



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

[REDACTED]  
Docket No. 7965-22

Ref: Signature Date

[REDACTED]

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 27 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 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, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal you did not do so.

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 on 13 May 1992. Your enlistment physical examination on 19 March 1992 and self-reported medical history both noted no psychiatric or neurologic

conditions or symptoms.

On 30 November 1992 your command issued you a "Page 11" counseling warning (Page 11) for making false statements during an interrogation. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation or limitation on further service. You did not submit a Page 11 rebuttal statement.

On 9 March 1995 you received non-judicial punishment for unauthorized absence (UA). You did not appeal your NJP. On 16 May 1995 your command issued you a Page 11 counseling sheet (Page 11) informing you that although you were eligible, you were not recommended for promotion to Corporal (E-4) for the May 1995 promotion period due to a lack of dependability and integrity. You did not elect to submit a Page 11 rebuttal.

On 18 May 1995 you commenced a period of UA. On 20 June 1995 your command declared you to be a deserter. A memorandum for the record dated 10 July 1995 noted that you were under investigation by Criminal Investigation Department (CID) for possible BAQ fraud amounting to approximately \$13,000 prior to being declared a deserter. Your UA terminated after 377 days with your arrest by civil authorities in [REDACTED] on or about 29 May 1996.

On 19 June 1996 you commenced another UA. Your UA terminated after five days with your surrender to military authorities on 24 June 1996.

On 22 July 1996 you submitted a voluntary written request for an administrative discharge under other than honorable conditions (OTH) in lieu of trial by court-martial for both of your UAs. Prior to submitting this voluntary discharge 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. You indicated you were entirely satisfied with the advice you received from counsel. You expressly admitted that you were guilty of your UAs. You acknowledged if your request was approved, an OTH characterization of service was authorized. As a result of this course of action, you were spared the stigma of a court-martial conviction for your UAs, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge for your long-term UA. Your civilian attorney submitted an endorsement recommending that your request be granted. In his endorsement, your attorney stated, in part:

...He has no legal defense or justification for his unauthorized absence... [REDACTED]  
[REDACTED] absence was the result of his making an attempt to assist his ailing mother, who had no one to turn to. After an extensive effort to seek assistance from the members of his chain of command, his former commander and the chaplain's office and without obtaining the assistance he felt he deserved, he departed his unit... Though he explains that his decision to leave the Marine Corps was made while he was under emotional stress and feeling helpless in trying to assist and take care of his mother, he fully accepts responsibility for his misconduct.

Ultimately, on 5 August 1996 you were separated from the Marine Corps with an OTH discharge characterization and assigned an RE-3C reentry code.

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 14 December 2022. The Ph.D. initially noted that your in-service records did not contain evidence of a mental health diagnosis or psychological or behavioral changes indicating any mental health condition. The Ph.D. observed that you did not provide any medical evidence to support your mental health claims. The Ph.D. determined the available records were not sufficiently detailed to establish clinical symptoms on active duty or a nexus with your misconduct. The Ph.D. concluded by opining that there was insufficient evidence of a service-connected mental health condition, and insufficient evidence your misconduct could be attributed to a mental health condition.

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: (a) you experienced physical and emotional abuse as an “outed” bi-sexual man that was horrific and omnipresent, (b) as a result of such pervasive abuse and harassment suicidal ideation became your mental escape, (c) in lieu of killing yourself you went UA and returned to ██████████, (d) you weren’t just an average Marine, you were an outstanding Marine, and (e) it has been twenty-five years since you were discarded as trash by the country you had sworn to serve, and no words can describe the shame, agony and lost opportunities the define the lived experience of this injustice. However, based upon this review and given the totality of the circumstances, the Board determined that your request does not merit relief.

In accordance with the Hagel, Kurta, 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 convincing evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health conditions or symptoms were related to or mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board determined the record reflected that your 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 not be held accountable for your actions.

The Board was troubled by the glaring inconsistencies with the stated reasons why you went UA in May 1995. Today, you contend that your absence was directly related to harassment you endured once your sexual orientation was discovered by your Marine Corps colleagues. However, at the time of your UA your attorney specifically argued that your UA was solely because you were assisting your ailing mother. The Board noted that neither you nor your attorney made any mention whatsoever about sexual orientation or any resulting harassment at the time of your discharge request when you had every incentive to provide such critical

information on the record to your command. Unfortunately, your morphing contentions adversely impacted the credibility of your petition, especially given that you did not provide convincing evidence to substantiate your harassment claims.

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 OTH conditions 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 without any legal justification or excuse on no less than two separate occasions totaling approximately 382 days. Lastly, absent a material error or injustice, the Board generally will not summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. The Board carefully considered any matters submitted regarding your character, post-service conduct, and personal/professional accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that given the totality of the circumstances your request does not merit relief. Accordingly, 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 an OTH, and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge.

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,

2/2/2023

  
Executive Director

Signed by: 