



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. 7776-22

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 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 6 March 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 naval 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) (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, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the Navy and commenced a period of service on 21 April 1969. Your enlistment application acknowledged pre-service arrests for burglary, breaking curfew, and trespassing. On 5 July 1969, you began a period of unauthorized absence (UA) and remained absent until 7 August 1969. You immediately went UA again from 9 August 1969 until 31 December 1969 and from 2 January 1970 until 19 March 1970. On 6 April 1970, you were convicted by Special

Court Martial (SPCM) of violating Uniform Code of Military Justice (UCMJ) Article 86, for periods of UA totaling 253 days, and Article 92, for failure to obey a lawful order.

On 9 August 1970, you were once again in a UA status from your unit until 12 November 1973, two periods totaling 1,141 days. On 26 December 1973, you were served with SPCM charges for violating Article 85, for desertion from 9 August 1970 – 3 July 1973 (1,059 days) and Article 86, for going UA from 22 August 1973 to 12 November 1973 (82 days). In response, you made a written request for discharge for the good of the service to avoid trial by court-martial for the foregoing periods of UA. Prior to submitting this request, you conferred with a qualified military lawyer at which time you were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. Your request was granted and you were discharged with an Other Than Honorable (OTH) characterization on 23 January 1974.

You previously submitted a petition to the Naval Discharge Review Board and were denied relief on 5 August 1977 and 2 May 1979. You also previously petitioned this Board for relief and were denied on 6 June 2018.

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 were struggling with undiagnosed mental health issues due to your mother's poor health, (c) the impact of your mental health concerns on your conduct, and (d) the purpose and subsequent availability of regulations such as the Family Medical Leave Act ("FMLA") and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). For purposes of clemency and equity consideration, the Board noted you provided documentation related to your post-service accomplishments and character letters.

In your petition, you contend that you were suffering from undiagnosed mental health concerns due to the stress associated with your mother's failing health, which might have mitigated your discharge character of service. You explain that your mother's adverse health posed a moral dilemma, which drove you to go UA. You further assert that reliance on the 1974 psychiatric analysis by █ alone, fails to consider your mental state at the time the offense was committed. As part of the Board's review process, a qualified mental health professional reviewed your contentions and the available records and issued an AO dated 12 January 2023. The AO noted in pertinent part:

Petitioner was appropriately referred for psychological evaluation during his enlistment and properly evaluated on more than one occasion. The absence of mental health diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluations performed. Unfortunately, he has provided no medical evidence to support his claims, and there is insufficient evidence to establish clinical symptoms in service or a nexus with his misconduct. Although the evidence supports his contention of personal stressors, there is no evidence of symptoms of such severity as to warrant a mental health diagnosis or repeated, extended 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 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 his misconduct could be attributed to a mental health condition."

After thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your SPCM and good of the service discharge request, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your repeated misconduct and its impact on the mission. The Board highlighted that you requested a discharge in lieu of trial, thereby avoiding the stigma of a court-martial conviction and the potential penalties of a punitive discharge and confinement at hard labor. The Board felt that the separation authority already granted you significant clemency by accepting your separation in lieu of trial by court martial.

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. The Board noted that you did not submit any clinical documentation or treatment records to support your mental health claims despite a request from BCNR on 20 October 2022 to specifically provide medical documentation in support of your claims. On 20 August 1973, you received a medical evaluation that revealed no signs of psychosis, neurosis, or dementia. The treating physician diagnosed you with Social Maladjustment, noting you were "preoccupied with family problems. He shows poor judgment and impulsiveness. He has been UA twice for long periods and there is no reason to assume that his judgment or capacity to handle responsibility will in any way improve. Therefore I am compelled to find him unsuitable for further naval service." A second medical evaluation was performed on 7 January 1974, in which the physician found "Patient is currently "neither psychotic nor suffering from between right and wrong or incapable of adhering to the right. Further, I find no evidence at this time to suggest that he has suffered from any such condition in the past." Although you were struggling from a moral dilemma related to your mother's health, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board determined the record clearly reflected that your decision to go UA 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. The Board considered your argument that you would not have received an unfavorable discharge had FMLA and USERRA been available at the time of your service. However, the Board highlighted that at the time of the misconduct, you could have requested a hardship discharge or otherwise resolved the situation through proper military channels, but chose not to do so. As a result, the Board concluded that your conduct constituted a significant departure from that expected of a Sailor and continues to warrant an OTH characterization.

Finally, 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,

3/9/2023

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