



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. 188-23
Ref: Signature Date

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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 12 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 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 chose not to do so.

You enlisted in the U.S. Marine Corps and entered active duty on 5 November 1984. Your pre-enlistment physical examination, on 11 July 1984, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On your enlistment application, you disclosed pre-service marijuana use.

On 18 February 1986, you commenced a period of unauthorized absence (UA) that terminated after twenty-eight (28) days, on 18 March 1986, with your surrender to military authorities. On 26 March 1986, you were convicted at a Summary Court-Martial (SCM) of your 28-day UA, as

well as the wrongful use of a controlled substance (marijuana). On 31 March 1986, the Convening Authority approved the SCM sentence but suspended confinement in excess of fifteen days.

On 11 June 1987, you commenced another UA. While in a UA status you were arrested by civilian authorities and placed into their custody. Your UA terminated after twenty-seven (27) days, on 8 July 1987, with your release by civilian authorities and return to military control.

On 2 August 1987, you commenced another UA. While in a UA status you missed movement with your unit for a two-week long exercise. Your UA terminated after nine (9) days on 11 August 1987.

On 26 August 1987, you submitted a voluntary written request for an administrative discharge under Other Than Honorable conditions (OTH) to avoid trial by court-martial for your two UAs, missing movement, simple assault, and assault with intent to do grievous bodily harm. Prior to submitting this voluntary discharge request you conferred with a qualified military lawyer at which time you would have been advised of your rights and warned of the probable adverse consequences of accepting such a discharge. You voluntarily admitted you were guilty of your charged offenses, and you acknowledged if your request was approved your discharge characterization would be OTH. In the interim, your separation physical examination, on 2 October 1987, and self-reported medical history both noted no neurologic or psychiatric conditions or symptoms. Specifically, on your medical history you stated, "I am in good health and am not taking any medication at this time." Ultimately, on 15 October 1987, you were separated from the Marine Corps in lieu of a trial by court-martial with an OTH discharge characterization 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) you suffered a series of five traumatic events that greatly impacted your mental health and ultimately led to your OTH discharge, (b) you believe you had PTSD while on active duty, and (c) in 2022 the VA granted you a service-connection for treatment purposes only for PTSD with delusions to include persistent depressive disorder with panic attacks. For purposes of clemency and equity consideration, the Board considered the evidence you submitted in support of your application.

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 30 March 2023. The Ph.D. stated in pertinent part:

There is no evidence that 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. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. Post-service, the VA has granted service connection for PTSD with other mental health concerns that is temporally remote to his military service. A civilian provider has expressed the

opinion that his misconduct was related to mental health concerns which onset during military service. However, available records indicate the Petitioner may not be a reliable reporter of his remote experience. The civilian provider noted elevated results of a self-report personality inventory indicated a “likely...degree of exaggeration.” Unfortunately, the Petitioner’s current statements are not consistent with the information in his service record. In his service record, he acknowledged pre-service marijuana use, requested separation due to family hardship, and denied mental health concerns on more than one occasion. It seems reasonable that if the Petitioner were experiencing severe turmoil” there would be record of post-service treatment. Additional records (e.g., post-service mental health records describing the Petitioner’s diagnosis, symptoms, and treatment) may aid in rendering an alternate opinion.

The Ph.D. concluded, “it is my clinical opinion there is post-service evidence of a diagnosis of PTSD from the VA that may be attributed to military service. There is post-service evidence from a civilian provider of other mental health concerns that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD or another mental health condition.”

After thorough 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 purported 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 forming the basis of your discharge. As a result, the Board concluded that your serious 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 concluded 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 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 calculated from your available performance evaluations during your enlistment was approximately 3.3 in conduct. 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 cumulative misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your serious misconduct and further justified your OTH characterization.

The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board also determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. The Board determined that characterization under OTH conditions 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 three separate occasions totaling approximately sixty (60) days. Finally, the Board considered that the misconduct that led to your request to be discharged in lieu of trial by court-martial was substantial and, more likely than not, would have resulted in a punitive discharge and extensive punishment at a court-martial. Therefore, the Board determined that you already received a large measure of clemency when the convening authority agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and likely punitive discharge.

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 misconduct and disregard for good order in discipline clearly merited your OTH discharge. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Wilkie Memo and reviewing the record liberally and 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,

5/17/2023

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Deputy Director
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