



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. 9545-23
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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 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). The Board also considered the advisory opinion (AO) furnished by a qualified mental health professional and your response to the AO.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You enlisted in the Marine Corps and commenced active duty on 31 May 1968. You received waivers for pre-service civil misconduct, including unauthorized use of an automobile, breaking and entering, and harassment.

On 20 June 1968, you received non-judicial punishment (NJP) for assaulting a superior non-commissioned officer by attempting to hit him with your open hand. On 21 January 1969, you received NJP for failure to go to your appointed place of duty.

You began serving in Vietnam on 19 March 1969. On 27 January 1970, you received NJP for failure to obey a lawful order. On 28 January 1970, you returned from Vietnam.

On 1 May 1970, you were issued an administrative remarks (Page 11) counseling concerning deficiencies in your performance and/or conduct. You were advised that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative discharge.

On 13 May 1970, you commenced temporary additional duty (TAD) onboard the █
█. While onboard, you received NJP for having an unclean rifle and magazine on 23 May 1970. You returned from TAD on 15 July 1970. On 20 July 1970, you commenced a period of UA that ended in your surrender on 28 July 1970. On 3 August 1970, you received NJP for the nine-day period of UA. On 28 September 1970, you commenced a period of UA that ended in your surrender on 19 October 1970.

On 29 October 1970, you submitted a written request for an undesirable discharge in order to avoid trial by court-martial for UA from 28 September 1970 to 19 October 1970, violating a lawful written order, causing approximately \$2,134.00 of damage to military property, and reckless operation of a vehicle. Prior to submitting this 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. While you were awaiting discharge, you received NJP on two separate occasions, 5 November 1970 and 10 November 1970, for failure to sign restriction papers. Your request for discharge was granted, and your commanding officer was directed to issue you an under Other Than Honorable conditions (OTH) discharge. On 13 November 1970, you were so discharged.

Post-discharge, you applied to the Naval Discharge Review Board (NDRB) for a discharge upgrade. The NDRB denied your request for an upgrade, on 12 September 1983, based on their determination that your discharge was proper as issued.

You previously applied to this Board for an upgrade to your characterization of service where you contended that your discharge unjust because the punishment was too harsh, you did not harm anyone, and you were just a kid. The Board denied your request on 30 September 2020.

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 change your discharge characterization of service and your contentions that you were on course to receive an Honorable discharge and “didn’t have any significant issues” prior to, and during, your deployment to Vietnam, you started having severe psychological and alcohol issues upon return from Vietnam, you now realize it was undiagnosed PTSD, you enlisted and were not drafted, and you served your country honorably until after you returned from Vietnam. For purposes of clemency and

equity consideration, the Board considered your statement, the letter from the █
█ Veterans Service Agency, the petition for discharge upgrade with 23 signatures, and the post-service medical information that you provided.

As part of the Board's review process, a qualified mental health professional reviewed your contentions and the available records and issued an AO dated 29 April 2024. The AO stated in pertinent part:

Petitioner contends he incurred mental health concerns PTSD during military service, which might have mitigated his discharge characterization of service.

The Petitioner submitted VA outpatient records noting diagnosis of PTSD due to combat trauma. He was seen at least three times according to the records submitted. 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 a temporally remote post-service diagnosis of PTSD. His personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct.

The AO concluded, "it is my considered clinical opinion there is sufficient evidence of a post-service 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."

In response to the AO, your representative at the █ Veterans Service Agency provided a statement that supplied additional clarification of the circumstances of your case. After reviewing your rebuttal evidence, the AO remained unchanged.

After thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs and separation in lieu of trial by court martial, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the likely negative impact your repeated misconduct had on the good order and discipline of your command. The Board noted that you were given multiple opportunities to address your conduct issues, but you continued to commit misconduct, which ultimately led to your request for an undesirable discharge to avoid trial for your offenses. The Board also noted that the misconduct that led to your request to be discharged in lieu of trial by court-martial was substantial and, more likely than not, would have resulted in a punitive discharge and/or extensive punishment at a court-martial. Therefore, the Board determined that you already received a large measure of clemency when the convening authority agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and possible punitive discharge. Additionally, the Board concurred with the AO and determined that, while there is sufficient evidence of a post- service mental health condition that may be attributed to military service, there is insufficient evidence that your misconduct could be attributed to a mental health condition. As explained in the AO, there is no evidence that you were diagnosed with a mental

health condition while in military service, or that you exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition.

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, 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,

6/24/2024

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Executive Director

Signed by: ■