



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: 6393-22
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 12 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 this Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, relevant portions of your service 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 and your response to the AO.

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 enlisted in the United States Marine Corps and commenced a period of service on 19 August 1986. On 28 May 1987, you received non-judicial punishment (NJP) for violation of Uniform Code of Military Justice (UCMJ) Article 86, for failure to go to your appointed place of duty, and Article 91, for willfully disobeying an order. On 1 December 1987, you were found guilty at your second NJP for violating UCMJ Article 91, for using disrespectful language. On 14 January 1988, you were found guilty at your third NJP for violating UCMJ Article 86, for a 5 day period of

unauthorized absence (UA). On 4 March 1988, you were found guilty at your fourth NJP for violating UCMJ Article 91, for willfully disobeying an order to clean your weapon prior to turning it in, Article 107, for making a false official statement about cleaning your weapon, and Article 134, for failure to maintain sufficient funds to cover a check presentment. The record shows that from January 1988 through April 1988, you had four multi-day periods totaling 71 days of UA from your command totaling and were declared a deserter on 27 March 1988. On 4 May 1988, you were found guilty at your fifth and final NJP for violating UCMJ for Article 86, for another 2 day period of UA, and Article 91, for disrespectful language. You did not appeal any of the five NJPs.

On 4 May 1988, you were notified that you were being processed for an administrative discharge by reason of misconduct due to pattern of misconduct. You waived your right to consult with qualified counsel and your right to present your case at an administrative separation board. Prior to your administrative separation, you were found guilty at Special Court Martial (SPCM) of violating UCMJ Article 90 (three specifications), for assaulting an officer and disobeying two lawful orders, and Article 134 (two specifications), for breaking restriction. You were sentenced to 100 days confinement, forfeitures of pay, and a Bad Conduct Discharge (BCD). Ultimately, on 9 May 1989, you were discharged from the Marine Corps with a BCD as a result of SPCM and assigned an RE- 4 reentry code.

The Board carefully considered all potentially mitigating and/or extenuating 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: (a) your desire to upgrade your characterization of service, (b) your contention that you suffered an undiagnosed TBI during Infantry Training School and the impact those symptoms had on your conduct, and (c) your contention that you were struggling with various life stressors at the time of the misconduct. In your petition you contended that you incurred “multiple, significant blows to the head while participating in required training activities” during Infantry Training School, which was completed in February 1987. You explain that you were “ordered to participate in an informal, unprotected boxing match...during which... [you] sustained several blows to the head. After the incident... [you] experienced headaches and nausea consistent with concussion and TBI... [which you] did not report... [because you feared that you would be] ostracized as ‘weak’ due to the culture of the Marine Corp at this time.” You claim that the injuries resulted in an undiagnosed Traumatic Brain Injury (TBI), which began to manifest in symptoms of “memory and concentration problems, mood changes, agitation, and combativeness... [in] October of 1987.” You also explain that your altercation with the officer was due to personal, financial stressors “and due to the impacts of the TBI.” For purposes of clemency and equity consideration, the Board noted you did not provide documentation related to your post-service accomplishments or character letters.

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 3 November 2022. The Ph.D. noted in pertinent part:

There is no evidence of a formal mental health diagnosis or treatment for TBI during military service. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. He has provided no medical evidence of in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish a

nexus with his misconduct. It is difficult to attribute financial mismanagement and false official statements to symptoms of TBI. Although the Petitioner has an alternate narrative regarding the court martial charges, it seems reasonable that this was part of a continuing pattern of disobedience demonstrated throughout his service. Additional records (e.g., in-service or post-service medical records describing the Petitioner's diagnosis, symptoms, and their specific link to his performance) may aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is insufficient evidence of TBI that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to TBI."

You provided a response to the AO on 1 December 2022, wherein you submitted numerous arguments, which included but were not limited to: (a) the Kurta memo allows the Board to rely on a Petitioner's statement alone, (b) formal diagnosis of TBI not commonplace at time of your service, (c) that you were discharged from the brig, so your separation physical was not accurate, (d) your pre-service marijuana use should not be considered, and (e) that behavior and TBI symptoms are linked. The Board noted that referenced and cited numerous articles and data related to TBI and the evolution of our understanding of the condition.

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. Specifically, the Board felt that your misconduct, as evidenced by your five NJPs and SPCM, outweighed these mitigating factors. In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about incurring a TBI and the stressful events occurring your life that impacted your service. The Board considered the seriousness of your repeated misconduct and the fact that it involved an assault. 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 your conduct was contrary to Marine Corps values and policy and poses an unnecessary risk to the safety of fellow Marines. In making this determination, the Board concurred with the advisory opinion that there was no convincing evidence that you suffered from a TBI or any type of mental health condition while on active duty, or that any such mental health condition was related to or mitigated the misconduct that formed the basis of your discharge.

As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board noted that your separation physical noted no psychiatric or neurologic conditions or symptoms, and per your own admission, you were "in good health." Even if less was known about TBIs at the time, the Board felt that you would have disclosed at least some symptoms consistent with TBI at the time of your separation if you were suffering from such mental health issues. The Board disagreed that your assessment that your separation physical was inaccurate due to being conducted at the brig, as you were examined by a licensed medical professional. Moreover, the Board observed that you did not submit any clinical documentation or treatment records, either in-service or post-service, to support your claims of TBI and mental health concerns. The Board found 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. Based on these factors,

the Board determined your conduct constituted a significant departure from that expected of a Marine and continues to warrant a BCD, as issued by the court.

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. Therefore, 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,

12/28/2022

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Executive Director

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