



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

█
Docket No. 3563-23
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 application on 15 December 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 professional. Although you were provided an opportunity to respond to the AO, you chose not to do so.

You enlisted in the Marine Corps and began a period of active duty service on 28 December 1983. Your pre-enlistment physical examination, on 26 August 1983, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms.

On 15 October 1986, you commenced a period of unauthorized absence (UA). On 14 November 1986, your command declared you to be a deserter. While in a UA status, you missed your unit's six-month deployment beginning on 4 November 1986. Your UA terminated after approximately 177 days on 10 April 1987.

On 10 July 1987, you were convicted at a Special Court-Martial (SPCM) for your long-term UA and missing ship's movement. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), forfeiture of pay, confinement for three (3) months, and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). On 7 September 1987, the Convening Authority approved the SPCM sentence as adjudged. On 5 October 1987, you waived your right to have your case considered for any clemency by the Naval Clemency and Parole Board. Ultimately, upon the completion of SPCM appellate review in your case, on 29 April 1988, you were discharged from the Marine Corps with a BCD and assigned an RE-4 reentry code.

On 21 May 2021, this Board denied your initial petition for discharge upgrade relief. The AO drafted on 9 April 2021 for your first petition stated, in part:

Petitioner's in-service records do not contain evidence of a diagnosis of a mental health condition or psychological/behavioral changes, which may have indicated a mental health condition.

-There was no evidence presented that indic[a]ted Petitioner's experience of life stressors was extraordinary or unique or that Petitioner met the diagnostic criteria for a mental health condition.

-. . .it is my considered medical opinion the preponderance of available objective evidence failed to establish Petitioner was diagnosed with a mental health condition, suffered from a mental health condition at the time of his military service, or his in-service misconduct could be mitigated by a mental health condition.

The Board carefully considered all potentially mitigating 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, your desire for a discharge upgrade and contentions that: (a) your discharge was improper in that you relied on your counsel's promise that after six months your BCD would be upgraded to General (Under Honorable Conditions) characterization of service, (b) the traumatic conditions experienced by you weigh heavily in favor of a discharge upgrade, (c) your discharge was inequitable because you suffered incredible trauma which likely caused your misconduct, (d) you engaged in some particularly difficult and gut-wrenching activity on active duty, (e) you participated in a combat mission in which you were called upon to take out a target, and while you did your duty, the unfortunate result was that a young child was also killed in the process, (f) the details of this event continue to haunt you, and (g) your achievements and accolades summary all militate in favor of upgrading your discharge. For purposes of clemency and equity consideration, the Board considered the evidence you provided 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 another AO dated 3 November 2023. As part of the Board's review, the Board considered the AO. The AO stated in pertinent part:

Petitioner contends he incurred mental health concerns during military service, which might have mitigated his discharge characterization of service...The Petitioner contends that his misconduct was mitigated by undiagnosed PTSD symptoms as a result of having shot and killed a 5-year-old boy while attached to █.

Although it is possible that he was attached to █ as a truck driver, there is no evidence of any operational history, combat, or killing of a child as contained within his record. Furthermore, there is no evidence that the Petitioner was diagnosed with a mental health condition or suffered from PTSD while in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. During his Court Martial, he only stated that he went UA "due to personal reasons." He did not mention PTSD or having had accidentally killed a child in his last petition. His personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct.

The Ph.D.'s AO 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 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 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 was troubled by the number of factual discrepancies in the record. First, the Board noted there was no credible evidence in the record you were ever assigned to any Marine

reconnaissance (recon) unit. Second, the years you served in the Marine Corps made it highly unlikely you would have ever been called into action in a recon unit in a forward-deployed area conducting covert operations. Third, during your SPCM guilty plea, your stated reasons for going UA and missing movement were that you were “going between █ and █ taking care of a personal problem at the time...” Lastly, the Board noted your now morphing contentions given that in your 2021 Board petition, you made no mention whatsoever of any mental health issues related to any covert operations and unintended deaths. Based on these discrepancies, the Board questioned your credibility as a historian of your record.

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. Notwithstanding, with or without a guilty plea, the Board determined your offenses were sufficiently serious to likely merit a BCD following your conviction for both offenses.

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 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 Sailor. 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 for approximately 177 days without any legal justification or excuse, and intentionally missed an overseas deployment in the process. You were properly convicted at a SPCM of serious misconduct, and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. 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 BCD. 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.

Regarding your request for your DD Form 214 to reflect any sea service you performed, the Board noted block 12f of your DD Form 214 reflects your foreign service. Board regulations require Petitioner’s to exhaust their administrative remedies prior to requesting relief from this Board. If you believe block 12g on your DD Form 214 does not accurately reflect your total sea service, the Board recommends that you first send a SF-180 form to Headquarters, Marine Corps with a request to review your record to determine if any inaccuracies exist.

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,

12/20/2023

