

DEPARTMENT OF THE NAVY

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

> Docket No: 6281-22 Ref: Signature Date

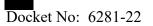


Dear Petitioner:

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 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 Board waived the statute of limitation 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 19 December 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, 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) of a qualified mental health professional which was previously provided to you. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

You enlisted in the U.S. Marine Corps (UCMJ) and began a period of active duty on 4 August 1972. Four month later, you received your first nonjudicial punishment (NJP) for disobedience of a lawful order. On 16 February 1973, you received a second NJP for being incapable of performance of duty due to indulgence of alcoholic beverages. On 20 April 1973, you received a third NJP for three specifications of unauthorized absence (UA). On 22 May 1973, you were found guilty at a summary court-martial (SCM) of two specifications of UA, disrespect, two specifications of disobeying a lawful order, and wrongful possession of marijuana. Subsequently, you were sentenced to confinement at hard labor for 30 days and to forfeit \$200.00 pay per month for one month.



On 13 June 1973, you were notified of your pending administrative separation by reason of misconduct due to unfitness as evidenced by your frequent involvement with military authorities, at which time you waived your right to consult with military counsel and to have your case heard before an administrative discharge board. On 16 July 1973, the Commanding General directed your discharge be remitted for one year. Despite this opportunity to remain in the USMC, on 25 July 1973, you commenced a period of UA which ended in your surrender after 14 days. As a result, on 23 August 1973, a staff judge advocate's review of your case found the proceedings to be sufficient in law and fact and recommended your suspended discharge be executed. On 31 August 1973, the separation authority agreed, vacated your suspended discharge, and directed you be separated with an undesirable (Other Than Honorable (OTH)) characterization of service for unfitness. On 10 September 1973, you were so discharged.

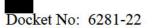
The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire to upgrade your discharge and your contentions that: (1) you incurred mental health concerns during your service as a result of sustained physical and emotional abuse by fellow Marines and those in charge, (2) this was as a result of you being a 5 foot 7 inches tall male from (3) when you sought help you were told to "suck it up" and "get tougher" so you started using marijuana and going AWOL as an escape and means of dealing with your depression, and (4) your desire for Department of Veterans Affairs benefits. For purposes of clemency and equity consideration, the Board noted you provided medical documents, character letters, a personal statement, and evidence of post-discharge accomplishments.

Because you contend that you incurred mental health concerns during military service which might have mitigated your discharge characterization of service, the Board also considered the AO. The AO stated in pertinent part:

The Petitioner contends that he sustained "physical and emotional abuse by fellow Marines and those in charge," while in service which led to mental health issues. He submitted as evidence a letter from his brother (licensed masters in social work), a letter from his wife, and medical records from hospitalized on an inpatient psychiatric basis for 3 days in December 2018 and discharged with a diagnosis of Unspecified Depressive Disorder. He was also prescribed (an anti-depressant medication). Unfortunately, the records submitted are not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited psychological symptoms or behavioral changes indicative of a diagnosable mental health condition.

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."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your three NJPs and SCM, outweighed these mitigating factors. In making this finding, the Board



considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Additionally, the Board considered your misconduct included a drug offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. Further, the Board concurred with the AO regarding the lack of evidence supporting your contended mental health condition. Finally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. 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. While the Board commended 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 that your request does not merit relief.

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 is attached 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.

