, you submitted an assignment of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A 1982), contending that your sentence was inappropriately severe. In affirming the findings and sentence of your SPCM, the appellate court found no materially prejudicial error, stating as follows:

The appellant was found guilty of various offenses involving the use of illegal drugs, methamphetamine and marijuana, over a period of several months. The theory of the defense at trial was that the appellant's supervisors failed to provide him with appropriate leadership and intervention during a period of emotional turmoil ... However, there is no question that the appellant recognized that turning to illicit drugs was criminal, and reflected poor judgment. We are confident that the military judge gave individualized consideration to the nature of the offenses and the character of the offender in reaching a just sentence. The convening authority also provided significant relief, suspending 40 days of confinement pursuant to the terms of a pretrial agreement. To grant additional sentence relief at this point would amount to clemency, which is the sole responsibility of the convening authority. *United States v. Healy*, 26 N.J. 394, 395-96 (C.M.A. 1988). This summary assignment of error is without merit.

Your BCD was ordered executed, and you were punitively discharged on 12 November 1998.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie, Kurta, and Hagel Memos. These included, but were not limited to, your desire to upgrade your discharge, reinstate your rank, reissue forfeitures of pay, and expunge your record of conviction. You contend maltreatment regarding your drug involvement and allegations that your SPCM proceedings and confinement were unjust. You state that you were called out in front of your unit and accused of being a drug dealer by your first sergeant, who ordered the chasers to publicly shackle you and take you to confinement without a proper arrest warrant. You alleged that the first sergeant did it himself when the chasers would not comply with an unlawful order, you were humiliated in front of your platoon, and helpless to defend yourself from being wrongfully arrested. You claim to have been placed into solitary confinement at the brig for either 49 days or 30 days, depending on your various statements, with no sunlight. You further claim to have been taken straight from the brig to your SPCM trial where you assert that you were “not given the opportunity to see justice served” because you acted as your own lawyer. You also allege that you pleaded not guilty to charges that were then withdrawn and dismissed, but that the government continued to add and withdraw various charges until they found charges that would result in a conviction. With respect to the origin of the allegations against you, you assert that you had asked for help in the form of substance abuse counseling, that the knowledge of your drug abuse was based on your own admission, and you attribute your drug use to mental health

concerns related to the trauma of the death of your best friend; who you purport was shot in the head in front of you. In the years since your discharge, you have struggled with addiction issues and have been homeless, which you blame on the Marine Corps for punishing your drug addiction with a conviction, confinement, and punitive discharge; rather than helping you get the treatment you needed. Additionally, you state that your license was recently suspended due to being under the influence and getting into a crash. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

Because you primarily contend that post-traumatic stress disorder (PTSD) or another mental health condition affected the circumstances of the misconduct which resulted in 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. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. Temporally remote to his military service, he has received diagnoses of PTSD and other mental health concerns that are attributed to military experiences. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct.

The AO concluded, “it is my clinical opinion that there is some post-service civilian evidence of PTSD and another mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD or a mental health condition.”

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 SPCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it involved multiple drug offenses. 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. Further, the Board concurred with the clinical conclusion that, although there is some post-service evidence of a diagnosis of PTSD and another mental health condition that may be attributed to military service, there is insufficient evidence to attribute your misconduct to either PTSD or another mental health condition. As explained in the AO, throughout your disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. 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.

Regarding your other contentions of maltreatment and injustice, the Board observed that you were granted a substantial period of constructive confinement credit due to a military judge’s findings of illegal pre-trial punishment; which appears to have been related to the circumstances of your treatment during your arrest and/or pre-trial confinement. However, whereas you claim to have been placed in solitary confinement “without sun” for a period of at least 30 days, but also for 49 days in certain statements submitted with your application, the Board found the evidence of the military judge’s order significantly more reliable regarding the circumstances of

your confinement. Your period of pre-trial confinement was credited as 19 days because you were confined, pending trial, from 15 January 1998 until 2 February 1998, when you were convicted by SPCM. In light of the judge's award of 30 days of confinement credit, in conjunction with the terms of your PTA which limited total confinement time to 60 days, the total number of actual days of both pre-trial confinement and post-trial confinement would not have exceeded 30 days; therefore, the Board found that the evidence of record contradicts your claims with respect to the duration of your pre-trial confinement. Regardless, to the extent that you contend to have been mistreated, the Board concluded that the military judge already granted sufficient relief when you were awarded with 30 days of constructive credit toward your total period of confinement.

With respect to your contention that you were denied the opportunity to see justice served due to not being represented by legal counsel and that the government withdrew and added various charges during your trial proceedings, the Board noted that your records reflect that, during your guilty plea proceedings, you voluntarily elected to waive representation by the detailed military defense counsel who was provided to you at no expense. Additionally, you were afforded the protection of a pre-trial agreement, presumably negotiated between your detailed defense counsel and the government trial counsel prior to being approved by the convening authority. In accepting your pleas of guilty, the military judge would have confirmed, as a matter of course and with or without representation by counsel, that you understood and voluntarily accepted the terms of that agreement. As for the withdraw of certain charges or addition of others, the Board noted that such actions routinely occur as a result of the negotiation of a pre-trial agreement and, ultimately, the military judge possesses the authority and special knowledge to rule on the propriety of the charges before the court. Furthermore, your punitive discharge was subject to automatic review by the Navy-Marine Corps Court of Criminal Appeals (NMCCA), during which you were assigned an appellate defense attorney who submitted and argued a sole assignment of error, with respect to the severity of your sentence, and no assignments of error regarding the form or nature of the charges. In regard to your various contentions regarding the propriety and justice of your SPCM proceedings, the Board found insufficient evidence of an error or injustice and concurred with the final ruling of the NMCCA.

With respect to your desire to have your conviction expunged, the Board notes that it does not have the statutory authority to overturn courts-martial convictions or issue pardons. Additionally, to the extent that your punishment included reduction in paygrade and forfeitures of pay, even if the Board were to find that misconduct was entirely mitigated by a mental health condition or other injustice, the Board does not routinely provide for such extraordinary relief absent clear evidence of a wrongful conviction or convincing evidence that the misconduct did not, in fact, occur. As explained previously, the Board found no error or injustice with your SPCM conviction or punishment.

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 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,

1/12/2025

