



**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: 5028-22

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 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 16 November 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)/mental health condition (MHC) (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 an advisory opinion (AO) from a qualified mental health professional, dated 29 September 2022. Although you were provided an opportunity to comment on the AO, you chose not to do so.

You entered active duty with the Marine Corps on 13 March 1974. On 3 April 1974, you received non-judicial punishment (NJP) for three hours and 30 minutes of unauthorized absence (UA). On 20 September 1974, civil authorities detained you for assault with intent to commit rape and later convicted you for the offense. Subsequently, you were notified of pending administrative separation action by reason of misconduct due to civil conviction. You elected to consult with legal counsel and subsequently requested an administrative discharge board (ADB). The ADB found that you committed misconduct due to civil conviction and recommended you receive an Other Than Honorable (OTH) characterization of service. The separation authority (SA) concurred with the

ADB and directed an OTH discharge by reason of misconduct. On 23 July 1975, you were discharged.

Post-discharge, you applied to the Naval Discharge Review Board (NDRB) for a discharge upgrade. On 26 April 1976, the NDRB denied your request after determining that your discharge was proper as issued.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to your desire to upgrade your discharge and contention that you incurred Post Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), and other mental health concerns during military service. You also assert that you were suffering from PTSD and TBI from childhood abuse and your pre-service criminal history, including substance use, should have precluded your enlistment. For purposes of clemency and equity consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board's review, a qualified mental health professional reviewed your request and provided the Board with an AO on 29 September 2022. The mental health professional stated in pertinent part:

There is no evidence of an injury sustained during military service that may have resulted in a TBI. During military service, Petitioner was diagnosed with a personality disorder by civilian providers after conviction for civilian charges for misconduct incurred during service. A personality disorder diagnosis is pre-existing to military service by definition, and indicates lifelong characterological traits unsuitable for military service. He has provided no medical evidence of a diagnosis of PTSD or another mental health condition incurred during military service. His in-service misconduct appears to be consistent with his diagnosed personality disorder, rather than evidence of PTSD or another mental health condition. There is no evidence he was unaware of his misconduct or not responsible for his behavior. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The AO concluded, "it is my considered clinical opinion there is insufficient evidence of TBI, a diagnosis of PTSD, or another mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to TBI, PTSD, or another mental health condition other than his diagnosed personality disorder."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined your misconduct, as evidenced by your NJP and civil conviction, outweighed the potential mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the discrediting nature of your civilian conviction. Further, the Board concurred with AO that there is insufficient evidence of a mental health condition that may be attributed to your military service or misconduct. Additionally, the Board noted that there is no evidence in your record, and you submitted none, to support your

contentions. Finally, while the Board considered your diagnosed personality disorder, they concluded it was insufficient to mitigate the seriousness of your misconduct. As a result, the Board concluded your conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH characterization. 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 upgrading your characterization of service or granting an upgraded characterization of service 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,

12/6/2022

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Executive Director  
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