



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: 3838-22

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 your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 28 October 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 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, an advisory opinion (AO) provided by Headquarters Marine Corps (Military Awards Branch), and applicable statutes, regulations, and policies, to include Secretary of the Navy Manual 1650., the Uniform Code of Military Justice (UCMJ), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). You were provided an opportunity to submit rebuttal evidence to the AO, which you submitted on 6 September 2022.

You enlisted in the Marine Corps and began a period of active service on 6 August 1964. While assigned to your initial combat unit, you received nonjudicial punishment (NJP) twice. First, in August 1965, for damage to the front sight of your rifle incurred through neglect, for which you received a punishment of a \$20 forfeiture of pay. Subsequently, you received a second NJP, in December 1965 for disobeying a lawful order from military police to either board the liberty truck or relocate to a different bar, which again resulted in a de minimis punishment of a \$10 forfeiture of pay.

You participated in combat operations in Vietnam from 21 May 1966 through 16 June 1967, to

include Operation Prairie III. You were injured, on 9 April 1967, when your foot was caught in a wheel well of a tractor trailer, and you were admitted to the Battalion Aid Station for initial care with medical record note reflecting further admission to the "ward" on 15 April 1967. After completing your combat tour you submitted an application for medals to which you believed you were entitled based on your combat service; your signed request of 21 September 1967 specified the Vietnam Service Medal and the National Defense Service Medal, with no claim for potential entitlement for the award of the Purple Heart Medal (PHM), although that option was included on the form you completed.

On 19 October 1967, you were transferred into a reliability billet aboard the [REDACTED] ([REDACTED]), based out of [REDACTED], [REDACTED]. In December of 1967, you followed established procedures for traveling out of bounds on liberty by submitted a written request for the approval of your commanding officer. However, on 8 December 1967, two African American sailors from the [REDACTED] were arrested by Scottish civil authorities. Although the Navy requested that Scottish authorities return the sailors to U.S. military control and waive jurisdiction over the offenses in accordance with the existing Status of Forces Agreement (SOFA), that request was denied by the foreign sovereign. On 7 February 1968, your outgoing Detachment Commanding Officer (Det CO) submitted your fitness report on the occasions of a change of Reporting Senior due to his departure and relief. Therein, he described your value to the Service as "excellent" with all marks being either above average, outstanding, or even excellent – the highest possible mark. Notwithstanding that you were a newly promoted Sergeant, his comments identified you as an above average non-commissioned officer who already met the requisites for promotion to the next higher grade (E-6) and, recognizing that your contract was nearing completion, whom he would be glad to see stay in the Marine Corps.

Shortly after your new Det CO arrived, on 2 March 1968, you executed liberty travel to [REDACTED], [REDACTED], outside the authorized liberty bounds of 50 miles. Despite your timely return, without unauthorized absence or the occurrence of any adverse liberty incident, you did not request written permission to execute this out of bounds travel. Your Det CO initially held office hours on 8 March 1968 and sought to impose NJP punishment for allegations under Article 92, for violation of a lawful detachment regulation by exceeding the weekend liberty limits without proper authority. Upon review of this action, which included reduction in grade to Corporal/E-4 and an unspecified period of restriction of 14 days or less, the CO, [REDACTED], who was also the Special Courts-Martial Convening Authority (SPCMCA), elected to withhold the Det CO's disposition authority and, instead, dispose of the charges at a higher level. As a result, entry of the Det CO's initial punishment action was stricken from your service record, the initial reduction was not executed nor was your pay affected, and you were released from restriction having served an unspecified period of 5 or fewer days in a restricted status. The CO, [REDACTED], conducted NJP on 12 March 1968, for your violation of Article 92 on 2 March 1968, adjudging a punishment of reduction to E-4 and 15 days of restriction.

Your new Det CO issued a fitness report on occasion of your reduction in rank to Corporal/E-4, on 12 March 1968, in which he noted that you were the subject of disciplinary action by the CO, [REDACTED]. He issued all marks of below average with the exception of personal appearance and described you as an "intolerable liability" who had demonstrated "little or no improvement when, on numerous occasions [you had] been counseled to change" your ways. You submitted a rebuttal to this evaluation, noting the dramatic change between his assessment versus your previous Det, alleging that his assessment of your performance was impacted by

racial prejudice. You also noted that you had initially been reduced in rank by your Det CO until he discovered that he could not reduce you and, thus, reinstated your rank. You also appealed your 12 March 1968 NJP, asserting that the punishment was disproportionate to the offense and explaining that the new Det CO had departed the ship on 1 March 1968 which resulted in the inability to obtain a written approval of an out of bounds pass; thus, you stated that you notified your Det Gunnery Sergeant of your intended liberty destination unless he directed you not to travel. In response to your appeal, your Det CO noted your admission that you did, in fact, knowingly execute out of bounds travel without the approval required by local regulations. An endorsement to your appeal further noted that the junior enlisted Marine who accompanied you out of bounds was also reduced in rank. Your appeal was denied, on 29 March 1968, after finding that you had actual knowledge of the lawful order, deliberately disobeyed it, and were not disproportionately punished. You continued serving after your 27 March 1968 reassignment to a command in the continental U.S. until completion of your obligated active service. You did not promote to Sergeant/E-5 prior to that time and were honorably discharged, on 5 November 1968, into the Marine Reserves in the grade and rank of Corporal/E-4.

While your appeal was routing for final decision, a petty officer from your ship contacted the Mayor of [REDACTED], on your behalf as your elected official. He opined that your punishment had been too severe for the offense, providing his own similar offense for comparison, which he considered more severe yet had not resulted in reduction. He additionally raised the December 1967 incident, asserting that the command had failed to provide adequate assistance to the minority service members in the hands of foreign civil authorities. His letter also alleged that you had received NJP and punishment twice for the same offense. The response to your Mayoral inquiry explained that your appeal had been denied after finding the proceedings correct in law and the punishment not disproportionate. Although the response vaguely explained that the Navy or Marine Corps were “prohibited” from interceding with the members confined by foreign civil authorities, the command’s reply to Headquarters Marine Corps fully outlined the extent to which the circumstances affecting those service members were governed directly by the specific terms of an international agreement between the U.S. and Scotland and, thus, beyond the command’s control.

On 9 November 2016, this Board considered your previous application in which you contended that the incident was based on hearsay, did not warrant the loss of rank, and was racially motivated; you did not address potential entitlement to the PHM at that time. This Board denied your request on 17 June 2016.

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. First, the Board carefully weighed all of the factors you presented in support of your award request, to include your contention that you were injured during combat operations in the Republic of Vietnam when your squad was on convoy operations, something hit you in the chest, you lost your footing, and fell into the wheel well of a flatbed truck, trapping your leg until they were able to use a jack to lift the truck and free your leg. For treatment and recovery, you state that you were remanded to the Battalion aid station for 6 weeks due to cellulitis and joint effusion; as evidence in support of this contention, you cite your separation physical, which notes your scar, and have provided current photographs of your scar along with the declaration of an eye-witness former Navy Hospital Corpsman. The Board also considered the AO, which specified the requirements for PHM eligibility, to include that the injury must meet circumstantial and severity

thresholds by having resulted from enemy action and by necessitating treatment by a medical officer. The AO failed to locate evidence in your available records to indicate that you were injured at the hands of the enemy. The Board concurred with the AO regarding those baseline thresholds and the assessment that your record contains none of the expected indications of having suffered a qualifying injury. To the extent further discussion was not directly outlined in the AO, the Board considered that documentation of a combat injury would normally have been entered directly into your Combat History to reflect that you had been wounded in action. The Board found this absence especially significant in light of the extraordinary level of detail otherwise reflected the numerous entries into your Combat History as well as in the your personal election not to seek entitlement to the award of the PHM at the time you submitted your application for medals, notwithstanding your personal knowledge of your injury.

External to your personnel records, the Board also observed that the two entries proffered from your service medical record are limited to discussion of the initial vehicular source of the injury and treatment, without mention of potential enemy action. Likewise, with the exception of notations by a nurse and corpsman, the Board found no record of treatment by a medical officer. Regardless, without confirmation that your injury was incurred as a result of enemy action, the Board found it unnecessary to determine whether your injury met the severity threshold. Rather, and regardless that the AO did not directly address your witness' attestation, the Board applied supplementary guidance which outlines the requirements for external proof of entitlement via substantiating witness statements when sufficient evidence has not been documented in a member's service record. The Board noted this guidance requires a minimum of two witness statements and directs that these sworn, notarized statements must specify the nature of the injury and how it occurred, to include addressing the extent to which the injury resulted from enemy action. The Board's review of your sole available witness statement identified, at the outset, that it did not meet the minimum requirement regarding statements. Additionally, although this statement contains an attestation, the signature and notary seal are on a separate page from the typed statement and, thus, render it difficult to verify that the statement remained unaltered from that signed by the sole witness. Finally, the Board observed that, although your witness mentions having recommended a PHM for a member injured by a landmine the day prior to your injury, his statement did not identify enemy action as the underlying source or cause of your injury.

Even in the light most favorable to your claim, the Board concluded that you submitted insufficient evidence to substantiate that your injury met the requirement of having been incurred as a result of enemy action. For this reason, the Board determined that there is insufficient evidence of the nature and cause of your injury to establish that you suffered a qualifying injury as defined under all applicable guidance. The Board's analysis and findings are not intended in any way to diminish the value of your service. The Board recognizes your honorable and faithful service in the Marine Corps and sincerely appreciates the sacrifice you made in volunteering for the perilous duties of combat during the Vietnam War.

With respect to your NJP, reduction in rank, and final grade at the time of your discharge from active duty, the Board carefully considered your contentions that your punishment was unduly harsh, that you were subject to prohibited double punishment after your Det CO realized he lacked the authority to reduce you in rank, and that the severity of your punishment was influenced by racial prejudice as evidenced by your performance evaluations by your previous and new Det COs. The Board conceded that, absent an atypical delegation of promotion

authority, your Det CO would not have held the requisite promotion authority to reduce you in rank. With respect to your contentions of the severity of the punishment being tied to racism, the Board found insufficient evidence to support this claim. Foremost, the Board concurred with the original legal review of your NJP appeal, as the evidence of record reflects, that you deliberately chose to travel out of bounds even though you knew the regulations required you to obtain approval.

While the Board recognized that your NJP circumstantially occurred during the height of the Civil Rights Movement, the Board also observed the evidence of significant background events which occurred immediately prior to your offense. To this extent, the Board noted that the CO, [REDACTED], was then the commanding officer and SPCMCA of a submarine tender stationed outside the continental U.S. and requiring the security of a Marine Corps guard detachment subject to a reliability program. Consequently, the detainment of two service members by Scottish authorities alone was a major event. Moreover, despite the Navy's request for the return of its personnel under the terms of the SOFA, the Scottish government declined and instead prosecuted and incarcerated them. The Board assessed that it was significantly aggravating for you to have willfully committed the specific orders violation of a liberty radius offense involving not one, but two, foreign sovereigns, all the while knowing that your Det CO had recently been relieved by a new Marine Corps captain in the wake of a noteworthy incident with international implications.

Given these considerations, the Board found it reasonable that the CO, [REDACTED], elected to withhold disposition authority from his subordinate commanding officer, direct that such action be stricken from the record, and proceed with disposition of the offense at a higher level of authority which would permit a commensurate punishment with your co-accused. Likewise, the Board observed that Article 37 of the Uniform Code of Military Justice permits a superior convening authority or commanding officer to withhold the authority of a subordinate convening authority or officer to dispose of offenses in individuals cases, types of cases, or generally. Having withheld such authority and ensured that the subordinate action had been stricken, the Board found no error or injustice in the reduction in rank awarded by the CO, [REDACTED]. To the extent that your Det CO may have initially attempted to impose reduction or restriction, the Board noted that your record reflects the date of reduction as 12 March 1968, the date that CO, [REDACTED], conducted NJP, indicating that your pay in the grade of Sergeant/E-5 continued until such time as the legal imposition of a reduction.

Finally, to the extent that you present the dramatic change in comments and markings between the fitness reports issued by your two Det COs, on 7 February 1968 and then 12 March 1968, as evidence of racial bias in the course of your NJP and reduction in rank, the Board acknowledged the notable disparity between Reporting Seniors. However, on its face, the adverse report expressed a degree of reproach reasonably expected from a newly reporting commanding officer in response to an intentional and potentially dangerous act of defiance without regard to the concerns prompted by recent events and, worse, involving a junior enlisted Marine in that offense in spite of your expected leadership role as a Sergeant. Recognizing the impact of those valid concerns, the Board found insufficient evidence to substantiate that the actions or opinion of your Det CO resulted from racial bias. As a result, upon consideration of the totality of available evidence, policy, regulation, and law, the Board concluded that your reduction was neither erroneous nor unjust. Even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants granting your

requested relief or granting relief as a matter of clemency or equity. 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,

11/17/2022

