



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. 6597-23
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 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 5 April 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 chose not to do so.

You enlisted in the U.S. Marine Corps and began a period of active duty service on 25 June 1974. Your pre-enlistment physical examination, on 25 June 1974, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms.

On 30 October 1974, you received non-judicial punishment (NJP) for assaulting another Marine by striking him in the face with a fork. You did not appeal your NJP. On 4 January 1975, you received NJP for unauthorized absence (UA). Your command suspended a portion of your punishment. You did not appeal your NJP.

On 20 January 1975, your command vacated and enforced the suspended portion of your 4 January 1975 NJP due to your continuing misconduct. On 21 January 1975, you received NJP for five (5) separation specifications of insubordinate conduct. You did not appeal your NJP.

On 14 May 1975, you received NJP for UA. On the same day, your command issued you a "Page 11" counseling warning (Page 11). The Page 11 expressly advised you that if your conduct did not improve, you may be subject to discharge by reason of unsuitability. On 19 July 1976, you received NJP for the willful disobedience of a superior commissioned officer. You appealed your NJP and, on 27 July 1976, higher authority granted your appeal and suspended the punishment.

On 29 December 1976, you were arrested and detained by civilian authorities on a first degree murder charge.¹ On 22 February 1977, your command notified you that you were being processed for an administrative discharge by your civilian conviction. Even though you were in civilian confinement at such time, you elected your right to present your case to an administrative separation board (Adsep Board).

On 3 March 1977 you entered a guilty plea to the crime of voluntary manslaughter in ██████████ ██████████, ██████████. On 16 May 1977, pursuant to your guilty plea you were convicted of voluntary manslaughter in the General Court of Justice, Superior Court Division, ██████████ ██████████, ██████████. The court sentenced you to confinement for a period of not less than eighteen (18), but not more than twenty (20) years, less 139 days of pre-trial confinement credit for time already served.

On 14 July 1977, an Adsep Board convened to hear your case on board Marine Corps Base, ██████████, ██████████. While you were not physically present at the hearing due to your civilian confinement, at the Adsep Board you were represented by a Marine Corps Judge Advocate. Following the presentation of evidence and any witness testimony, the Adsep Board members determined that you were unfit for further military service and unanimously determined that you should be discharged with an under Other Than Honorable (OTH) characterization of service.

On 8 August 1977, the Staff Judge Advocate to the Separation Authority (SA) determined your separation proceedings were legally and factually sufficient. On 11 August 1977, the SA approved and directed your OTH discharge due to your civilian voluntary manslaughter conviction. Ultimately, on 16 August 1977, you were discharged from the Marine Corps for misconduct due to your civilian conviction with an OTH discharge characterization and assigned an RE-4 reentry code.

¹ The Board observed that you were in a UA status from the day you were arrested on 29 December 1976 until your official discharge date, a period of approximately 227 days. The Board noted that each day you spent either in civilian custody or civilian confinement was in a UA status the entire time on a day-for-day basis.

On 3 May 1979, the Naval Discharge Review Board (NDRB) denied your discharge upgrade request. The NDRB determined that your discharge was proper as issued and that no change was warranted.

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 for a discharge upgrade and contentions that: (a) you were suffering from a mental condition developed while serving in the Vietnam War and are still diagnosed with a mental disorder and are presently being treated, (b) you are forever suffering for your terrible actions, and (c) the VA has determined that they require a change in the character of your discharge to process your PTSD claim. 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 clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 7 February 2024. The 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. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service 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) may aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my clinical opinion there is insufficient evidence of a diagnosis of PTSD or another mental health condition that may be attributed to military service. 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. 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 that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or 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. Additionally, 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. Moreover, the Board concluded that your offense of involuntary manslaughter was not the type of misconduct that would be excused

or mitigated by a mental health conditions even with liberal consideration. 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 also noted, contrary to your contentions, that while you may have served towards the end of the Vietnam War era, there is no evidence in your service record that you ever deployed to Vietnam or engaged in any combat against enemy forces.

The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board determined that characterization under OTH conditions is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Marine. The simple fact remains is that you were convicted for the unlawful killing of another person, and were also in a UA status without any legal justification or excuse for approximately 227 days. Moreover, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans benefits, or enhancing educational or employment opportunities. As a result, the Board determined that there was no impropriety or inequity in your discharge and concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. 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,

4/10/2024

