



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. 7897-22
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 3 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). Additionally, the Board also considered the advisory opinion (AO) furnished by a qualified mental health provider 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 Marine Corps and entered active duty on 7 August 1969. Your enlistment physical examination, on 24 April 1969, and self-reported medical history both noted no

psychiatric or neurologic conditions or symptoms.

On 19 February 1970, you received non-judicial punishment (NJP) for two separate specifications of failing to obey a lawful order. You did not appeal your NJP. On 6 September 1971, you commenced a period of unauthorized absence (UA) that terminated after sixteen days with your surrender to military authorities on 22 September 1971. On 29 September 1971, you received NJP for your UA. You did not appeal your NJP.

On 6 September 1972, you commenced another period of UA that terminated after 155 days with your surrender to military authorities on 8 February 1973. On 24 February 1973, pursuant to your guilty plea, you were convicted at a Special Court-Martial (SPCM) of your long-term UA. You were sentenced to confinement for three months, forfeitures of pay, and a reduction and rank to the lowest enlisted paygrade (E-1). On 4 May 1973, the Convening Authority approved the SPCM sentence, but suspended all confinement in excess of forty-five days, and all forfeitures in excess of two months.

On 30 July 1973, you received NJP for willful disobedience of a superior commissioned officer, and for insubordinate conduct toward a superior non-commissioned officer. You did not appeal your NJP.

On 31 July 1973, you were notified that you were being processed for an administrative discharge by reason of unsuitability. You elected your right to submit a statement for consideration. In the interim, your separation physical examination, on 28 August 1973, noted no psychiatric or neurologic issues or symptoms. Ultimately, on 5 September 1973, you were discharged from the Marine Corps for unsuitability with a General (Under Honorable Conditions) (GEN) characterization of service and assigned an RE-4 reentry code.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) prior to going into combat your conduct and proficiency marks were high, and when you left █ you began to struggle with what happened there, (b) you were not being treated for PTSD at such time, but you were dealing with the violence that you had witnessed and took part in which lead to you having behavioral issues, (c) the fear and anxiety of walking “point” while on patrol still affects you to this day, (d) you agreed to a GEN under stress so you could get out of solitary confinement, (e) you never personally came to terms with your treatment while in █ or █, (f) racism was institutionalized in the military at the time of your service, (g) you were never charged with a crime or afforded legal counsel, and (h) you deserve back pay and compensation. For purposes of clemency and equity consideration, the Board noted you provided advocacy letters.

On 18 October 2022, the VA granted you a service-connection for PTSD with a 50% rating. 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 9 January 2023. The Ph.D. stated in pertinent part:

There is no evidence 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 in service. Post-service, he has received service connection for PTSD from the VA. Unfortunately, available records are not sufficiently detailed to establish a nexus with all of his misconduct, as his first NJP of disobedience occurred prior to his ██████████ deployment. While it is possible some of his UA could be attributed to avoidance, it is difficult to attribute extended UA to PTSD avoidance symptoms. 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 post-service evidence from the VA of a diagnosis of PTSD. There is insufficient evidence all of his misconduct could be attributed to PTSD."

In response to the AO, you submitted a personal statement providing additional information regarding the circumstances of your case. Following a review of your AO rebuttal, the Ph.D. did not modify their original AO.

After thorough review, the Board concluded these 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 about any traumatic or stressful events you experienced and their possible adverse impact on your service. However, the Board concluded that there was no nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, even under the liberal consideration standard the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your serious misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. The Board also concluded 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.

Additionally, the Board observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average in conduct was 3.73. Marine Corps regulations in place at the time of your discharge recommended a minimum trait average of 4.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your serious misconduct which further justified your GEN characterization of discharge.

The Board also 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 determined that characterization under GEN or under other than honorable conditions (OTH) is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Marine. The simple fact remains is that you left the Marine Corps while you were still contractually obligated to serve and you went into a UA status twice without any legal justification or excuse. Additionally, absent a material error or injustice, the Board generally will not summarily upgrade a discharge solely for the purpose of facilitating veterans benefits, or enhancing educational or employment opportunities. Finally, the Board found no merit in your contentions that your discharge was unjust, or that you were never charged with a crime nor afforded legal counsel. In reviewing your record, the Board found ample reason to support your administrative separation and noted you were charged with multiple crimes under the Uniform Code of Military Justice. The Board also applied the presumption of regularity in finding that you were assigned legal counsel during your SPCM. As a result, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your serious misconduct clearly merited your receipt of a GEN, and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge. Based on this finding, the Board also concluded that any contention you were also entitled to retroactive compensation for lost wages and earning capacity was without merit.

While the Board carefully considered the evidence you submitted in mitigation, 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 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,

3/7/2023

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Executive Director

Signed by: █