

## DEPARTMENT OF THE NAVY

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

> Docket No. 7585-22 Ref: Signature Date



## Dear Petitioner:

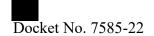
This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found 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 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 27 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.

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 previously petitioned this Board and were denied relief on 24 August 2012.

You enlisted in the United States Marine Corps and commenced a period of active duty on 10 September 1980. On 4 January 1981, you began a period of unauthorized absence totaling 265 days. During that period of UA, on 16 September 1981, you were arrested by civilian



authorities for "larceny in a building." On 28 September 1981 you were convicted on that charge and sentenced to 25 days of confinement.

On 5 November 1981, you were served with a Special Court Martial (SPCM) charge sheet for violation of Uniform Code of Military Justice (UCMJ) Article 86, for your period of UA from 4 January 1981 to 16 September 1981. On 1 December 1981, you requested "Administrative Discharge for the Good of the Service to Avoid Trial by Court Martial." The Commanding General positively endorsed your request and on 28 December 1981, you were discharged from the service "Under Conditions Other than Honorable" (OTH) "to escape trial by court-martial" and assigned a RE-4 reenlistment code.

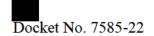
In your petition, you contend that you incurred mental health concerns during military service due to the death of your child, which mitigated the circumstances surrounding your misconduct. As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 3 January 2023 as part of your petition. The Ph.D. noted in pertinent part:

There is no evidence that he was diagnosed with a mental health condition, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition during military service. He has provided no medical evidence in support of his claims. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct, particularly given his statements in service regarding his reason for UA and his civilian conviction while UA. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

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

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 mental health concerns due to the death of your child, and (c) the impact that your mental health had on your conduct while in service. For purposes of clemency consideration, the Board noted that you did not provide any evidence of post-service accomplishments or character letters.

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. 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 significant 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 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. You have not provided any medical evidence in support of your claims. Further, the Board relied heavily on your separation request dated 1 December 1981 in which you state "The Marine Corps and me just don't see eye to eye..." and "My ways of life are a lot different...." The Board felt that you did not accept responsibility for your actions and continue to show a lack of remorse for your misconduct. At no time does your request discuss the death of a child or any mental health symptoms from which you were suffering. The Board concluded 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. The Board felt that you were already granted clemency in the acceptance of your administrative discharge in lieu of trial by court martial. After applying liberal consideration, even in light of the Wilkie Memo, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting clemency in the form of an upgraded characterization.

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.

