



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

█
Docket No. 3512-23

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 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 reconsideration application on 27 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 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, 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 began a period of active duty service on 28 February 1977. Your pre-enlistment physical examination, on 25 February 1977, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms.

On 2 December 1977, you received non-judicial punishment (NJP) for unauthorized absence

(UA). You did not appeal your NJP. On 3 January 1978, you received NJP for UA lasting eight (8) days. You did not appeal your NJP. On 10 July 1978, you received NJP for five separate UA specifications. You did not appeal your third NJP.

On 25 October 1978, you commenced another UA. On 27 January 1979, you were arrested by civilian authorities in █, █ and charged with DWI. Your UA terminated after 111 days, on 13 February 1979, following your civilian court hearing on 12 February 1979 and return to military authorities the next day.

On 2 April 1979, pursuant to your guilty plea you were convicted at a Special Court-Martial (SPCM) for your 111-day UA. You were sentenced to confinement for sixty (60) days and forfeitures of pay. The Convening Authority approved the SPCM sentence as adjudged.

On 25 September 1979, you received NJP for another UA. You did not appeal your NJP.

On 5 February 1980, pursuant to your guilty pleas you were convicted at a SPCM for violating a lawful general order, driving while drunk, and the destruction of government property. You were sentenced to confinement for sixty (60) days, forfeitures of pay, and a Bad Conduct Discharge (BCD). The Convening Authority approved the SPCM sentence as adjudged on 8 May 1980. In the interim, your separation physical examination, on 4 June 1980, noted no psychiatric or neurologic issues or symptoms. Upon the completion of appellate review in your SPCM case, on 17 March 1981, you were discharged from the Marine Corps with a BCD and assigned an RE-4 reentry code.

On 19 September 2012, this Board denied your first petition for discharge upgrade relief.

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 received a good conduct ribbon and had less than one year left to finish your enlistment, and (b) you consumed Camp Lejeune water that caused psycho-neuro behavioral issues. For purposes of clemency and equity consideration, the Board you did not provide documentation describing post-service accomplishments or advocacy letters.

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 6 September 2023. The Ph.D. stated in pertinent part:

Petitioner was appropriately referred for psychological evaluation and properly evaluated during his enlistment. The absence of mental health diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed by the mental health clinician. Unfortunately, he has provided no medical evidence to

support his claims. 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 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 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 cumulative 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.

Regarding your contention you suffered from the effects of tainted water while stationed at Camp Lejeune, the Board concluded that you did not submit any convincing evidence to support your claim. Notwithstanding, the Board noted that if you indeed experienced any health-related issues due to contaminated Camp Lejeune water, you *may* not be prohibited from receiving Department of Veterans Affairs benefits due to your BCD. As long as you did not receive a dishonorable discharge and meet certain qualifying criteria, you are *potentially* eligible to receive certain VA benefits related to tainted water at Camp Lejeune.¹

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 2.9 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

¹ <https://www.va.gov/disability/eligibility/hazardous-materials-exposure/camp-lejeune-water-contamination/>

misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your cumulative misconduct.

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, even one awarded by a court-martial. However, the Board concluded that despite your contentions this was not a case warranting any clemency as you were properly convicted at a second SPCM of serious misconduct. The simple fact remained is that, in addition to your second SPCM conviction, you left the Navy while you were still contractually obligated to serve and you went into a UA status on no less than seven separate times without any legal justification or excuse. 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 concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. 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. 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,

10/31/2023

