

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

> Docket No: 6293-21 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.

Although you did not file your application in a timely manner, the statute of limitations 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 24 January 2022. 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). Additionally, the Board considered a 6 December 2021 advisory opinion (AO) furnished by a qualified mental health provider.

After having served honorably for three years in the U.S. Army, you enlisted in the Marine Corps and began a period a period of active duty on 4 February 1991. According to your naval records, on 19 May 1992, you were convicted by authorities for stealing private property. You were sentenced to a year and a day of forced labor in a sentence was suspended for a period of three years. On 23 May 1992, you submitted a request for discharge in lieu of facing a trial by court-martial based on charges of conspiracy, assault, and making a false statement. Your request was granted, and on 24 July 1992, you were discharged with an other than honorable characterization (OTH) of service. In 2019, you petitioned this Board seeking an upgrade to your discharge characterization. You contended that the charges that led to your discharge were not true. On **Sector**, this Board denied your petition.

The Board carefully considered all potentially mitigating factors in your current petition to determine whether the interests of justice warrant relief in your case including in accordance with the Wilkie Memo. You contend in your petition, as you did in your prior petition, that you were innocent of the charges that led to your discharge. You also contend that you suffered from a mental health condition while on active duty, which serves to mitigate your misconduct.

In connection with your assertion that you suffered from a mental health condition, the Board requested, and reviewed, the AO. The AO reviewed your service record as well as your petition and the matters that you submitted, and determined:

Petitioner's OMPF did not contain evidence of a diagnosis of or reported psychological symptoms/behavioral changes indicative of a mental health condition. Evidence submitted by Petitioner supported a post-discharge diagnosis of PTSD; however, it did not provide sufficient evidence of markers of a mental health condition during his military service. Petitioner does not attribute his misconduct (stealing) to a mental health condition or the circumstances that led to his request for discharge. In fact, the evidence submitted by Petitioner illustrates his trauma was the discharge, as he felt he was falsely accused and innocent, and his symptoms interfered with his ability to function after his discharge.

The AO concluded, "it is my considered clinical opinion the preponderance of available objective evidence failed to establish Petitioner suffered from a mental health condition at the time of his military service or his in-service misconduct could be mitigated by a mental health condition."

The Board reviewed the totality of the circumstances concerning your discharge and characterization of service. Based upon its review, the Board concluded the potentially mitigating factors that you raised were insufficient to warrant relief. With respect to your contention relating to a mental health condition, the Board concurred with the findings of the AO, finding that the objective evidence failed to establish that you suffered from a mental health condition that may mitigate your in-service misconduct. With respect to your contention that your discharge was based on false allegations, the Board noted that there is no evidence in the record to support your contention. In balancing the positive aspects of your service with the misconduct that led to your discharge, which included both a civilian conviction by a foreign government, in addition to your request for discharge in lieu of trial by court-martial, the Board did not find an error or injustice in your discharge or characterization of service. Thus, the Board concluded that your requested relief is not warranted.

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,

