



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

██████████
Docket No. 6956-23

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.

Although you did not file your application in a timely manner, the Board waived the statute of limitation 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 28 February 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 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 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. 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 the understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on evidence of record.

You enlisted in the Marine Corps and began a period of active duty on 10 July 1989. On 18 February 1990, you were subject to nonjudicial punishment (NJP) for violations of the Uniform Code of Military Justice (UCMJ) under Article 86, due to a period of unauthorized absence (UA), and under Article 134 due to being incapacitated for proper performance of duty as a result of previous indulgence in intoxicating liquor. Your second NJP occurred, on 26 April 1990, for another violation under Article 86 after your UA from formation. As a result, in

addition to your NJP punishment, you were administratively counseled that frequent misconduct and continued violations of the UCMJ could result in administrative separation. Notwithstanding this warning, you were tried and convicted by Special Court Martial (SPCM), in November 1990, for yet another violation under Article 86, for a period of UA beginning 8 July 1990 which continued through 27 August 1990 and a violation under Article 87 due to missing movement during your UA period. However, your sentence did not include a punitive discharge, and you were permitted to continue serving.

The following year, in November 1991, you were administratively counseled due to your inability to be at your appointed place of duty on time. Then, on 12 December 1991, you were subject to your third NJP, this time for a violation under Article 91 due to using disrespectful language toward a noncommissioned officer and by speaking to him in a demanding tone.

On 3 February 1992, you were notified of administrative separation processing for pattern of misconduct, and you requested a hearing before an administrative separation board. On 6 March 1992, you testified at that hearing. However, the members found that the basis of pattern of misconduct was substantiated by a preponderance of the evidence and specifically found that you had failed to respond effectively to administrative counseling. They recommended that you be separated under Other Than Honorable (OTH) conditions. You were discharged, on 13 April 1992, following legal review and approval of that recommendation. Although your average performance markings in service were 4.1, your conduct marks of 3.2 were significantly below that normally required for an “Honorable” characterization of service.

Your previous application to the Board was considered on 4 June 2018, wherein you contended that your sergeant had falsely accused you of assault and that your post-discharge character and behavior warranted consideration of clemency. However, the Board found those factors insufficient to warrant an upgrade of your discharge in light of your three NJPs and SPCM conviction.

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 to upgrade your discharge to “Honorable” and your contention that your service-connected disability of post-traumatic stress disorder (PTSD) was not considered prior to your administrative discharge. You assert that your chain of command mishandled your mental health problems through disciplinary action and separation rather than “amicably” through other more fitting means. You also submit that one of your periods of unauthorized absence occurred in conjunction with a period of block leave after you discovered that your girlfriend was abusing your infant child, leaving you in a position to need to secure the child’s safety and causing a conflict between you and your leadership. With respect to your PTSD, you state that you are grateful for having access to the mental health crisis line provided by the Department of Veterans Affairs (VA) to assist in your mental health struggles. For purposes of clemency and equity consideration, the Board noted you submitted a personal statement, letters of support in the form of statements made on your behalf to the VA, your VA mental health treatment records, and, your service health records.

Because you contend that PTSD or another mental health (MH) condition affected the circumstances of your discharge, the Board also considered the AO, which noted:

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. Post-service, the VA has provided treatment for symptoms of PTSD attributed in part to military service. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct, particularly given in-service medical records in which he denied mental health symptoms following his misconduct. Additional records (e.g., post-service mental health records describing Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

The AO concluded with a clinical opinion that although "there is post service evidence from the VA of diagnosis of PTSD that may be attributed to military service in part. There is insufficient evidence to attribute his misconduct to PTSD or another mental health condition."

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 NJPs and SPCM, 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. The Board also concurred with the AO in this regard and found insufficient evidence of a nexus between your in-service misconduct over 30 years ago and your recent diagnosis from the VA. Finally, the Board considered that you were given multiple opportunities to correct your conduct deficiencies but chose to continue to commit misconduct. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member 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 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,

3/14/2024

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