



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: 2769-21
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 Board waived the statute of limitations 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 10 December 2021. 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) furnished by a qualified mental health provider (MHP) which was previously provided to you. Although you were afforded an opportunity to submit a rebuttal, you did not do so.

You enlisted in the Marine Corps and began a period of active duty on 25 March 1974. Your enlistment records indicate that you disclosed prior juvenile misconduct, to include court ordered incarceration at the █ a secure juvenile detention facility, based on a judicial finding that you were incorrigible and a repeat runaway. Although your service records do not contain your juvenile court records, your enlistment documents indicate that your recruiters reviewed the court order and spoke with local authorities to confirm the nature of your pre-service history prior to finding you qualified for enlistment.

You received your first nonjudicial punishment (NJP) a mere 3 weeks into recruit training for Article 91, disobeying a lawful order and received forfeitures of pay. You married your spouse on 21 June 1974 after completing boot camp, and she ultimately resided in ██████████ state while you attended your occupational school at ██████████. After discovering that your spouse had been injured in an accident and needed surgery in August of 1974, you commenced a period of unauthorized absence (UA) on 3 September 1974 to return to care for her. On 26 September 1974, you surrendered to military authorities in ██████████ and remained confined until 17 October 1974 when your student command issued orders for your return. Upon return to your unit on 18 October 1974, you received a second NJP for your UA and received forfeitures of pay, restriction, and correctional custody. You filed a dependency application for your spouse on 23 October 1974. While in correctional custody, you caused the destruction of unspecified government property, committed the wrongful appropriation of unspecified property, and broke restriction to include publicly urinating on the floor. You received a third NJP for these offenses and were again awarded forfeitures of pay as punishment.

You commenced a second period of unauthorized absence on 3 December 1974. Although you initially surrendered to military authorities in ██████████, and were directed to return to your military unit, you again travelled to ██████████, reporting to military authorities on 2 January 1975. You returned to your unit on 14 January 1975, again receiving checked pay for the cost of your air fare. In contemplation of court-martial charges, your command requested a psychiatric evaluation which was conducted on 21 January 1975 and made an initial diagnosis of a passive aggressive personality. The psychiatrist noted that you had been the subject of multiple criminal charges as a minor and had a long history of running away; the medical note does not specify the source of this information. A letter from the Division Psychiatrist on 19 February 1975 also recounted your "predisposing maladaptive patterns" in your juvenile history without specifying the source of that information. The psychiatrist diagnosed an anti-social personality disorder and strongly recommended separation for unsuitability on the basis of that condition. However, you commenced a third period of UA from 3-4 March 1975, for which you received a fourth NJP and additional forfeitures of pay on 6 March 1975. For your previous period of UA, your command then convened a Special Court-Martial (SPCM) on 10 March 1975, which found you guilty and sentenced you to 30 days of confinement with hard labor. The record of trial from this SPCM, which includes the testimony of your Sergeant as a character witness on your behalf and which also includes your unsworn testimony in mitigation regarding the situation with your wife's injuries and your financial problems, is part of your official military personnel file (OMPF).

Although your command initially forwarded a recommendation for administrative discharge on the basis of unsuitability due to character and behavior disorder on 28 March 1975, this recommendation was returned by higher headquarters on 22 April 1975 for further review of your misconduct. That same day, your command forwarded a new recommendation for undesirable discharge by reason of unfitness due to frequent discreditable involvement with military authorities. You commenced a fourth period of UA on 8 May 1975; you were apprehended and returned to the Naval Support Activity (NSA) ██████████ brig on 13 May 1975. On 15 June 1975, you escaped confinement and remained in an UA status until apprehended by civilian authorities on 26 July 1975. At that time, the civilian authorities held you for trial, at which you pled guilty and received a civil conviction for taking and driving a vehicle without the permission of the owner. The offense to which you pled guilty equated to an offense of Article 121, wrongful

appropriation of a motor vehicle, which constituted a serious offense under the Uniform Code of Military Justice (UCMJ). On 3 September 1975, an officer, who later served as the government recorder for your administrative board, provided you with a standard notification of administrative discharge and rights advisement for a respondent in the hands of civil authorities. In this advisement, you initially indicated “no” to the question 4.1.; however, you replaced that response with “yes,” indicating that you had the opportunity to clarify questions regarding your election of rights. Although you could not personally attend a hearing due to your incarceration, you had the right to a hearing and to representation by appointed military counsel at no cost to you. However, you elected to waive your right to counsel, to include your right to have such counsel represent you in-absentia before an administrative board. Although you also waived your right to a hearing, an administrative board convened on 13 November 1975 to review the recommendation for your discharge on the sole basis of commission of a serious offense (COSO), evidenced by your civilian conviction. The board’s recommendation for your separation for COSO with an undesirable characterization of service was approved on 16 December 1975 following legal sufficiency review, and you were separated on 31 December 1975.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warranted relief in your case in accordance with the Wilkie Memo. These included, but were not limited to, your desire to upgrade your discharge and your contentions that your discharge resulted from both error and injustice. The Board gave specific attention to the facts surrounding your allegations of defective waiver of rights during your administrative separation proceedings, to your claim that the severity of the discharge was disproportionate in light of mitigating factors which you believe were not considered during your discharge, and especially to your contention that you should have been processed for personality disorder based on unsuitability, a condition which you assert was known at the time of your enlistment but disregarded by recruiters who erroneously enlisted you rather than finding you unqualified for enlistment. In reviewing your contention of suffering PTSD or other mental health (MH) conditions, including your contention of pre-service MH disqualifications, and in the absence of a diagnosis rendered by a licensed psychiatrist or psychologist or any other substantiating documents such as the juvenile court order for your psychiatric treatment, the Board applied liberal consideration to evidence that might support the existence of those conditions occurring in-service, or of disqualifying conditions being known but erroneously disregarded at the time of your enlistment, and also considered the AO in making its determination. As set forth in the AO, the MHP observed that your enlistment physical noted a prior arrest for running away, which resulted in being sent to a boys’ home. The MHP reviewed the clinical records from your in-service psychiatric evaluation and noted that the juvenile record referenced during that exam was not mentioned in your enlistment physical, nor did your service record contain any records to substantiate the source of the claims in that psychiatric exam. The MHP further pointed out that your statement during your SPCM acknowledged that your periods of UA resulted from trying to work through problems with your wife and supporting her as a result of your ongoing pay issues. Although the antisocial personality disorder diagnosed during your period of service may have rendered your character or personality unsuitable for military service, the MHP opined that it did not constitute an unfitting MH condition and that your record contained no indications of a diagnosable unfitting MH condition. More importantly, the MHP reiterated that the nature of your civil conviction (wrongful appropriation of property), which served as the basis for your

separation, is not the type of misconduct which would typically be mitigated by PTSD or MH conditions.

In its deliberations, the Board concurred with the MHP's assessment that your records contained insufficient evidence to establish that you suffered from PTSD or an unfitting MH condition at the time of your military service or that your in-service misconduct could be mitigated by such condition. In accordance with the Kurta memo, the Board also noted that premeditated misconduct, such as wrongful appropriation of property, is not generally excused by MH conditions. With respect to your allegation that you were erroneously enlisted in spite of your recruiter's knowledge of your unsuitable personality disorder, or of any of the unfitting pre-service mental health conditions you contend, and, as a result, should have been processed for separation based on your unsuitable personality disorder or erroneous enlistment, the Board found insufficient evidence to support this contention. At a minimum, the Board would have needed to review the juvenile court order for your psychiatric treatment, other juvenile treatment and rehabilitation records which you made available to your recruiter, or a certified statement from a probation officer or youth counselor whom your recruiter interviewed, which might, if available for consideration, potentially substantiate such an allegation.

Although the Board acknowledged that you were administratively processed for separation on the sole basis of COSO for your civilian conviction, without the additional known bases of your pattern of misconduct, your conviction by SPCM, or the psychiatric recommendation to process you for unsuitability due to personality disorder, the Board noted that this exercise of command discretion did not constitute a material error to your discharge nor did it result in an injustice which would merit relief. To the extent that you contend error because you made statements to your commanding officer or to the psychiatrist which were not included in your record, the Board found no evidence in your record which indicates the omission of any statements to which you were entitled to make but were omitted; rather, the Board notes that your OMPF contains your unsworn statement made during your SPCM, that your OMPF contains both your' and your spouse's letters to your Congressman, and that you specifically waived your right to submit any further statement on your behalf at the time of your administrative discharge advice. The Board likewise found no error in your advisement of rights or election to waive those rights.

Finally, although the Board sympathizes with your contention regarding false information contained in the military health record of your psychiatric evaluation and the Division Psychiatrist's letter in your OMPF, the information in those records is subject to a presumption of regularity. Absent contradictory factual evidence which might be contained in your juvenile court order or juvenile criminal records, the Board concluded that there is no evidence upon which to find error with the statements regarding your juvenile misconduct. Based upon this review, the Board concluded that the potentially mitigating factors and allegations of injustice and error which you contended, even when considered in their totality, were insufficient to warrant relief without the consideration of further evidence in support of those contentions. Specifically, the Board determined that your misconduct, as evidenced by your civilian conviction for a serious offense of a premeditated nature, outweighed the totality of the evidence you presented. Accordingly, even after considering all relevant and available evidence in the light most favorable to your contentions, 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 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,

1/14/2022

[REDACTED]

Executive Director

[REDACTED]