



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

█
Docket No. 4423-23
Ref: Signature Date

█

Dear █

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 12 January 2024. 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. Although you were afforded an opportunity to submit an AO rebuttal for consideration you did not do so.

You enlisted in the U.S. Navy and began a period of active duty service on 24 March 1978. Your pre-enlistment physical examination, on 12 January 1978, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms. On 28 July 1978, you reported for duty on board the █ (█) in █, █.

On 20 November 1978, you were found totally unresponsive on the ship following a heroin overdose. You were admitted for observation and released back to duty the next day.

On 9 January 1979, pursuant to your guilty plea, you were convicted at a Special Court-Martial (SPCM) for an assault in which you inflicted grievous bodily harm. During the Military Judge's guilty plea inquiry, you admitted under oath that your aggravated assault was unlawful and was not justified by self-defense or any other legal justification. You were sentenced to confinement, forfeitures of pay, and a discharge from the Navy with a Bad Conduct Discharge (BCD).

In the meantime, on 1 June 1979, you received non-judicial punishment (NJP) for unauthorized absence, insubordinate conduct, and for failing to obey a lawful regulation. You did not appeal your NJP. Your separation physical examination, on 13 June 1979, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You specifically answered "no" to ever having or presently having a "head injury."

On 27 August 1979, the Convening Authority approved the SPCM sentence as adjudged. On 30 October 1979, the U.S. Court of Military Review (CMR) affirmed the SPCM findings and sentence. Upon the completion of SPCM appellate review in your case, on 12 June 1980, you were discharged from the Navy with a BCD and assigned an RE-4 reentry code.

On 14 August 2012, this Board denied your first petition for a discharge upgrade.

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, a change to your reason for separation, and changes to your separation and reentry codes. You contend that: (a) you are seeking a discharge upgrade due to, among other issues, the severe bullying on the basis of race that you experienced as an African-American sailor in 1978-1980, related substance abuse issues, a head injury you experienced while serving, and your PTSD diagnosis and Traumatic Brain Injury (TBI) or concussion, (b) your receipt of a BCD constituted both an error of law and injustice, as it was against both the law and facts of your case, (c) the PTSD, bullying on the basis of race, substance abuse, and other serious hardships you encountered as a 19-year-old in the Navy all counsel toward a discharge upgrade, (d) the character of your post-service conduct has been outstanding, and (e) you have won the respect of your employer, friends, and family members - all of whom cherish you dearly. For purposes of clemency and equity consideration, the Board considered the entirety of the evidence you provided in support of your application.

As part of the Board review process, the BCNR Physician Advisor who is a licensed psychiatrist reviewed your contentions and the available records with a clinical psychologist (Ph.D.), and issued an AO dated 21 November 2023. The M.D. and Ph.D. stated 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.

While there is in-service evidence of a mild head injury, there is no evidence of residual symptoms of TBI over time requiring treatment. His statements during his separation physical that denied head injury or loss of consciousness are particularly noteworthy, as is the lack of post-service evidence of residual TBI symptoms.

Post-service, he has provided evidence of a single visit to a civilian mental health provider with nonspecific credentials listing diagnoses of PTSD and substance use disorder that are temporally remote to military service and not specifically related to his service.

Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct, which he has claimed as due to, alternately, retaliation or self-defense. 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 M.D. and Ph.D. both concluded, "it is my clinical opinion there is some post-service evidence from a civilian mental health provider of a diagnosis of PTSD that may be attributed in part to military service. There is insufficient evidence of a TBI that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD, TBI, or another 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 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 observed that you pleaded guilty to the charged offense and specification at your SPCM. The Board further noted that a plea of guilty is the strongest form of proof known to the law. Based upon your plea of guilty alone and without receiving any evidence in the case, a court-martial can find you guilty of the offenses to which you pleaded guilty. The Board noted that during a SPCM guilty plea such as yours, the Military Judge (MJ) will only accept your guilty plea once they were satisfied that you fully understood the meaning and effect of your guilty plea, and only after determining that your plea was made voluntarily, of your own free will, and with full knowledge of its meaning and effect. On the record, the MJ would have also had you state on the record that discussed every aspect of your case including the evidence against you and possible defenses and motions in detail with your lawyer, and that you were satisfied with your counsel's advice. Further, the MJ would have also had you state on the record that you were pleading guilty because you felt in your own mind that you were guilty. Moreover, the Uniform Code of Military Justice states that during the appellate review process, the appellate court may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In other words, the appellate court has a duty to conduct a legal and factual sufficiency review of the case. If any errors or improprieties had occurred at any stage in your case, the appellate court surely would have concluded as such and ordered the appropriate relief. However, no substantive, evidentiary, or procedural defects were identified in your case. Therefore, the Board concluded that any such suggestion or argument that your BCD was an error of law and an injustice because it was against the law and facts or your case was not persuasive and without merit.

The Board also noted that during your SPCM providency inquiry both you and your counsel conceded that your assault was not legally justified or was done in self-defense. The Board noted that while you may not have had the healthiest of working relationships with your supervisor, that on the day in question there was no excuse or justification for your actions. Lastly, the Board determined you did not provide any convincing evidence that you were somehow the victim of racially motivated bullying or disparate treatment.

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 2.7 in conduct. Navy regulations in place at the time of your discharge recommended a minimum trait average of 3.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your 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 SPCM of serious misconduct. The Board determined that characterization with a BCD appropriate when the basis for discharge is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your misconduct and disregard for good order and discipline clearly merited your discharge. While the Board carefully considered the evidence you submitted in mitigation and commends you for your post-discharge accomplishments, 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,

1/26/2024

