



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

█
Docket No. 7841-23
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.

A three-member panel of the Board, sitting in executive session, considered your application on 3 October 2023. The names and votes of the members of the panel 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 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)/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). In addition, the Board considered the 3 May 2023 advisory opinion (AO) furnished by a Licensed Clinical Psychologist and your response to the AO.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will 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.

The Board carefully considered your request to remove all derogatory material referencing the incident involving submission of the training certificate, including the command investigation (CI), 22 October 2020 Report of Misconduct (ROM), and 19 April 2021 Report of Board of

Inquiry (BOI). You also request to remove fitness reports for the reporting periods 10 November 2020 to 30 September 2021 and 1 October 2021 to 9 January 2022. Your further request that Marine Corps Forces Reserve (MARFORRES) provide a neutral explanation for the missing fitness reports that will not prejudice future promotion boards or other individuals who are reviewing your records, a letter "FOR CONTINUITY PURPOSES ONLY" be placed in your record, pay and points towards retirement, reimbursement of insurance payments or medical bills, remove any adverse information not previously identified, and any other relief the Board finds in the interests of justice.

The Board considered your contentions that the BOI convened, reviewed all of the evidence and testimony, and determined that none of the allegations or reasons for separation were substantiated. Thus, the BOI found that you did not make a false official statement with regard to the training certificate and your conduct was not unbecoming an officer and a gentleman. You also contend that regulations and administrative directives that govern the placement of adverse material into a Marine officer's official military personnel file (OMPF) are contradictory and inconsistent. The BOI serves as a fact-finder and adjudicator of the individual's guilt or innocence with regard to those allegations. The clear implication is that adverse material to be filed in an OMPF should reflect instances of proven wrongdoing. The BOI that evaluated the allegations of misconduct determined them to be unsubstantiated. That is the administrative equivalent of an acquittal. You further contend that the actions by your leadership, including placing derogatory material in your OMPF and writing two poor fitness reports were vindictive. You claim that your Traumatic Brain Injury (TBI) and Post Traumatic Stress Disorder (PTSD) were the cause of your behavior. As part of your treatment, you were prescribed clonazepam, mirtazapine, and risperidone. You also claim that your conduct throughout this process was exemplary, despite the vindictiveness of the involuntary transfer to the Individual Ready Reserve (IRR). You explained that you accepted responsibility for the incident and expressed remorse to the BOI, your submission of the training certificate was the risky behavior of a highly anxious Marine suffering from the combined effects of TBI caused by multiple concussions while in combat, as well as PTSD caused by your military service.

Based on your arguments that PTSD and TBI were related to your behavior, the Board requested and considered the AO. The AO stated in pertinent part:

This opinion will only address the mental health claims of the petition. Petitioner has provided evidence from service of head injury and residual mild TBI symptoms with ongoing academic and military success despite residual TBI symptoms. The Petitioner has also provided evidence of a diagnosis of PTSD attributed to combat exposure. It is possible that symptoms of anxiety and distorted cognitions associated with PTSD may have contributed to his misconduct, but it is difficult to attribute all of his error in judgment to mental health concerns, given the Petitioner's contentions that the false official statement was outdated and inconsequential. Additionally, his mental health status appears to have been included in consideration of the consequences associated with his misconduct.

The AO concluded, “it is my considered clinical opinion there is evidence of diagnoses of mild TBI and PTSD associated with military service. There is evidence some of his misconduct may be attributed to his mental health concerns.”

In response to the AO, you contend that the AO’s conclusion supports your petition and should point the Board towards relief. You also provided evidence that you required an academic accommodations due to the impact of your TBI and PTSD symptoms and articles regarding TBI. You also claim that because the Helicopter Rope Suspension Techniques (HRST) Master certification was not helpful, the behavior is explained by your PTSD and TBI. You explained that you suffered at least four concussions in combat, and individuals with TBI may also have long-term problems, including ongoing problems with concentration, memory, headache and physical problems, such as keeping one’s balance.

The Board noted that the Commanding General, █ (█, █ █) issued a Report of Misconduct (ROM) for inclusion in your official military personnel file (OMPF) for violating Uniform Code of Military Justice (UCMJ) Articles 107 (false official statement) and 133 (conduct unbecoming an officer) by submitting an electronic personnel action request (EPAR) to add a HRST Master certification into your record, then denying that you submitted the EPAR for a course you did not attend. The CG, █ recommended that you be required to show cause. On 19 April 2021, the BOI majority found that a preponderance of the evidence did not prove the allegations. The BOI minority noted that while he/she agreed that your mental state greatly impacted your decision making and you should have been retained; he/she did vote in the minority that you did indeed violate Article 107, UCMJ, but did not believe that your actions violated Article 133, UCMJ. The BOI Report also noted that the “purpose of the Board of Inquiry was to recommend whether the respondent should be separated from the U.S. Marine Corps, and if so, the appropriate characterization of service” and that you gave a sworn testimony admitting to the allegations.

The Board, however, substantially concurred with the AO’s finding that it is difficult to attribute all of your errors in judgment mental health concerns, and your mental health status appears to have been included in consideration of the consequences associated with your misconduct. In this regard, the Board noted that you provided evidence of a head injury and residual mild TBI symptoms with ongoing academic and military success despite residual TBI symptoms and PTSD attributed to combat exposure between 2010 and 2012. The Board also noted that despite your diagnoses, you continue to serve satisfactorily, you successfully completed several reconnaissance/infantry related formal schools, and you remained competitive for promotion without incident following your combat service. The Board found your claim that the HRST certificate was not helpful to be speculative in nature, especially in light of the other infantry related formal courses you have completed. Although the AO found that it is possible that symptoms of anxiety and distorted cognitions associated with PTSD may have contributed to your misconduct, the Board determined that your actions were methodical, you admitted to communicating a false official statement, and your denial that you submitted the certificate when questioned demonstrates your understanding that your actions were inappropriate.

The Board determined that according to Title 10 U.S.C. Section 1182, BOI’s are not convened to determine guilt or innocence, BOIs are convened to receive evidence and make findings and

recommendations as to whether an officer should be retained. In fact, the Report of BOI specifically noted the purpose of the BOI. The BOI is a separate and distinct administrative process formed to make findings and recommendations that provide a basis for separation for cause, or retirement in the current grade or a lesser grade, and for the member to present matters favorable to their case on the issues of separation and characterization of service. The Board also determined that your BOI's findings are not binding on the CG, who had independent and discretionary authority to determine whether you committed the misconduct.

Concerning the inclusion of adverse material in your OMPF, the Board found no errors in the processing of your ROM, or in the DC, M&RA's decision to include the adverse materials in your OMPF because the ROM meets the definition of adverse material. According to the Department of Defense Instruction 1320.04, adverse information is any substantiated adverse finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance of the evidence. To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual. Moreover, according to the Marine Corps Legal Support and Administration Manual (LSAM), if the General Court Martial Convening Authority (GCMCA) determines that the officer did commit misconduct, the GCMCA may document the incident in a ROM. The Board determined that the GCMCA relied upon credible information when determining that the ROM was warranted. This included the CI and evidence that you denied submitting the EPAR, while a search of your EPAR records verified that the EPAR originated from your account.

The Board considered guidance in accordance with the Kurta, Hagel and Wilkie memorandums that provided clarifying guidance to military Discharge Review Boards and Boards for Correction of Military/Naval Records due to mental health conditions. The Board also determined that there is sufficient evidence that the BOI considered your mental health concerns in consideration of the consequences associated with your misconduct. The Board further noted the fact that you committed misconduct by providing a false official statement and that the Marine Corps considered your mental health conditions when deciding to retain you.

Concerning your involuntary transfer to the IRR, the Board noted that, according to the Marine Corps Reserve Administration Manual, the Commander, MARFORRES may involuntarily transfer Reserve officers from the Selected Marine Corps Reserve (SMCR) to the IRR and, unless otherwise directed by the DC, M&RA, the Commander, MARFORRES will involuntarily transfer Reserve officers to the IRR upon performance in an unacceptable manner. After a careful review of the evidence, the Board determined that your transfer from the SMCR to the IRR was not in error or unjust. Based on this finding, the Board found no basis for awarding of back pay, retirement points, or reimbursement of medical expenses. Therefore, 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. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Concerning your request to remove your fitness report for the reporting period 10 November 2020 to 30 September 2021 and 1 October 2021 to 9 January 2022, the Board determined that you have not exhausted your administrative remedies. The Performance Evaluation Review Board (PERB) is the initial action agency for fitness report appeals, therefore, according to the Marine Corps Performance Evaluation Appeals Manual you must submit your request to the PERB.

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,

10/19/2023

