

DEPARTMENT OF THE NAVY

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

> Docket No: 5662-22 Ref: Signature Date



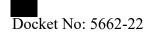
Dear Petitioner:

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 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 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) (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 the advisory opinion (AO) furnished by a qualified mental health professional and your response to the AO.

You enlisted in the United States Navy and began a period of active duty on 25 October 1973. Your record indicates that you served in (a), from April 1974 to September 1974, where after you were transferred to the you were screened for sea service and determined fit for duty. On 18 February 1975, you received non-judicial punishment (NJP) for violating Uniform Code of Military Justice (UCMJ) Article 86, unauthorized absence (UA). On 30 April 1975, you received your second NJP for violation of UCMJ Article 121, for wrongful appropriation of government property and Article 134, for communicating a threat. You did not appeal either NJP.

On 16 May 1975, you began a seven month period of UA and were not recovered until



11 December 1975. You were declared a deserter on 16 June 1975. Upon your return to duty, you were served with Special Court Martial (SPCM) charges for violations of UCMJ Article 86, for four specifications of UA to include the period of desertion, Article 91, for failure to obey a lawful order, Article 121, for wrongful appropriation, and Article 134, communicating a threat. After reviewing the charges, you spoke with a Chaplain about your request for an Undesirable Discharge in lieu of court martial. The Chaplain's letter states, "[h]e admits the Navy gave him just what he wanted and looked out for his best interest but it just wasn't exactly what he was looking for." On 29 January 1976, your request for an Undesirable Discharge in lieu of court martial was accepted by the separation authority and, on 6 February 1976, you were discharged from the naval service with an Other than Honorable (OTH) characterization and RE-4 reenlistment code.

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 character of service and your contention that you experienced a traumatic event while stationed in GTMO, which contributed to your misconduct. For purposes of clemency and equity consideration, the Board noted you provided supporting documentation from your record and a character letter.

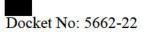
As part of the Board's review process, a qualified mental health professional reviewed your contentions and the available records and issued an AO, which was provided to you on 28 September 2022. The AO noted in pertinent part:

There is no evidence that Petitioner was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Unfortunately his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct, as the nature of some of his misconduct, e.g., stealing and threatening a NCO are not necessarily congruent with his post-service diagnosed depression and/or anxiety. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. Additional records (specifically from his time in would aid in rendering an alternate opinion.

The AO concluded, "it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition."

In response to the AO, you submitted a statement that provided additional information regarding the circumstances of your case.

After thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your repeated misconduct, as evidenced by two NJPs and request to be discharge in lieu of court-martial, outweighed these



mitigating factors. The Board considered the seriousness of your misconduct and the fact it involved desertion from the service. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command. The Board determined that such misconduct is contrary to Navy core values and policy and has a substantial negative impact on the mission readiness of a vessel. In making its determination, the Board concurred with the AO and determined that there is insufficient evidence of a mental health condition that may be attributed to military service, and there is insufficient evidence your misconduct could be attributed to a mental health condition. The Board highlighted that you knowingly requested an Undesirable Discharge in lieu of court martial, thereby avoiding a court martial conviction and punitive discharge. The separation authority granted you elemency by accepting your discharge in instead of holding you accountable at court martial. Further, your discharge request does not mention mental health concerns or the impact of a traumatic or stressful event as the cause of your misconduct. There is nothing in your service records that support your contention that a traumatic event occurred while you were stationed in GTMO, nor did you provide proof of such occurrence, outside of providing a personal statement. On the contrary, the Board determined that the record clearly reflected that your active duty misconduct was intentional and willful and demonstrated you were unfit for further service. The Board also determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should otherwise not be held accountable for your actions. As a result, the Board determined your conduct constituted a significant departure from that expected of a Sailor and continues to warrant an OTH characterization. While the Board commends your post-discharge accomplishments and good character, 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 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.

