



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. 4115-23
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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.

Because your application was submitted with new evidence not previously considered, the Board found it in the interest of justice to review your application. A three-member panel of the Board, sitting in executive session, considered your application on 13 November 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 the 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 to the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (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). The Board also considered the advisory opinion (AO) of a qualified mental health provider, which was previously provided to you. Although you were afforded an opportunity to submit a rebuttal, 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.

Your previous application to the Board was considered and denied, on 14 April 2023, in Docket Number 7737-23.

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 include, but were not limited to, your desire to upgrade your discharge and your myriad contentions which, in primary part, contest the Board's previous review of your discharge. For purposes of clemency and equity consideration, the Board noted you submitted supporting documents to include your service health records, your disability rating decision from the Department of Veterans Affairs (VA), your VA treatment records, and news reports regarding your contended traumatic experiences.

Because you also contend that post-traumatic stress disorder (PTSD) or another mental health (MH) condition affected your discharge, the Board also considered the AO, which provided the following factual information relevant to your diagnoses and the chronology associated therewith:

The Petitioner was granted service connection for PTSD with Persistent Depressive Disorder and Generalized Anxiety Disorder (GAD) from the Department of Veterans Affairs (VA) effective October 2021.

Petitioner provided VA records from February to May 2023 describing treatment for PTSD and 'brief MH [mental health] treatment in the USMC which left him feeling distrustful of mental health providers.' In April 2023, he completed a mental health evaluation with the VA, following which he received diagnoses of complex PTSD and Major Depressive Disorder. He submitted May to August 2022 evidence of VA treatment for GAD and Persistent Depressive Disorder 'at least as likely as not ... a continuation of the mental health issues listed in his military records from 2/2004. His military STRs [service treatment records] show ... he had been treated from depression from 2003 to 2/04.

Upon review of your medical documentation, the AO observed the following:

During Petitioner's service in the US Marine Corps, he was diagnosed with a personality disorder, based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluations performed by the mental health clinicians over several months of observation and treatment. His in-service misconduct appears to be consistent with his diagnosed characterological features, rather than evidence of another mental health condition incurred in or exacerbated by military service. Post-service, the VA has granted service connection for mental health concerns that are attributed to his Army service.

The AO concluded, "it is my clinical opinion there is insufficient evidence of a mental health condition that may be attributed to service in the US Marine Corps. There is insufficient evidence to attribute his misconduct in the US Marine Corps to a mental health condition, other than his diagnosed personality disorder."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your request for discharge in lieu of trial by court-martial, outweighed these mitigating factors. In

making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations.

To the extent that you assert the Board's review "went beyond" the issues you raised in your application, the Board found that it has discretion to review the entirety of your available service records and to consider all issues which it finds reasonably relevant to the circumstances of your discharge as well as your post-discharge character with respect to clemency requests.

Regarding your military health records, you contend that you received mental health treatment in 1992 and 1993, which appears related to your contention that you experienced hazing related to your rank during a deployment, but that the records were lost. However, the Board noted that you continued serving with minimal incident other than a single nonjudicial punishment (NJP) in October of 1994 due to failure to attend a mandatory unit event which resulted in an unauthorized absence, and you subsequently reenlisted in March of 1997. To the extent that your medical records contain a note regarding a potential overdose of aspirin in May of 1994, you reported your reason was to help you sleep and not related to mental health or suicidal ideations.

You contend that you should have demanded trial with respect to the charge from your first NJP. However, that offense occurred during your first period of enlistment in the Marine Corps, which was Honorable. While regulations would have permitted consideration of that NJP with respect to your suitability for retention incident to your request for separation in lieu of trial, the Board observed that the numerous offenses identified in the charge sheet incident to your pre-trial confinement in August of 1997 formed the basis of the misconduct for which you requested discharge in lieu of trial by court-martial and your administrative discharge was due to your voluntary request to be discharged rather than stand trial for the charged offenses.

You also contest the accuracy of dates that your pre-trial confinement and confinement physicals occurred. You assert that your mental health referral in April of 1997 was voluntary, you deny that you intentionally failed your physical fitness test, you deny that you had an alcohol use problem or refused level II treatment. In light of the nature of the charges for which you requested separation in lieu of trial, the Board found that these contended discrepancies, whether valid or not, had no bearing on the Board's previous decision or upon the propriety of your discharge on reconsideration.

You also claim that your statement to the psychiatrist, at the time it was documented in your medical records, was misquoted. Having reviewed your service and health records relevant to that contention, the Board found insufficient evidence to support this contention. Rather, the Board noted that you sought mental health care, per your request, on 11 August 1997 after making various statements for which you remained in isolation while in pre-trial confinement. This medical record, hand written by the attending mental health professional expressly documents: "the pt. says he is not sure of what he is capable of doing while in the Brig, but he is sure that when the harshest punishments are levied upon him, he will do his time and [I] will read about him massacring people someday." The Board found that the reference to "[I]" was written by the medical professional, in the performance of mental health care services, after you made the statement directly to him and he was attempting to record it as accurately as possible. Notwithstanding your unsupported assertion that this statement was misquoted, the Board concluded that the entirety of your medical evaluations from July through September of 1997

provide ample evidence to support the reliability of the assessment that you were a danger to yourself and others due to the severity of your diagnosed Personality Disorder.

The Board likewise noted that your VA records have connected your mental health diagnoses to your Army service, which occurred after your discharge from the Marine Corps. Therefore, the Board concurred with the AO's assessment that your misconduct while in the Marine Corps was associated with your personality disorder and not a mental health condition within the meaning of the policies governing liberal consideration of your request for a discharge upgrade. Notwithstanding your amplifying explanation of the incidents related to the charges which resulted in your request for separation in lieu of trial during your Marine Corps service, the Board found the evidence of record clearly sufficient to assess the severity of the charged offenses which led to your request for separation in lieu of trial. Further, the Board reiterates its finding that you marked "no" by hand, with an "X" – and initialed next to that response – on page two of the DD Form 1699, in your response to block 24.a, "Are you now or have you ever been in any regular or reserve branch of the Armed Forces or in the Army National Guard or Air National Guard?" The fact that you elsewhere marked "yes" in response to at least one other answer indicates that you read the document and did not merely mark everything "no" out of negligence. Having served in the Marine Corps for over six years, to include reenlisting, belies your claim that this negative response was due to negligence or oversight rather than fraud, reinforcing the Board's perception regarding your lack of candor in general. As such, the Board was not persuaded by your evidence of post-discharge character.

As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an Other Than Honorable characterization. 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 the 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 is attached 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,

12/4/2023

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Executive Director

Signed by: █