



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

■
Docket No. 1056-23

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 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 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 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 afforded the opportunity to respond to the AO, you chose not to do so.

You enlisted in the United States Marine Corps and commenced a period of service on 10 June 1981. On your enlistment application, you acknowledged pre-service arrests for robbery and larceny, and noted that the charges were later dismissed.

On 30 June 1982, you were formally counseled for your poor attitude, and counseled again the following day for drug and alcohol abuse. On 1 October 1982, you were found guilty at Summary Court Martial (SCM) for violation of Uniform Code of Military Justice (UCMJ) Article 86, for five days of unauthorized absence (UA), Article 112(a), for possession of marijuana, Article 107, for signing a false identification card with the intent to deceive, and Article 121, for wrongfully stealing one pack of cigarettes. You were awarded 30 days confinement, forfeitures of pay, and reduction in rank.

On 30 November 1982, you received non-judicial punishment (NJP) for violating UCMJ Article 89, for disrespect. You were formally counseled due to your misconduct and provided notice that further misconduct could result in judicial action or administrative processing. On 7 April 1983, you received your second NJP for violating UCMJ Article 86, for four hours of UA. You did not appeal either of these NJPs. You were subsequently counseled two additional times for your lack of integrity and your poor performance while standing guard duty.

On 7 June 1983, you were notified that you were being processed for an administrative discharge by reason of misconduct due to pattern of misconduct. You waived your right to consult with qualified counsel and your right to present your case at an administrative separation board. On 23 June 1983, you received your separation physical and denied mental health symptoms. On 29 June 1983, you were discharged from the Marine Corps for pattern of misconduct, with an Other Than Honorable (OTH) characterization of service and assigned an RE- 4 reenlistment code.

In your request for relief, you contend that you incurred mental health concerns due to racial harassment and physical pain experienced during your military service, which contributed to your misconduct. In support of your assertion, you submitted a December 2022 Department of Veterans Affairs (VA) rating decision deferring a decision on entitlement to compensation for mental health (anxiety, depression). You also provided evidence of treatment for medical conditions, including leukemia and diabetes.

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 and change your narrative reason for separation and reenlistment code, (b) your contention that you were struggling with undiagnosed mental health concerns due to racial harassment and physical pain during service, and (c) the impact that your mental health had on your conduct. For purposes of clemency and equity consideration, the Board noted you provided documentation related to your post-service accomplishments and character letters.

As part of the Board review process, the BCNR Physician Advisors, a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 11 April 2023. The advisors noted 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. He has provided no medical evidence in support of his mental health claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct. 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 clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct 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 mental health and the possible adverse impact your mental health had on your conduct during service. Specifically, the Board felt that your misconduct, as evidenced by your two NJPs and SCM conviction, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved a drug offense. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command. The Board determined that your conduct was contrary to Marine Corps values and policy, renders such Marine unfit for duty, and poses an unnecessary risk to the safety of fellow service members.

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 post-service medical evidence that you provided was not only temporally remote, it did not establish a nexus to your in-service misconduct. You did not raise any mental health issues during your discharge process, and waived your right to consult with qualified counsel and your right to present your case at an administrative separation board. The Board 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. As a result, the Board determined your conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH characterization and the assigned narrative reason for separation and reenlistment code. 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,

6/1/2023

