



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

██████████
Docket No. 8035-23
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 10 May 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, which was previously provided to you. 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 with a pre-service arrest record for auto theft and began a period of active duty on 4 October 1970. You deployed to the Republic of Vietnam, on 28 November 1970, and remained there until 17 March 1971. Prior to redeploying, you were tried and convicted by Special Court-Martial (SPCM), on 2 March 1971, for multiple violations of the Uniform Code of Military Justice (UCMJ), including Article 92, for violating a lawful

General Order by having a loaded weapon in your possession, three specifications of Article 128 for committing assault upon a corporal by threatening him with a knife, for assaulting a lance corporal by pointing your rifle at him, and committing an assault upon a private first class by pointing your rifle at him, and Article 134, for being incapacitated for the proper performance of duty as a result of previous indulgence in intoxicating liquor. Your sentence included four months confinement at hard labor with concurrent forfeitures of pay and reduction to the pay grade of E-1.

You were later warned in an administrative counseling entry regarding your frequent involvement of a discreditable nature and informed that administrative separation was being considered but held in abeyance. On 31 January 1972, you were convicted by civilian authorities for larceny of a pistol which you stole from a man's automobile after he gave you a ride into town. Your sentence of 12 months confinement was suspended for a period of a year provided that you paid a fine.

On 8 February 1972, you were subject to nonjudicial punishment (NJP) for violation of the UCMJ under Article 92 for failure to obey a lawful order, and you were subsequently notified of misconduct due to civil conviction for offenses punishable by more than one year in confinement. After consulting military counsel, on 14 February 1972, you requested a hearing before an administrative separation board, which convened and reviewed the recommendation for your discharge on 11 May 1972. The members found the basis for separation substantiated, found you unfit for further service, and recommended an undesirable or Other Than Honorable (OTH) discharge. This recommendation was approved and you were so discharged on 7 June 1972.

Your previous application to the Board was considered on 8 April 2014, wherein you contended that you sought an upgrade on the basis of post-service conduct. However, the Board found insufficient evidence to warrant relief at that time.

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 and your contentions that you were a great Marine but suffered from undiagnosed post-traumatic stress disorder (PTSD) from your Vietnam-era service. You further contend that you were diagnosed with PTSD in 2012 and that you have been an upstanding citizen in the decades since your discharge. For purposes of clemency and equity consideration, the Board noted you submitted post-service medical records and two character letters attesting to your post-discharge behavior and accomplishments.

Because you contend, in part, that trauma due to PTSD affected the circumstances of your misconduct and discharge, the Board also considered the AO. The AO stated in pertinent part:

During military service, the Petitioner was evaluated and received no mental health diagnosis. Temporally remote to his service, he has received a diagnosis of PTSD from a civilian provider that is attributed to Vietnam service. Unfortunately, available records are not sufficiently detailed to provide a nexus with his

misconduct, given pre-service behavior which appears to have continued in service. 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 AO concluded, "it is my clinical opinion there is post-service evidence from a civilian mental health counselor of a diagnosis of PTSD 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. Specifically, the Board determined that your misconduct, as evidenced by your NJP, civil conviction, 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. Additionally, the Board considered the discrediting effect your civil conviction had on the Marine Corps. Further, the Board concurred with the AO regarding the lack of evidence linking your contended PTSD with your misconduct, specifically given that the primary basis of misconduct for which you were administratively separated was your civilian conviction for larceny. The Board noted that specific intent offenses such as larceny are not typically attributable to PTSD symptoms, regardless of your PTSD diagnosis.

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 and commends you for your post-discharge good character, 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,

5/29/2024

