



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. 9114-23
Ref: Signature Date

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Dear ██████████

This is in reference to your application for correction of your spouse's naval record pursuant to Title 10, United States Code, Section 1552. After careful and conscientious consideration of relevant portions of your spouse's 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 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 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.

Your spouse enlisted in the Marine Corps and began a period of active duty on 22 June 1967. On 21 March 1968, he was subject to nonjudicial punishment (NJP) for a violation of the Uniform Code of Military Justice (UCMJ) under Article 86 due to being absent from his appointed place of duty. Two weeks later, he was subject to a second NJP under Article 86 for a period of unauthorized absence (UA) in excess of 48 hours and Article 134 after being found with an unauthorized liberty card and failing to sign restriction papers. All of these offenses occurred prior to his deployment to the Republic of ██████████ in support of combat operations in May 1968. While deployed, on 14 July 1968, your spouse fell from a moving truck and struck his head, sustaining a concussion for which a non-hostile personnel casualty report (PCR) was submitted reflecting that his condition and prognosis were good. The following month, on

15 August 1968, he received a third NJP, again for violation of Article 86 of the UCMJ due to failure to go to his appointed place of duty at the time prescribed in addition to a violation of Article 91 for disobeying the lawful order of a gunnery sergeant. While still deployed in support of combat operations in ██████████ your husband was tried by Special Court-Martial (SPCM) for wrongful possession of marijuana on 26 November 1968; however, he was found not guilty of that offense.

Your spouse returned to the continental United States after his combat deployment terminated in May 1969. On 9 August 1969, he absented himself without authority. Civil authorities arrested your spouse and held him for trial on charges of possession of marijuana; however, the possession charges were dropped due to insufficient evidence, and he was convicted by civil authorities for drunk and disorderly conduct.

On 14 October 1969, your spouse was psychiatrically evaluated due to problems with his temper and anger, and to assess his mental competency in relation to pending charges for three specifications for violations of Article 86 due to his continued UA periods. He reported that he had gotten along fairly well with discipline until arriving in Vietnam but that he was “unable to handle harassment without reacting inappropriately.” The mental health provider observed him as being overly dramatic in his responses and manipulative with a diagnosis of both anti-social and sociopathic personality disorder (PD); however, the evaluation noted that he was mentally competent and responsible for his conduct.

On 7 January 1970, your spouse was tried and convicted by General Court-Martial (GCM) for a period of UA from 9-21 August 1969 in violation of Article 86 of the UCMJ and for a violation of Article 134 for wrongfully selling one tablet of a dangerous drug containing the hallucinogen LSD. The legal review of your spouse’s drug distribution offense described the circumstances from testimony provided during GCM trial proceedings, during which a witness testified:

“he and approximately twenty other Marines were preparing to go on liberty when the accused [your spouse], dressed in a bright shirt, entered the barracks and offered to sell him some “acid.” The accused removed a small orange colored pill from a gold box and the witness purchased the pill for five dollars, and the accused departed.”

Multiple witnesses to the transaction described it similarly and noted that the gold case appeared to have five or six pills in it at the time. They all positively identified your spouse as the individual who sold the LSD to the Marine in their barracks. Your spouse denied the allegations and asserted that he had no friends in that barracks, did not recognize the witnesses who testified against him, did not sell LSD, did not own a gold box or case like the one described, and did not own a shirt like the one described. He provided an alternative timeline of his whereabouts during the period of the alleged incident. Of note, his testimony between the initial Article 32 investigation and his testimony at his GCM trial proceedings change significantly with regard to his whereabouts and a number of factors such as having previously admitted to owning a shirt similar to that described and to owning a gold “soap” case.

His GCM sentence included a punishment of reduction to the paygrade of E-1, eight months confinement with concurrent forfeitures of pay and allowances, and a Bad Conduct Discharge (BCD). The findings and sentence were affirmed by Article 66 review in March 1970, and your

spouse subsequently waived his right to request restoration to active duty to continue serving. His punitive discharge was ordered executed and he was so discharged on 21 July 1970.

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 spouse's discharge and contentions that his character of discharge warrants liberal consideration for an upgrade due to his mental health condition and post-traumatic stress disorder (PTSD). You further contend that your spouse had no significant misconduct prior to his combat deployment, his drug use was for self-medication, his UA and single drug-related incident was the direct result of an untreated mental health condition due to the horrors of war, and an upgrade of his discharge is warranted on the basis of clemency and his need for veterans' benefits. For purposes of clemency and equity consideration, you address his combat service record, his mental health condition, his successful rehabilitation, the disproportionate severity of his punishment, and disparate handling of nonviolent misconduct.

Because you contend in part that PTSD or another mental health condition affected his discharge, the Board also considered the AO. The AO stated in pertinent part:

[Petitioner's spouse] was appropriately referred for psychological evaluation during his enlistment and properly evaluated on two occasions. His personality disorder diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose to the mental health clinicians, and the psychological evaluations performed. A personality disorder diagnosis is preexisting to military service by definition, and indicates lifelong characterological traits unsuitable for military service, since they are not typically amenable to treatment within the operational requirements of Naval Service. Unfortunately, [Petitioner] has provided no medical evidence to support [her] claims of another mental health concern. 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. Additional records (e.g., post-service mental health records describing the [Petitioner's spouse'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."

In response to the AO, you provided rebuttal evidence that included additional medical documentation and supplemental family member statements.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your spouse's misconduct, as evidenced by his NJPs, civil conviction, and GCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your spouse's misconduct and found that his conduct showed a complete disregard for military authority and regulations. Further, the Board noted your spouse's misconduct included a drug offense. The Board

determined that illegal drug distribution by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. Further, the Board concurred with the AO that there is insufficient evidence of a mental health condition that may be attributed to military service and insufficient evidence to attribute your spouse's misconduct to a mental health condition other than his PD. With respect to his in-service PD diagnosis, the Board noted that the UA behavior and conduct for which he was subject to military justice occurred both before and after his combat tour. This factor, in addition to his changing testimony between his Article 32 hearing and his GCM trial, appears consistent not only with his general PD diagnosis but also with the contemporaneous observation of the attending provider that he appeared manipulative but mentally competent. More significantly, although he was only convicted of one of the several drug-related allegations against him by both civil and military authorities, the offense for which he was convicted involved willful distribution of a dangerous hallucinogen, which the testimony reflects occurred within a Marine barracks aboard a military installation. Additionally, the fact that he testified under oath at both his Article 32 hearing and his GCM trial, but significantly altered the testimonial facts of his story in the course of denying the drug distribution against him, gave the Board considerable pause with respect to his candor and the plausibility of his contentions regarding his exposure to combat trauma. In making this determination, the Board noted the lack of documented participation in any named combat operation and the lack of awards which would have indicated that his service in the Republic of ██████████ caused any substantial exposure to direct combat. Furthermore, the Board considered that your spouse had a long history of anti-social behavior that commenced while he was an adolescent, prior to his entry into the Marine Corps; serious anti-social behavior that included auto theft, petty theft, and fighting. The Board reached the conclusion that his anti-social behavior remained consistent after he entered the Marine Corps and was not indicative of a mental health condition caused or aggravated by his military service. Finally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities.

As a result, the Board concluded your spouse's conduct constituted a significant departure from that expected of a service member and continues to warrant a BCD. While the Board carefully considered the evidence you submitted in mitigation and empathizes with his current medical condition, 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 spouse's 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,

7/2/2024

