



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: 4459-21
Ref: Signature Date



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 the entire record, the Board for Correction of Naval Records (Board) found the evidence submitted was insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board, sitting in executive session, considered your application on 8 November 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 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). In addition, the Board considered the advisory opinion (AO) furnished by a qualified mental health professional dated 11 August 2021, which was previously provided to you.

You enlisted in the Marine Corps and began a period of active duty on 26 May 1976. On 17 March 1977, you were counseled concerning your driving performance and excessive use of speed. On or about 21 July 1977, you were a victim of a head injury when you struck your head on a diving board while attempting a somersault. Based on your Certificate of Release or Discharge from Active Duty (DD Form 214) you had three periods of unauthorized absence (UA) between the periods from 10 December 1977 to 14 July 1978 totaling 195 days. Additionally, it appears that you submitted a written request for an other than honorable (OTH) discharge in order to avoid trial by court-martial for those three periods of UA. Prior to submitting this request for discharge, it appears you conferred with a qualified military lawyer, were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. Subsequently, your request for discharge was granted and on 19 September 1978,

you received an OTH discharge in lieu of trial by court-martial. As a result of this action, you were spared the stigma of a court-martial conviction and the potential penalties of a punitive discharge and confinement at hard labor. Your original service record was incomplete and did not contain any documentation pertaining to your separation from the Marine Corps. Absent such evidence, the Board relied upon the presumption of regularity and presumed that the officials acted in accordance with governing law/policy and in good faith.

A qualified mental health professional reviewed your request for correction to your record and provided the Board with an AO regarding your assertion that you were suffering from a mental health condition during your service. The AO noted that based on the available evidence, there exists sufficient objective evidence in support your contention of experiencing a Traumatic Brain Injury (TBI) at the time of your military service, and that your in-service misconduct may be mitigated by your experience of TBI.

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 Memo. These included, but were not limited to your assertions that: (a) you had planned on retiring from the Marine Corps, and you were railroaded because of the original incident at █ with a LT who had been in-charge of the motor pool and officer mess hall; (b) during this time, you were, put in the brig for six months without a charge, and were told you would be given a general under honorable conditions discharge, but received an other than honorable discharge; (c) you are 100% service disabled veteran, received a head injury in Okinawa, and the Veteran Administration (VA) informed you that you received an unlawful and illegal discharge, due to the LT that was removed from █ for inability to lead men; (d) the VA is giving you benefits because of an unlawful and illegal discharge; (e) while at █, you had good performance ratings, until reporting to █, and that your VA benefits were denied originally until they found out about what the LT had done to your military career. Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct as evidenced by your three period of UA totaling over six months, the referral of charges to a court-martial, and your request for discharge outweighed these mitigating factors. The Board believed that considerable clemency was extended to you when your request for discharge was approved. Further, the Board fully considered the findings of the AO, but did not find a significant enough nexus between your head injury that occurred in July 1977, and your misconduct resulting in your periods of UA beginning in December 1977. 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,

11/17/2021

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Executive Director

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