



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. 2242-24

Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your late husband's naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of his 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 23 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 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 was considered favorable to your case.

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.

Your late husband enlisted in the U.S. Marine Corps and began a period of active duty service on 27 April 1967. His pre-enlistment physical examination, on 12 April 1966, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 10 October 1967, your late husband commenced a period of unauthorized absence (UA). His UA terminated on 20 October 1967. On 6 November 1967, he received non-judicial punishment (NJP) his 10-day UA. He did not appeal his NJP.

Your late husband deployed to Vietnam on or about 17 November 1967. Between 18 November 1967 and 29 November 1968 he participated in approximately thirteen (13) combat operations in Vietnam. He departed from Vietnam on 1 December 1968.

On 21 January 1969, your late husband commenced another UA. His UA terminated on 22 January 1969. On 27 January 1969, he received NJP his 1-day UA. He did not appeal his NJP.

On 17 February 1969, your late husband commenced another UA. His UA terminated after on 27 February 1969. On 28 February 1969, he received NJP his 10-day UA. He did not appeal his NJP.

On 22 April 1969, your late husband commenced yet another UA when he failed to comply with order to report to Marine Corps Base, ██████████, ██████████. His command declared him to be a deserter. His UA finally terminated with his arrest by the FBI on or about 6 June 1973.

On 12 July 1973, your late husband submitted a voluntary written request for an undesirable administrative discharge for the good of the service to avoid trial by court-martial for his 1,506-day UA. Prior to submitting this voluntary discharge request, he conferred with a qualified military lawyer, at which time he was advised of his rights and warned of the probable adverse consequences of accepting such a discharge. He acknowledged that if his request was approved, his characterization of service will be under Other Than Honorable conditions (OTH) without referral or consideration by an administrative separation board. He acknowledged and understood that with an OTH discharge you would be deprived of virtually all veterans benefits based on his current period of service under both federal and state legislation, and that he 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, he was spared the stigma of a court-martial conviction for his long-term UA, as well as the potential sentence of confinement and the negative ramifications of receiving an almost certain punitive discharge from a military judge.

In the interim, on 17 July 1973, the Staff Judge Advocate for the Separation Authority (SA) determined his separation was legally and factually sufficient. On 18 July 1973, the SA approved your late husband's request for an OTH discharge for the good of the service in lieu of trial by court-martial. His separation physical examination, on 25 July 1973, noted no psychiatric or neurologic issues, symptoms, or conditions. Ultimately, on 27 July 1973, he was 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.

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) his discharge was based on an undiagnosed mental health condition/PTSD, (b) PTSD was not a known issue for Vietnam veterans returning home and there was no diagnosis of it, (c) he offered to complete his enlistment in any capacity stateside other than returning to Vietnam, (d) you believe your late husband's rationale for going UA was due to PTSD and fear of returning to Vietnam, and (e) exemplary post-service conduct. 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 26 July 2024. The Ph.D. stated in pertinent part:

The Petitioner submitted four character references in support of [service member's] claim. In his personal statement, he noted that he had "confirmed kills" from his first tour to Vietnam. Although he did not elaborate on any symptoms that would have suggested PTSD, his spouse indicated that she believes his rationale for going UA was due to PTSD and fear of returning to Vietnam. Although no medical evidence was submitted in support of his claim, it is plausible that he did suffer from PTSD symptoms following having participated in 13 separate combat operations while in Vietnam.

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 late husband's record of service, and your contentions about any traumatic or stressful events he experienced and their possible adverse impact on his service. However, notwithstanding the AO, the Board concluded that there was no convincing evidence of any nexus between any mental health conditions and/or related symptoms and his serious 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 his discharge. As a result, the Board concluded that your late husband's long-term UA was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that his misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of his misconduct, involving a 1,506-day UA, more than outweighed the potential mitigation offered by any mental health conditions. The Board determined the record reflected that his misconduct was intentional and willful and demonstrated he was unfit for further service. The Board also concluded that the evidence of record did not demonstrate that your late husband was not mentally responsible for his conduct or that he should not be held accountable for his actions.

The Board did not believe that your late husband's record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of his conduct and/or performance greatly outweighed any positive aspects of his 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. Your late husband left the Marine Corps while he was still contractually obligated to serve and went into a UA status without any legal justification or excuse on no less than four (4) separate occasions, and that his discharge was based on a UA totaling 1,506 days.

As a result, the Board determined that there was no impropriety or inequity in your late husband's discharge and concluded that his misconduct and disregard for good order in discipline clearly merited his 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 late husband'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 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,

9/4/2024

