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

[redacted]
Docket No. 8979-23
Ref: Signature Date

[redacted]

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 17 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 and your response to the AO.

You enlisted in the Marine Corps and began a period of active duty on 10 April 1970. At the time of your enlistment, you denied any pre-service history of criminal arrest or conviction. However, during a subsequent in-service mental health evaluation, you reported having arrested for grand theft auto and attempted burglary. You began experiencing significant difficulties documenting proof of your spouse's dependency, which created significant problems with allotments and pay beginning in October of 1970 and continued over the course of your active service.

On 26 October 1970, you absented yourself without authority and remained in an unauthorized absence (UA) until your return on 23 November 1970. You were subject to nonjudicial punishment (NJP) for this initial UA offense due to violation of the Uniform Code of Military Justice (UCMJ) under Article 86. While still in a restricted status from your punishment, you against absented yourself from 9 December 1970 through 22 March 1971. Following your return, you were convicted by Special Court-Martial (SPCM) for this second Article 86 offense – however, your sentence did not include a punitive discharge, and you were permitted to continue serving.

In December 1971, you were administratively counseled regarding enrollment in the drug exemption program after admitting to pre-service use of marijuana, LDS, and amphetamines during a psychological evaluation. Although you had failed to properly disclose your pre-serviced drug use at the time of your enlistment, you were again permitted to continue serving. Your command pursued a recommendation for your administrative discharge by reason of unfitness, which was disapproved in April 1972, and you were yet again permitted to continue serving. However, shortly thereafter, you accepted trial by Summary Court-Martial (SCM) and, on 15 May 1972, you were convicted of a third offense under Article 86 due to being UA from fire watch in addition to an Article 92 violation for disobedience of a lawful command from an officer after you willfully left your company area while still on light duty. Concurrent with this conviction, you submitted a request to your elected representative to assistance with in-service issues which addressed medical problems for which you had been placed on light duty and your difficulties in seeking redress through your chain of command.

On 2 June 1972, you received a psychiatric evaluation and a diagnosis of immature personality [Personality Disorder (PD)]. You were determined to be medically unsuitable for further service and were recommended for administrative discharge based on your characterological and behavioral diagnosis.

On 20 June 1972, you received administrative counseling for issues with your performance of duties and continued tardiness. You then absented yourself on 1 July 1972 and remained absent until 5 July 1972. You accepted a second SCM on 17 July 1972 for this additional UA offense and were formally notified, on 21 July 1972, of the recommendation for your undesirable discharge. Prior to processing this recommendation, you received another psychiatric evaluation on 31 July 1972. Your records also note that you were counseled regarding procedures to request a hardship discharge, although your record contains no indication that you pursued such request.

On 29 August 1972, Commanding General, [redacted], approved the recommendation for your undesirable discharge for the reason of unfitness, noting that you had waived your right to request a hearing before an administrative separation board. Prior to completing your out-processing, you were subject to another NJP, on 5 September 1972, for violation of Article 134, UCMJ, due to possession of alcoholic beverages in your barracks room. Your average proficiency and conduct marks in service were significantly below 4.0, and you were discharged under Other Than Honorable conditions on 8 September 1972.

You previously received multiple reviews of your discharge from Naval Discharge Review Board (NDRB) under special Vietnam-era discharge review policies. On 25 January 1978, a reconsideration of previous denials found you had a record of satisfactory active service for 24 months prior to your discharge. In arriving at this conclusion "in the spirit of mercy and compassion," the NDRB credited you with 24 months of service in spite of having completed 1 day less than 24 months and, as a result, upgraded your discharge to General (Under Honorable Conditions) (GEN). However, the narrative reason of separation documenting this correction specified the authority and reason as being under the "DoD Discharge Review Program (Special) SPD: KCR" which provided you with an improved characterization in your discharge record for general civilian use but did not qualify your discharge under existing law for benefits tied to a discharge under honorable conditions due to the upgrade being through the special review program.

You previously submitted a request to the Board to review your discharge, which was considered, on 13 January 1977, and disapproved. You sought reconsideration of this denial in 2002; however, your request was denied on the basis that, although you had submitted so new matters for consideration, that new information was not material to your existing characterization of service and would inevitably result in the same conclusion as the previous consideration.

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 are ineligible for veteran benefits due to your original characterization of service and your previous upgrade being part of the Special Discharge Review Program. You acknowledge your deficiencies in performance and conduct but attribute your absences to the financial difficulties you encountered with your family and dependency issues; you believe you were never provided with appropriate mental health assistance for your diagnosed personality disorder; and, you believe that the totality of your approximately 24 months of service in conjunction with your post-discharge evidence of rehabilitation and your continued service-connected disabilities, for which you are entitled to treatment only without financial benefits. You believed that you warrant an upgrade on the basis of clemency, noting that you worked full time after your discharge to raise your sons while obtaining a trade diploma and pursuing an associate degree in robotics, to include working for the company that developed the first laser disc drive. For purposes of clemency and equity consideration, you submitted a personal declaration, witness statements from your family, service health records and medical documentation of your injury, previous upgrade requests, and the denial of your benefit claim from the Department of Veterans Affairs (VA). However, you did not include documentation of your specific post-service accomplishments, such as evidence of your education and career.

Because you contend that a mental health condition affected the circumstances of your misconduct and discharge, the Board also considered the AO. The AO stated in pertinent part:

> Petitioner was appropriately referred for psychological evaluation and properly evaluated on multiple occasions during his enlistment. His personality disorder diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluations

> performed by the mental health clinicians. A personality disorder diagnosis is pre-existing to military service by definition, and indicates lifelong characterological traits unsuitable for military service, since they are not typically amenable to treatment within operational requirements. Unfortunately, he has provided no medical evidence to support his claims. His in-service misconduct appears to be consistent with his diagnosed personality disorder, rather than evidence of PTSD or another mental health condition incurred in or exacerbated by military service. Furthermore, it is difficult to consider how another mental health condition would account for his misconduct, given his statements that his UA was related to family circumstances, rather than avoidance due to trauma exposure. 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 insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to a mental health condition, other than personality disorder."

After reviewing your rebuttal evidence, the AO remained unchanged.

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 NJPs and courts-martial, 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. Further, the Board concurred with the AO in regard to your mental health condition, observing that your diagnosed PD would have been based on life-long characterological and behavioral patterns that would have existed prior to your entry to military service which, therefore, would not mitigate your misconduct. Contrary to your contention that you were never provided mental health assistance, the Board found that you received appropriate psychological evaluations during your military service on multiple occasions, with an ultimate medical recommendation that your PD rendered you unsuitable for military service. In other words, had your immature personality been known at the time of your enlistment, your application would more likely than not have been denied. In this regard, the Board further noted that you failed to initially reveal your pre-service juvenile arrest history and your pre-service drug use, either of which might have resulted in further screening that could have identified your PD prior to your enlistment. As a result, the Board concluded that your mental health contentions were without merit with respect to the underlying nexus with your misconduct as well as your claim regarding not having received mental health care.

With respect to your clemency contentions, the Board noted that you receive medical services from the VA for your disability regardless of your benefits status. The remainder of your post-discharge evidence of character is insufficient to determine the scope of your purported rehabilitation or personal accomplishments. Finally, the Board noted you already received a large measure of clemency when your characterization of service was upgraded to GEN.

As a result, the Board concluded significant negative aspects of your service outweigh the positive aspects and continues to warrant a GEN characterization. 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 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,

6/10/2024

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