



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. 4647-23
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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 26 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 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 provided an 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 27 May 1980. On your enlistment application, you acknowledged pre-service infractions related to disorderly conduct, running a red light, and speeding.

On 11 April 1981, you were involved in a serious motorcycle accident, resulting in multiple head lacerations and a deep laceration to your left hand. A NAVMEDADMIN message documented this incident; however, none of the records from that hospitalization are contained within the available service record.

On 30 November 1982, you received non-judicial punishment (NJP) for violation of Uniform Code of Military Justice (UCMJ) Article 92, for failing to obey an order by having a female in your barracks room, Article 86, for failure to go to Honor Guard duty, and Article 134, for wrongful use of marijuana. You were formally counseled that continued misconduct could result in administrative or judicial processing. You did not appeal this NJP.

On 10 February 1983, you were found guilty at Summary Court-Martial (SCM) of violating Article 91, for four specifications of disobedience towards a noncommissioned officer, and Article 95, for resisting apprehension. You were awarded 20 days of confinement, forfeitures of pay, and reduction in rank to E-1.

On 23 May 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. However, prior to your separation you received your second NJP, on 26 May 1983, for violating UCMJ Article 134, for the wrongful use of marijuana.

On 6 June 1983, your Commanding Officer recommended your separation with an Other Than Honorable (OTH) characterization of service based on your repeated marijuana use, as well as your disobedience, lack responsibility and professionalism, and immaturity. On 27 June 1983, the Separation Authority directed your separation by reason of "Misconduct- Pattern of Misconduct (ADMIN Discharge Board required but waived)" with an OTH and a RE-4 reentry code.

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, (b) your contention that you were suffering from symptoms related to a TBI during your time in service, and (c) the impact that your mental health had on your conduct. For purposes of clemency and equity consideration, the Board noted that you provided documentation from the Department of Veterans Affairs (VA) but no documentation related to your post-service accomplishments or character letters.

In your request for relief, you contend that you sustained a Traumatic Brain Injury (TBI) during service, and that the symptoms thereof mitigate your misconduct. You assert that your TBI was never treated as such injuries were not understood in 1981. You contend that the Marine Corps failed to recognize your mental state and misread your conduct for insubordination. In support of your request, you supplied a VA service-connection of a TBI for treatment purposes only. 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 29 November 2023. The Ph.D. noted in pertinent part:

The Petitioner stated that he sustained a TBI in service and that the symptoms thereof may have mitigated his misconduct. His record is sparse but does contain one memorandum dated April 1981 indicating that he sustained a motorcycle accident and had "multiple head lacerations," and was admitted to Tripler Hospital. Unfortunately, none of the records from that hospitalization are

contained within his available service record. Although it is possible that a significant TBI could cause alterations in thoughts and behaviors, it is unlikely that these would go unnoticed for eight months until his first NJP. Additionally, his misconduct appears to be consistent with pre-service behaviors as indicated by traffic infractions and disorderly conduct. There is no evidence that the Petitioner was diagnosed with a mental health condition or suffered from symptoms of TBI while in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He did not submit any medical evidence in support of his claim. His personal statement is not sufficiently detailed to establish clinical symptoms 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) would aid in rendering an alternate opinion.

The Ph.D. 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 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 undiagnosed mental health issues and the possible adverse impact on your service. Specifically, the Board felt that your misconduct, as evidenced by your SCM conviction and NJPs, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved repeated drug use. 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 illegal substance abuse is 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. Additionally, your repeated disobedience placed an undue burden on your chain of command and fellow Marines, and likely negatively impacted mission accomplishment.

In making this determination, the Board concurred with the AO that, while it is possible that a significant TBI could cause alterations in thoughts and behaviors, it is unlikely that these symptoms would go unnoticed for such a significant period of time prior to the first instance of misconduct. There was nothing in your official service records that indicated you sought mental health treatment, or that you raised such symptoms or concerns during your numerous disciplinary processing events. Further, you did not provide any post-service medical evidence of mental health treatment. The VA grant of treatment only for service connected TBI fails to provide any etiology for the diagnosis or analysis regarding a nexus to the underlying misconduct. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board determined the record clearly reflected that your active duty 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 otherwise not be held accountable for your actions. The Board concluded that your conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH 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 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,

2/2/2024

