



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

█
Docket No. 8940-23
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 3 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 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 the advisory opinion (AO) furnished by qualified mental health provider and your AO rebuttal submission.

You originally enlisted in the U.S. Marine Corps and began a period of active duty service on 5 October 1981. Your pre-enlistment physical examination, on 15 September 1981, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 5 January 1983, you received non-judicial punishment (NJP) for insubordinate conduct. You did not appeal your NJP. On 25 February 1983, you received NJP for dereliction in the performance of duties. You did not appeal your NJP.

On 26 April 1983, your command issued you a “Page 11” counseling warning (Page 11) documenting your frequent involvement with military authorities, and your insubordinate attitude toward seniors. The Page 11 advised you that that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative discharge. You did not elect to submit a Page 11 rebuttal statement.

On 27 July 1983, you received NJP for the violation of a lawful order. You did not appeal your NJP. On or about 2 November 1983, you were involved in a motor vehicle accident (MVA).

On 7 November 1983, you commenced an unauthorized absence (UA) that terminated on 14 November 1983. On 23 November 1983, your command issued you a Page 11 documenting your “frequent involvement in misconduct.” You did not elect to submit a Page 11 rebuttal statement. On 4 December 1983, you received non-judicial punishment for your 7-day UA. You did not appeal your fourth and final NJP.

On 21 December 1983, your separation physical examination and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. Your medical examination also specifically noted no abnormalities with “Head, Face, Neck and Scalp.”

On 29 December 1983, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to a pattern of misconduct. You consulted with counsel and waived your right to request a hearing before an administrative separation board. On the same day, your commanding officer (CO) recommended that your discharge characterization be under Other Than Honorable conditions (OTH). In his recommendation to the Separation Authority, the CO stated, in part:

Private ██████████ conduct has plummeted the last eleven months. He has been found guilty of various infractions of the UCMJ at four separate non-judicial punishment proceedings. His conduct as a Marine can only be described as abysmal. Despite repeated counseling and opportunities to recant, he continues to be an administrative burden due to the frequency of his disciplinary problems. His failure to respond to counseling and disregard for accepted Marine Corps standards warrants a speedy separation.

Ultimately, on 23 February 1984, you were discharged from the Marine Corps with an OTH characterization of service and were assigned an RE-4 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 change to your basis for separation. You contend that: (a) your chain of command erred in their discretion when they chose to discharge you for allegedly going AWOL, rather than providing you with the necessary paperwork for medical leave and the appropriate rehabilitation services for your traumatic brain injury (TBI), and physical injuries, (b) your chain of command erred in their discretionary powers when they charged you with going AWOL after you were granted medical leave to recuperate, (c) your chain of command did not give you the opportunity to go to

physical therapy and focus on the rehabilitation of your physical and mental health, even after you notified your command of your severe post-car crash headaches, (d) as a result, your injuries had exacerbated upon return from medical leave, (e) you and your family have suffered from the stigma of your OTH status for nearly forty (40) years, and you have had to live with the shame and embarrassment that accompanies an OTH discharge, and (f) post-service it is evident you have persevered and created a successful and flourishing life for you and those around you, despite the negative impact surrounding your discharge status. 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 26 March 2024. The Ph.D. stated in pertinent part:

The Petitioner contended he incurred a head injury in a serious November 1983 car crash, which resulted in an erroneous UA charge. He claimed that his misconduct was minor and accidental: the disrespectful language was to his close friend who had been recently promoted; the damage to the concrete wall was accidental; the chaplain incident was with a friend during a holiday weekend; and the UA was due to incorrect paperwork. He provided evidence of character and post-service accomplishment.

There is evidence that the Petitioner sought medical treatment for head injuries and headaches on a few occasions during his military service. Unfortunately, there is insufficient evidence to attribute his misconduct to an undiagnosed TBI, given statements that his misconduct was minor and based on misunderstanding. 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 in-service evidence of head injury that may have been undiagnosed TBI. There is insufficient evidence to attribute his misconduct to TBI."

Following a review of your AO rebuttal submission, the Ph.D. did not change or otherwise modify their original AO.

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 3.9 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 noted that your record reflected four NJPs, three of which occurred prior to the MVA, as well as multiple counseling entries. 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 OTH characterization.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. 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 an OTH characterization 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 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 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 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,

5/8/2024

