



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

█  
Docket No. 8794-22  
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 22 May 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 an advisory opinion (AO) furnished by qualified mental health provider. Although you were afforded an opportunity to submit an AO rebuttal for consideration 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 U.S. Marine Corps on 6 January 1998. Your pre-enlistment physical examination on 25 July 1997 and self-reported medical history both noted no psychiatric or neurologic issues or symptoms.

On 13 December 2001, contrary to your pleas, you were convicted at a General Court-Martial (GCM) of: (a) conspiracy to commit assault consummated by a battery, (b) two separate specifications of assault, and (c) disorderly conduct. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), restriction for twenty-three days, and a discharge from the Marine Corps with a bad conduct discharge (BCD).

On 2 January 2002 you signed a Parole, Clemency & Restoration Statement wherein you represented that you did not request to be restored to duty, did not request clemency, and did not request parole. On 16 April 2003 the Convening Authority approved the GCM sentence as adjudged. On 14 May 2003 you were placed on involuntary appellate leave while awaiting your discharge.

On 29 April 2005 the US Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence as approved by the Convening Authority. The NMCCA concluded that the findings and sentence were correct in law and fact and that no error materially prejudicial to your substantial rights was committed. The NMCCA remarked that certain errors during the GCM sentencing phase were plain and obvious, but not materially prejudicial.

However, on 24 July 2006 the U.S. Court of Appeals for the Armed Forces (CAAF) affirmed the NMCCA decision as to findings, but reversed as to the sentence. CAAF set aside the sentence and authorized a rehearing on the GCM sentence.

In lieu of a formal resentencing hearing, on 8 June 2007 the Convening Authority approved a sentence of “no punishment.” On 6 May 2008 the Navy and Marine Corps Appellate Leave Activity (NAMALA) administratively determined that you will be separated with a general (under honorable conditions) (GEN) characterization of service. Upon the completion of appellate review in your GCM case, on 29 May 2008 you were discharged from the Marine Corps with a 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: (a) you were wrongfully court-martialed and separated from the USMC, (b) you had limited involvement with an altercation with fellow Marines, (c) while you admit that some of your actions were wrong because you should have walked away, your actions did not arise to the level of separation, let alone a court martial, (d) CAAF overturned your sentence five years later while you were on voluntary appellate leave, (e) the USMC separated you from the service without giving you proper written notice and a hearing when your case was overturned, (f) the circumstances of your discharge, when considered in

conjunction with the quality of your service and personal character, are plainly inequitable and warrant an upgrade from this Board, (g) your culpability was greatly exaggerated by the GCM charges, (h) exceptional community service and exemplary post-service conduct, and (i) you still suffer from PTSD resulting from the 9/11 terrorist attacks on the Pentagon. The Board noted that for clemency consideration you submitted, *inter alia*, a personal statement, a Ph.D.'s post-service medical opinion, the 2006 CAAF opinion, the 2003 GCMCA order, multiple advocacy letters, and certain photos.

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 15 March 2023. The Ph.D. initially observed that there was no evidence you were diagnosed with a mental health condition in military service, or that you exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. The Ph.D. noted that throughout your disciplinary processing, there were no mental health concerns raised warranting an evaluation referral. The Ph.D. noted a civilian practitioner's post-service PTSD diagnosis was temporally remote from your active duty service, and the Ph.D. determined your available records were not sufficiently detailed to provide any nexus between your misconduct and any purported mental health issues. The Ph.D. concluded by opining that while there was evidence of a PTSD diagnosis that may be service-connected, there was insufficient evidence to attribute your misconduct to PTSD or another mental health condition.

Based upon this review the Board concluded these potentially mitigating factors were insufficient to warrant 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 of any 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, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, 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 misconduct far outweighed any and all mitigation offered by such mental health conditions. 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 determined your due process arguments were fundamentally flawed. After CAAF authorized the sentencing rehearing, the Convening Authority subsequently approved a sentence of no punishment which then warranted certain remedial relief including the restoration of your

rank. Following the promulgation of your no punishment sentence, you were beyond the EAOS of your enlistment contract and no longer obligated to serve on active duty. Accordingly, at such time it was up to NAMALA to determine and assign your discharge characterization based on the overall quality of your service. NAMALA subsequently determined you should be separated with a GEN discharge characterization and not an honorable discharge. Thus, no formal notification and election of rights were necessary because you were not administratively separated given that you were no longer on active duty. The Board also relied on a presumption of regularity to determine that you were properly separated and discharged from the USMC, and you have not provided any credible and convincing evidence to overcome such presumption. The Board concurred with the GEN characterization as your service was marred by a GCM involving very serious misconduct. The Board was not willing to relitigate the well-settled facts of your case and conviction and determined any arguments that attempt to distort the facts on the record and minimize your culpability were not persuasive.

The Board also unequivocally concluded that any suggestion of racial bias in the command's charging decisions was totally baseless. The Board further concluded that any factual sufficiency and sentence disparity contentions, as well as any jury nullification-based arguments proffered by your counsel were entirely without merit.

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 also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge. However, the Board concluded that despite your contentions this was not a case warranting any clemency as you were properly convicted at a GCM of serious misconduct. Moreover, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans benefits, or enhancing educational or employment opportunities. As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your misconduct and disregard for good order and discipline clearly merited your discharge. Even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an error or injustice exists to warrant upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief, and that your discharge characterization 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,

5/26/2023

[REDACTED]

Executive Director

Signed by: [REDACTED]