



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. 1041-23

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 limitations 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 13 October 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 service 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)/mental health condition (MHC) (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 an advisory opinion (AO) from a qualified mental health professional. Although you were offered the opportunity to reply to the AO, you chose not to 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 United States Marine Corps and commenced a period of service on 3 January 2002. On 10 June 2002, you began a period of unauthorized absence (UA) from your unit and remained absent until 18 June 2002. On 21 June 2002, you were awarded non-judicial punishment

(NJP) for violating Uniform Code of Military Justice (UCMJ) Article 86, for the 8-day period of UA.

Almost immediately after your NJP, on 30 June 2002, you began a second period of UA from your unit and remained absent until 19 August 2002. On 26 September 2002, you were found guilty at Special Court Martial (SPCM) of violating UCMJ Article 86, for the 50-day period of UA. You were sentenced to 90-days confinement and a Bad Conduct Discharge (BCD).

On 1 November 2002, you requested placement of voluntary appellate leave pending review of your case and, on 8 November 2004, you were transferred to involuntary appellate leave. On 24 January 2005, appellate review was complete and the sentence was ordered executed. On 14 April 2005, you were separated with a BCD as adjudged at the SPCM and assigned an RE-4 reentry code.

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 assertion that you were struggling with undiagnosed mental health conditions during your service due to life stressors, and (c) the impact that your mental health had on your conduct. For purposes of clemency and equity consideration, the Board noted that you provided documentation related to your post-service accomplishments.

In your request for relief, you contend that you were suffering from undiagnosed mental health issues after discovering that a friend and fellow Marine had passed away. In support of your request, you provided psychological testing dated 21 March 2023. 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 August 2023. The Ph.D. noted in pertinent part:

The Petitioner contends that he discovered a friend with whom he enlisted had died and that he went UA to attend his friend's funeral. He submitted post-service accomplishments and psychological testing which noted no elevations aside from the validity scales which noted that the results "need to be considered in light of cautions noted about the possible impact of under-reporting." In other words, "The test-taker presented himself in a positive light by denying some minor faults and shortcomings that most people acknowledge." The Petitioner's available service record is sparse, however there is no evidence that the Petitioner lost a friend and subsequently went UA, or that he was diagnosed with a mental health condition in military service. There is no evidence that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition, and even if he had gone UA to attend a friend's funeral, seemingly he did not have to go UA twice, or for so long. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., active duty medical records containing

the events described by the Petitioner, post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. 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 that his misconduct could be attributed to a mental health condition."

After thorough review, the Board concluded the 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 undiagnosed mental health issues and the possible adverse impact on your service. Specifically, the Board felt that your misconduct, as evidenced by your NJP and SPCM, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the likely negative impact that your conduct had on the good order and discipline of your command, especially considering the length of your periods of UA. The Board determined that such misconduct is contrary to Marine Corps values and policy and places an undue burden on fellow Marines.

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 report that you were suffering from any mental or physical conditions that would have triggered referral for treatment. It also does not appear that you tried to work with your command to obtain support or an approved period of absence to handle your personal affairs. Further, the Board agreed with the AO that your post-service medical evidence does not contain a diagnosable mental health condition, is temporally remote to your service, fails to draw a sufficient nexus to your underlying misconduct. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board found that your active duty 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 otherwise not be held accountable for your actions. The Board felt that you received advice from qualified counsel throughout your court martial and that you were aware of your rights. The Board concluded that your conduct constituted a significant departure from that expected of a Marine and continues to warrant a BCD, as issued by the court. While the Board commends your post-service accomplishments, the Board did not believe that your in-service record was otherwise so meritorious as to deserve a discharge upgrade.

Therefore, while the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos 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,

10/17/2023

