



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

█
Docket No. 7149-23

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.

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 29 March 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 originally enlisted in the U.S. Marine Corps and began a period of active duty service on 6 January 1976. Your pre-enlistment physical examination, on 6 January 1976, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 20 August 1976, your command issued you a "Page 11" counseling warning (Page 11) documenting your frequent failure to report for duty at the prescribed time. The Page 11 advised you that such conduct "could result in an administrative discharge for reasons of frequent

involvement.” On 25 September 1976, your command issued you a Page 11 documenting your substandard performance of duty. The Page 11 advised you that the continuation of such conduct “could result in an administrative discharge.”

On 18 November 1976, you commenced an unauthorized absence (UA) that terminated on 29 November 1976. On 3 December 1976, you received non-judicial punishment for your 11-day UA. You did not appeal your NJP.

On 14 January 1977, your command issued you a Page 11 concerning your substandard performance of duty, standards of conduct, and negative attitude, which caused you to be a non-effective member of your command. The Page 11 advised you that your continued substandard performance will result in a recommendation for an administrative discharge under other than honorable conditions (OTH).

On 8 March 1977, you were convicted at a Summary Court-Martial (SCM) of two separate specifications of failing to obey a lawful order, dereliction of duty, and UA. You were sentenced to confinement at hard labor for thirty (30) days, and forfeitures of pay. On 11 March 1977, the Convening Authority approved the SCM sentence.

On 8 April 1977, you received NJP for the willful destruction of government property and reckless driving when you drove a government vehicle into a blast wall. You did not appeal your NJP.

On 9 May 1977, your separation physical examination and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You did not report any “head, face, neck and scalp” abnormalities or issues during your examination.

On 10 May 1977, your command notified you that you were being processed for an administrative discharge under the Marine Corps’ Expeditious Separation Program (ESP) by reason of your: (a) inability to accept instructions or orders, (b) clearly substandard performance of duty, and (c) poor attitude and motivation. You waived your rights to consult with counsel and submit a statement on your behalf. You did not object to your USMC discharge. Ultimately, on 11 May 1977, you were discharged from the Marine Corps with a General (Under Honorable Conditions) (GEN) characterization of service and assigned an RE-3C reentry code.

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 fell off the back of a vehicle responding to an alarm, and subsequent treatment and the nature of your injury caused behavioral changes, (b) at the time you were seventeen (17) and not very good at self-advocating, (c) you received a head injury but medical treatment did not resolve the treatment and migraines ensued, (d) this led to declining performance and morphine treatment for your headaches, (e) at the time you did not know how the injury was affecting you, (f) it wasn’t until years later it was discovered that migraines and vision problems were a result, (g) you always intended to be “the best,” but circumstances did

not permit that path, and (h) it has nagged you all these years that your GEN discharge did not match your commitment and desire. For purposes of clemency and equity consideration, the Board considered 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 31 January 2024. The Ph.D. stated in pertinent part:

There is no evidence that he was diagnosed with a head injury in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a TBI. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. 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, given misconduct that preceded his migraines and continued afterwards. 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 TBI. There is insufficient evidence to attribute his misconduct to TBI."

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 TBI, mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such TBI and/or 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 TBI or any mental health-related conditions or symptoms. Moreover, even if the Board assumed that your misconduct was somehow attributable to TBI or 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 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 3.85 in conduct. Marine Corps regulations in place at the time of your discharge recommended a minimum trait average of 4.0 in conduct (proper military behavior), for a fully Honorable characterization of service. The Board concluded that your

cumulative misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your serious misconduct and a repeated failure to conform to basic military standards of good order and discipline, all of which further justified your GEN characterization.

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 GEN or 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. As a result, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. 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.

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,

4/2/2024

█

Executive Director

Signed by: █