



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: 6641-21

Ref: Signature Date

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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 28 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 also considered the advisory opinion (AO) furnished by a qualified mental health provider which was previously provided to you. You were afforded an opportunity to submit an AO rebuttal and you did not submit a rebuttal statement for consideration.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You originally enlisted in the Marine Corps and entered active duty on 6 February 1990. Your pre-enlistment physical examination on 16 January 1990 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. After initial recruit training, between 20 August 1990 and 27 March 1991 you participated in ██████████ and ██████████

After returning back stateside, on or about 21 April 1991 you were the driver of a car involved in a drive-by shooting in ██████████ that involved the death of one individual. At one point during the incident you also exited the vehicle with a handgun and fired shots at multiple other individuals. You were charged and convicted in ██████████ of one count of voluntary manslaughter and three counts of attempted murder. Following your conviction you were sentenced to twenty-five years and eight months in state prison. You served over thirteen years of confinement before being released on parole in 2004.

On 10 February 1992, your Marine Corps command notified you of administrative separation proceedings by reason of misconduct due to the commission of a serious offense. The basis for the recommendation was your involvement in the drive by shooting on 21 April 1991 in ██████████. You elected to waive your rights to consult with counsel, include rebuttal statements, and to present your case to an administrative separation board. In the interim, on 14 August 1992 the command Staff Judge Advocate determined your separation was legally and factually sufficient. Ultimately, on 3 September 1992 you were discharged from the Marine Corps for misconduct due to the commission of a serious offense with an other than honorable conditions (OTH) characterization of service and assigned an RE-4 reenry code.

As part of the Board review process, the BCNR Physician Advisor, who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 14 December 2021. The Ph.D. initially noted that your in-service records do not contain evidence of a mental health diagnosis or reported psychological or behavioral changes indicating any mental health condition. The Ph.D. also noted that although it is common for persons suffering from PTSD to engage in reckless/self-destructive behaviors in an effort to feel the same type of adrenaline as experienced in combat, it was typically expressed in behaviors other than those applicable in your case. While the Ph.D. considered your described overuse of alcohol, the Ph.D. concluded that there was no indication your symptoms were so severe at the time you were unable to make sound decisions. Therefore, the Ph.D. concluded by opining that there was sufficient evidence you exhibited PTSD behaviors on active duty, but that the preponderance of available objective evidence failed to establish your misconduct could be mitigated by PTSD.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to: (a) your service was honorable for the most part besides the tragic events leading to your OTH which were directly connected to your service-connected PTSD; (b) the Marine Corps did you a grave injustice by giving a combat veteran an OTH and arbitrarily and capriciously denying you of your veteran benefits like the GI

Bill, VA healthcare, compensation benefits, VA Home loan and other state of ██████████ and federal veteran benefits you earned; (c) the conduct leading to your OTH would not have happened had you not self-medicated to deal with your combat trauma; and (d) your OTH fails to reflect the honor and sacrifice of your service, the connection between your PTSD and discharge, and your over twenty years of not being able to access your earned veteran benefits. However, given the totality of the circumstances, the Board determined that your request does not merit relief.

In accordance with the Hagel, Kurta, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced and their possible adverse impact on your service. However, the Board concluded that there was no nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated any of the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to or excused by mental health-related conditions or symptoms. Even if the Board assumed that your egregious misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was intentional, showed a reckless disregard for human life, and demonstrated you were unfit for further service. The Board also determined that the evidence of record did not demonstrate you were not mentally responsible for your conduct or that you should not be held accountable for your actions.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. Additionally, absent a material error or injustice, the Board generally will not summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your depraved-heart misconduct and disregard for good order and discipline clearly merited your receipt of an OTH.

The Board unanimously concluded, despite your contentions, that this is not a case warranting any clemency. Further, the Board did not find any evidence of an error or injustice in this application that warrants upgrading your OTH. The Board carefully considered any matters submitted regarding your post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded your request does not merit relief given the totality of the circumstances.

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,

2/8/2022

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Executive Director

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