



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. 6453-22

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 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 9 January 2023. 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)/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 the advisory opinion (AO) furnished by a qualified mental health professional, dated 26 October 2022, and your response to the AO.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issue(s) 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 Marine Corps and began a period of active duty on 4 April 1972. From 2 October 1972 to 1 November 1972, you were in an unauthorized absence (UA) status totaling 32 days, 20 hours, and 20 minutes. On 13 November 1972, you received nonjudicial punishment

(NJP) for two periods of UA. From 2 February 1973 to 10 April 1973, you were again UA for 67 days. On 12 February 1975, you were apprehended by civil authorities and charged with possession of marijuana and other charges. On 15 April 1975, you began a fifth period of UA which lasted 16 days and resulted in your apprehension by civil authorities. On 30 April 1975, you were placed in confinement. On 13 May 1975, you were charged by the State of █ 16th Judicial Court with attempt to breaking and entering a building, possession of burglary tools, and conspiracy to commit a felony. On 13 August 1975, you were charged by the State of █ 16th Judicial Court with sale of marijuana. On 10 December 1975, you were sentenced to imprisonment for 5 years in a state correctional institution.

As a result, on 5 April 1976, you were notified of the initiation of administrative separation proceedings by reason of misconduct due to conviction by civil authorities. On 15 April 1976, your commanding officer recommended an Other Than Honorable (OTH) discharge characterization of service by reason of misconduct due to conviction by civil authorities. On 4 May 1976, you decided not to appeal your civil court charges. On 29 April 1976, your administrative separation proceedings were determined to be sufficient in law and fact. On the same date, the separation authority approved the recommendation and ordered your discharge. On 12 May 1976, you were discharged with an OTH.

Post-discharge, you applied to the Naval Discharge Review Board (NDRB) for relief. The NDRB denied your request on 29 January 1979 after determining your discharge was proper as issued. On 3 January 2022, this Board denied your request for a discharge characterization upgrade.

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 for a discharge upgrade and contentions that: (a) your command repeatedly neglected to perform their duties by failing to determine why you were UA numerous times; (b) the negligence and even abandonment of a heroin addicted Marine by your command resulted in your arrest and incarceration for breaking and entering a drug store; (c) incarceration was the best thing that happened to you because civilian authorities realized you had a drugs addiction, provided drug rehabilitation treatment, and saved your life. For purposes of clemency and equity consideration, the Board noted you provided supporting documentation describing post-service accomplishments including advocacy letters.

As part of the Board's review, the Board considered the AO. The AO stated in pertinent part:

The Petitioner submitted evidence of two character references and post-service accomplishments. He contends that his Command should have queried his UA status and offered him treatment for substance abuse/mental health conditions. Throughout his disciplinary actions, and administrative processing, there were no concerns noted which would have warranted referral to mental health resources. Furthermore, there is no indication, in his personal statement or in-service records, he availed himself to any of the supportive services within the USMC (i.e., medical/mental health providers, Red Cross, Chaplain, etc.). There is no evidence

that he was diagnosed with a mental health condition or substance abuse/dependency in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He has provided no medical evidence in support of his claims. The nature and severity of his misconduct is inconsistent with a mental health condition and amenability to treatment.

The AO concluded, “it is my clinical opinion that 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 two statements providing additional information regarding the circumstances of your case.

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 NJP and civilian conviction, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that it showed a complete disregard for military authority and regulations. Further, the Board considered the likely discrediting effect your conviction had on the Marine Corps. Additionally, the Board concurred with the AO that there is insufficient evidence that your misconduct could be attributed to a mental health condition. The Board was not persuaded by your attempt to shift responsibility for your criminal behavior to the Marine Corps and determined your misconduct was the result of your intentional actions for which you were mentally responsible. As pointed out in the AO, there was no evidence you attempted to avail yourself to any of the resources available to you while you were on active duty. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member 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 granting you the relief you requested or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. 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 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,

1/25/2023

[REDACTED]

Executive Director

Signed by:

[REDACTED]