



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

██████████
Docket No. 0753-24
Ref: Signature Date

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██
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Dear Petitioner:

This is in reference to your application for correction of your husband's, herein after referred to as service member (SM), naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of SM'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 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 26 August 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 husband's 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. Although you were provided an opportunity to respond to the AO, you chose not to do so.

SM enlisted in the Navy and commenced active duty on 23 August 1971.

On 8 December 1971, he commenced a period of unauthorized absence (UA) ended by his surrender on 27 January 1972. On 31 January 1972, he was issued an administrative remarks (Page 13) counseling concerning deficiencies in his performance and/or conduct. He was advised that any further deficiencies in his performance and/or conduct may result in disciplinary action and in processing for administrative discharge.

On 24 February 1972, SM was convicted at Special Court-Martial (SPCM) of violating Article 86 of the Uniform Code of Military Justice (UCMJ) for UA between 8 December 1971 and 27 January 1972. He was sentenced to restriction for 15 days, hard labor without confinement for 30 days, forfeiture of \$50 pay per month for one month, and reduction to paygrade E1.

On 19 October 1972, SM was again convicted at SPCM of violating Article 86 of the UCMJ for UA between 21 June and 21 August 1972. He was sentenced to confinement at hard labor for three months, and forfeiture of \$100 pay per month for three months.

On 11 April 1974, SM was again charged with violating Article 86 of the UCMJ for UA from 26 to 29 January 1973, 2 February to 20 September 1973, and 10 December 1973 to 1 April 1974. The following day, he submitted a request for an Other Than Honorable (OTH) discharge in lieu of trial by court-martial.

Shortly thereafter, on 19 April 1974, SM was examined by a psychiatrist at the request of his command. He was found to be neither currently psychotic nor suffering from any other psychiatric condition which would render him unable to distinguish between right and wrong or make him incapable of adhering to right.

Ultimately, his commanding officer favorably endorsed SM's request for an OTH discharge, and he was so discharged on 25 April 1974.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in his case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire to upgrade SM's characterization of service and your contentions that SM suffered traumatic mental events incurred during combat resulting in issues such as flash backs, reliving and reacting to events, anxiety, fight or flight responses, nightmares, triggers, depression, injustice, and addiction. You contend SM needed mental health services and prevention when self-destructive behaviors such as AWOL, leading to confinement, hard labor, restriction, SPCM, & discharge, began. You further contend he was exposed to chemicals, herbicides, and pesticides (such as Agent Orange) while at sea, in combat, and possibly on board the ██████████ or in ██████████. You contend he also possibly falls under the PACT ACT. For purposes of clemency and equity consideration, the Board noted you did not provide supporting documentation describing his post-service accomplishments or advocacy letters.

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 11 July 2024. The AO noted in pertinent part:

There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service, or that he exhibited any symptoms of a mental health condition. [His wife's] statement is not sufficiently detailed to provide a nexus with his misconduct. No medical evidence was provided in support of his claim. Additional records (e.g., mental health records describing Petitioner's

diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The AO 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.”

After thorough review, the Board concluded SM’s potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that his misconduct, as evidenced by multiple periods of unauthorized absence, resulting in two court-martial convictions, outweighed these mitigating factors. In making this finding, the Board considered the likely negative impact SM’s repeated absences had on the operations and good order and discipline of his command. The Board additionally noted that he was given multiple opportunities to address his conduct issues but he continued to commit misconduct, which ultimately led to his request for an undesirable discharge to avoid a third trial for his misconduct. The Board also noted that the misconduct that led to SM’s 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 he already received a large measure of clemency when the convening authority agreed to administratively separate him in lieu of trial by court-martial; thereby sparing SM the stigma of a court-martial conviction and possible punitive discharge. The Board also concurred with the AO and determined that there is insufficient evidence of a mental health condition that may be attributed to SM’s military service, and there is insufficient evidence to attribute SM’s misconduct to a mental health condition. As the AO noted, there is no evidence he was diagnosed with a mental health condition while in military service, or that he exhibited any symptoms of a mental health condition. In fact, as noted above, SM was psychologically assessed while in service, on 19 April 1974, and found not to be suffering from any psychiatric condition. The Board also agreed that the available records are not sufficiently detailed to provide a nexus with his misconduct. Finally, regarding your concerns SM was exposed to toxins during service, the Board found no evidence of such, and further noted his record neither indicated service in combat or in Vietnam.

As a result, the Board concluded SM’s 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 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 SM’s misconduct. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Regarding your questions related to the PACT Act, they cannot be addressed by the Board and must be directed to the Department of Veteran’s Affairs. Additionally, a review of SM’s record determined he did not qualify for Survivor Benefit Plan benefits since he did not retire from the Navy or pass away while on active duty. Therefore, the Board took no action on these two issues.

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,

9/8/2024

