



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. 7162-22
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 24 February 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 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 the advisory opinion (AO) from a qualified mental health professional that was issued as part of your petition 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 active duty on 24 August 1973. A Federal Bureau of Investigation background check revealed that you had a substantial amount of pre-service misconduct, to include criminal arrests and periods of confinement. On 17 March 1974, you began a period of unauthorized absence totaling 11 days. During that period of UA, on 17 March 1974, you were arrested by civilian authorities for “auto

larceny” and placed in pre-trial confinement. On 20 May 1974, you were convicted in civilian criminal court on charges of “Temporary Larceny of a Motor Vehicle” and sentenced to a maximum period of confinement of 2 years.

On 22 October 1974, you were notified that you were being recommended for undesirable discharge from the Marine Corps by reason of your conviction by civil authorities. You were advised of and waived your rights to consult with military counsel and to present your case to an administrative discharge board. On 19 November 1974, you were discharged from the service “Under Conditions Other than Honorable” (OTH) by reason of misconduct due to conviction by civil authorities.

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 incurred PTSD as a result of being “blown up in a tank and ... in the hospital after being the only one still alive,” and (c) the impact that your mental health had on your conduct while in service. For purposes of clemency and equity consideration, the Board noted that you did not provide any evidence of post-service accomplishments or character letters.

In your petition, you contend that you incurred PTSD after you were “blown up in a tank and [were] in the hospital after being the only one still alive.” 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 23 November 2022 as part of your initial petition. The Ph.D. noted in pertinent part:

There is no evidence that he 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. He has provided no medical evidence in support of his claims. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms or a nexus with his misconduct, particularly given pre-service behavior that appears to have continued during military service. Additional records (e.g., mental health records describing the Petitioner’s diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, “it is my considered clinical opinion there is insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to symptoms of PTSD.”

In response to the advisory opinion, you provided a civilian psychological evaluation dated January 2023 listing diagnoses of PTSD and Persistent Depressive Disorder. After review of the provided medical document, the AO concluded that diagnoses are temporally remote to your military service, but acknowledged that there is post-service evidence from a civilian clinician of a diagnosis of PTSD that may be attributed in part to military service. However, the AO determined that there is still insufficient evidence of clinical symptoms during military service and insufficient evidence to attribute your misconduct to PTSD, particularly given your pre-service behavior.

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave liberal and special consideration to your record of service and your contentions regarding mental health. Specifically, the Board felt that your misconduct, as evidenced by your period of unauthorized absence and civilian conviction, outweighed these mitigating factors. The Board considered the seriousness of your misconduct, and the fact that it involved the commission of an offense while in a UA status. 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 this type of misconduct is contrary to Marine Corps values and policy, renders such Marine unable to perform their duty, and poses a risk to the civilian community.

In making this determination, the Board concurred with the advisory opinion that there was no convincing evidence that you suffered from 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. While the Board considered your post-service diagnosis, they felt that it was temporally remote to your service. The Board felt that your pre-service behavior continued during military service and that your misconduct was not due to mental health-related symptoms. The Board also did not find any evidence in your record to support your contentions about a tank explosion or subsequent injuries, nor did you raise such issues during your separation process. 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. As a result, the Board determined your conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH characterization.

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 granting you the relief you requested or granting relief 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,

2/27/2023

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Signed by: █