



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. 8990-23
Ref: Signature Date

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Dear █

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 14 June 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 a qualified mental health provider and your AO rebuttal submission.

You enlisted in the U.S. Marine Corps and began a period of active duty service on 8 August 1974. Your pre-enlistment physical examination, on 14 February 1974, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 2 July 1975, you commenced a period of unauthorized absence (UA) that terminated on 14 October 1975. On 2 April 1976, pursuant to your guilty plea, you were convicted at a Special

Court-Martial (SPCM) for your 104-day UA. You were sentenced to a reduction in rank to Private First Class (E-2), forfeitures of pay, and confinement at hard labor for seventy-five (75) days. On 4 May 1976, the Convening Authority approved the SPCM sentence, except suspended all confinement and forfeitures for a period of six (6) months.

On 19 May 1976, you commenced another UA period that terminated on 24 May 1976. On 1 June 1976 you commenced another UA that terminated with your arrest by the FBI in or near █, █ on 29 September 1976.

On 28 October 1976, you submitted a voluntary written request for an administrative discharge for the good of the service under Other Than Honorable conditions (OTH) to avoid trial by court-martial for your two UAs. As a result of this course of action, you were spared the stigma of a court-martial conviction for your multiple UAs, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge. Prior to submitting this voluntary discharge request, you conferred with a qualified military lawyer, at which time you were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. You acknowledged that if your request was approved, your characterization of service will be an undesirable discharge (OTH) without referral or consideration by an administrative separation board. You acknowledged and understood that with an OTH discharge you would be deprived of virtually all veterans' benefits based on your current period of service under both federal and state legislation, and that you may encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of the discharge therein may have a bearing.

On 4 November 1976, the Staff Judge Advocate for the Separation Authority (SA) determined your separation was legally and factually sufficient. On 8 November 1976, the SA approved your request for an undesirable discharge for the good of the service in lieu of trial by court-martial. Ultimately, on 16 November 1976, you were separated from the Marine Corps in lieu of a trial by court-martial with an undesirable OTH discharge characterization and assigned an RE-4 reentry code.

On 10 April 1984, the Naval Discharge Review Board denied your discharge upgrade application. On 2 July 2002, this Board denied your initial petition for relief.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) you have been recently diagnosed with attention deficit hyperactivity disorder (ADHD), (b) you know that your impulsive decisions during your youth, and the impulsivity that has followed you and plagued you most of your adult life were due to ADHD, (c) ADHD is a lifelong disorder that was not recognized at the time of your discharge and therefore could not have been diagnosed or treated, (d) your mental health diagnosis mitigates and outweighs your discharge, and (e) you were diagnosed with ADHD on 5 November 2021 and before this time you were not aware of this diagnosis or the underlying reasons for your failure to adapt to military life. 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, a licensed clinical psychologist (Ph.D.) reviewed your contentions and the available records and issued an AO dated 16 April 2024. The Ph.D. stated in pertinent part:

The Petitioner submitted a psychological evaluation dated December 2021 whereby he was diagnosed with ADHD and Generalized Anxiety Disorder. He also submitted two character references in support of his claim. There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He submitted evidence of post-service diagnoses of ADHD and Generalized Anxiety Disorder that are temporally remote to service. Even if the Petitioner had been suffering from ADHD during service, it is unlikely that the symptoms of ADHD alone would cause such repetitive and lengthy periods of UA. His personal statement is not sufficiently detailed to establish clinical symptoms 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) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition."

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 mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct forming the basis of your discharge. As a result, the Board concluded that your serious misconduct was not due to mental health-related conditions or symptoms. Moreover, 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. The Board also concluded 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 2.56 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 further justified your OTH 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 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 left the Marine Corps while you were still contractually obligated to serve and you went into a UA status without any legal justification or excuse on no less than three separate occasions totaling approximately 229 days.

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,

6/17/2024

