



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. 175-24
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 12 July 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; the AO considered favorable toward you.

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 U.S. Marine Corps and began a period of active duty service on 27 June 1979. Your pre-enlistment physical examination, on 20 March 1979, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 12 May 1980, you commenced a period of unauthorized absence (UA). Your UA terminated on 15 May 1980. On 21 May 1980, you received non-judicial punishment (NJP) for your 3-day UA. You did not appeal your NJP.

On 23 June 1980, you commenced another UA. On 22 July 1980, your command declared you to be a deserter. Your UA terminated after approximately fifty-six (56) days on 18 August 1980.

In September 1980, you underwent a psychiatric evaluation. One of the listed reasons for the mental health referral stated, in part: "19 year old male who states that he hates the Marine Corps and wants a discharge." The Medical Officer (MO) diagnosed you with a mixed personality disorder that existed prior to entry (EPTE) to military service, and alcohol abuse. The MO recommended your administrative separation after the resolution of your pending legal issues.

However, on 10 September 1980, you commenced another UA. On 10 October 1980, your command declared you to be a deserter and dropped you from the rolls. Your UA terminated after approximately 678 days with your surrender to military authorities in ██████████ on 20 July 1982.

Upon your return to military control, according to your medical records, you received treatment for varying issues on 30 July, 9 August, 18 August, and 20 August 1982. Your medical treatment, on 9 August 1982, was in the form of a "return to duty" physical evaluation and the examining physician found you fit for full duty. On 20 August 1982, you were given a complete physical examination along with a shoulder x-ray to assess the current condition of your shoulder. The treating physician determined that your shoulder was completely normal. No neurologic or psychiatric issues were diagnosed during any such examinations.¹

¹ In a Headquarters, Marine Corps letter, Ser IGA:cdf dated 27 August 1982, as part of a Congressional Inquiry involving you, the Assistant Inspector General of the Marine Corps noted the following:

On August 9, 1982, ██████████ was given a return to duty physical examination and was found fit for full duty. A copy of the Report of Medical History (dated 9Aug82) is enclosed. In the remarks section (block 21) of the Report, ██████████ indicates that he had a shoulder injury during recruit training. To eliminate any doubt as to the current condition of Lance Corporal ██████████ shoulder, he was given a complete physical examination on August 20, 1982 at the Naval Regional Medical Center, ██████████. The examination, which was made by an orthopedic surgeon, included a shoulder x-ray. ██████████ shoulder was diagnosed as being completely normal. A copy of the orthopedic surgeon's report (dated 20Aug82) is enclosed. The command reports that they have been unable to locate ██████████ Health Record from which he reproduced pages. When ██████████ was questioned by the command as to how he obtained the reproduced pages from his Health Record, he said he had copies made when he hand-carried his Health Record to the Naval Regional Medical

On 16 August 1982, 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. 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. As a result of this course of action, you were spared the stigma of a court-martial conviction for your multiple long-term UAs, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge.

On 20 August 1982, the Staff Judge Advocate for the Separation Authority (SA) determined your separation was legally and factually sufficient. On 23 August 1982, the SA approved your request for an OTH discharge for the good of the service in lieu of trial by court-martial. Ultimately, on 24 August 1982, you were separated from the Marine Corps in lieu of a trial by court-martial with an OTH discharge characterization and were assigned an RE-4 reentry code.

On 19 September 1983, the Naval Discharge Review Board (NDRB) denied your discharge upgrade application. The NDRB noted that there was no indication in the record or evidence to show mistreatment by your superior commissioned officers or noncommissioned officers while in the service.

On 20 August 1984, you were convicted in the U.S. District Court for the District of Colorado of: (a) extortionate collection of credit, (b) interstate travel in aid of a racketeering enterprise, and (c) conspiracy to commit interstate travel in aid of a racketeering enterprise. You were sentenced to forty-two (42) months of imprisonment but were released in November 1986. In July 1997, you were convicted for the unlawful possession of a pistol. The Court sentenced you to five (5) years of imprisonment but spent approximately twenty-seven months in prison.

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) on active duty you were hazed, belittled, and denied medical and psychological treatment by leaders in your unit, (b) your attempts to address the issues with company leadership were ignored, and out of fear for your safety, you fled your duty station without authorization, (c) you were not offered an opportunity to speak to a lawyer to address your options regarding your "good of the service" request, nor were you counseled on the ramifications of accepting a discharge, (d) under current DoD and Marine Corps policy

Center for a psychiatric evaluation approximately 4-8 September 1980. He states he has a copy of his Health Record at his permanent mailing address but is unwilling to provide the command a copy. He denies having his original Health Record.

directives, you firmly believe that the abuse would have been addressed and you would have continued your service and received an Honorable discharge, (e) you are confident that with the change in Marine Corps policies on mental health and hazing, that a review under current policy directives will demonstrate you were unfairly discharged, (f) your discharge was erroneous because you did not received a thorough physical examination prior to separation, and you should have also received more civil readjustment support, (g) you have been diagnosed with persistent depressive disorder and somatic symptom disorder, and a psychiatric expert concluded both conditions existed while you were on active duty, (h) your mental health conditions contributed to and mitigated your UAs, (i) your chain of command failed to provide you with adequate mental health treatment, (j) your punishment was disproportionate to your misconduct, (k) you present strong evidence of good character and rehabilitation, and (l) you likely would have received a more favorable outcome under today's Marine policies involving mental health, abuse, and discrimination. 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 24 June 2024. The Ph.D. stated in pertinent part:

Petitioner submitted a signed statement dated August 2023 from his former Captain corroborating hazing and abusive behavior demonstrated by the Gunnery Sergeant previously mentioned by Petitioner. He submitted a comprehensive psychiatric evaluation dated October 2023, which notes current diagnoses of PTSD, Persistent Depressive Disorder, and Somatic Symptom Disorder. There is evidence that the Petitioner was subject to various forms of maltreatment while in the Marine Corps. The first two, and shorter periods of UA are likely the result of this and resultant symptoms of depression, hopelessness and fear. Although his last period of UA was 627 days long, it does appear that the Petitioner asked Congress to intervene on his behalf due to fear of returning to his unit.

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

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, while the Board took into consideration the findings of the AO, the Board unequivocally concluded that the severity of your misconduct which totaled 737 UA days outweighed the potential mitigation offered by any 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 2.35 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 was not persuaded by your contentions that you were not offered an opportunity to speak to a lawyer to address your options regarding your “good of the service” request. The Board noted the language of your signed and witnessed OTH discharge request stated:

Prior to submitting this request, I consulted with and am entirely satisfied with the advice of my counsel who is certified in accordance with Article 27(b), Uniform Code of Military Justice, and who has witnessed this request and affixed his signature hereon [emphasis added]. I understand that my discharge from the Naval Service, effected by acceptance of this request by the discharge authority, will be a discharge under other than honorable conditions which will be issued without referral to or consideration of my case by an administrative discharge board. I understand that with a discharge under other than honorable conditions as a veteran under both federal and state legislation, I may not be eligible for any benefits earned by service under honorable conditions, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or where the character of the discharge received therefrom may have a bearing. My counsel has advised me on the nature and purpose of the Board for Correction of Naval Records and the Navy Discharge Review Board. I understand that I may petition these two administrative agencies for relief; however, I have also been advised that because I have requested a discharge for the good of the service, any petition that I may submit will, in almost every instance, preclude relief in that I initiated this good of the service discharge action to escape trial by court-martial.

The Board was also not persuaded by your contention that your punishment was disproportionate to your offenses. The Board 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.

The Board also determined your procedural arguments about medical examinations or the lack thereof prior to discharge were without merit. The Board noted you were medically examined on no less than four (4) occasions upon your return to military control in July 1982, and that you

underwent a complete physical examination on 20 August 1982 - four (4) days prior to your ultimate discharge on 24 August 1982.

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, regardless of your command climate at the time, 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 under the Uniform Code of Military Justice on no less than three separate occasions totaling approximately 737 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,

7/22/2024

