



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

██████████
Docket No. 4259-24
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 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 18 October 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.

You enlisted in the Marine Corps and began a period of active duty on 20 August 1991. You reported a pre-service history of traffic citation for failure to reduce speed. On 25 September 1991, you were involved in a motor vehicle crash which you caused by operating or controlling your vehicle in a grossly negligent manner and which resulted in the premature death of a child. You were counselled, on 17 December 1992, that you were not recommended for promotion due to pending disciplinary concerns. On 13 January 1993, you accepted nonjudicial punishment (NJP) for a violation of the Uniform Code of Military Justice (UCMJ) under Articles 92 and 123 for, respectively, consuming alcohol under the legal age of 21 and for altering a military identification card with the intent to defraud the appearance of your age. You then had a second NJP, on 8 February 1993, for a violation of Article 92 of the UCMJ due to underage

consumption of alcohol in violation of a Marine Corps order. You were also issued administrative counseling advising you to correct your underage consumption of alcohol and notifying you of the potential for administrative separation.

In April 1993, you were indicted by a state grand jury for charges related in your previous motor vehicle accident, for vehicular manslaughter, reckless driving, speeding, and driving at a speed greater than was reasonable or prudent. As a result, a bench warrant was issued for your arrest. In June 1993, a Medical Evaluation Board reviewed your fitness for duty in light of injuries you suffered from your motor vehicle accident and advised that you were not considered medically fit for duty. During this period, the civilian charges against you remained in a status of pending legal action and you were advised routinely over the course of December 1993 and March 1994 that you were not recommended for promotion due to pending civil action.

On 13 May 1994, you were found guilty on all counts for the civil offenses against you. You were sentenced, on 2 August 1994, to a total of six years of confinement, of which three years were suspended in lieu of supervised probation. You remained in the hands of civil authorities due to incarceration and, subsequently, you were notified of processing for administrative separation by reason of commission of a serious offense and civilian conviction. Although your immediate supervisors recommended that you either be retained or, if separated, separated with an Honorable or General (Under Honorable Conditions) discharge, you were recommended for separation under Other Than Honorable (OTH) conditions. You elected to waive your right to a hearing before an administrative separation board and your separation under OTH conditions was approved on 1 June 1995 for the primary reason of misconduct due to your civilian conviction. You were so discharged 15 June 1995.

You previously applied to the Naval Discharge Review Board (NDRB) requesting review of your discharge but submitted no specific contentions for consideration. Your request was considered on 14 April 2004 and denied.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie, Kurta, and Hagel Memos. These included, but were not limited to, your desire to upgrade your discharge and change your narrative reason and reenry code. You contend that the policies of liberal consideration of post-traumatic stress disorder (PTSD), other mental health concerns, and traumatic brain injury (TBI) apply to evaluating whether your discharge warrants an upgraded characterization. Specifically, you reference the injuries you received due to your motor vehicle accident, which resulted in a head injury (post-concussive syndrome), PTSD, and depression and ultimately led to your alcohol abuse and alcohol-related misconduct. You also submit for consideration that your traffic offense was neither premeditated nor an act of malice and that you have no criminal convictions since your discharge nearly 30 years ago. You further argue that multiple factors as identified for potential consideration in accordance with the Wilke Memo are relevant to consideration of an upgrade of your discharge on the basis of clemency, that the collateral consequences of your discharge are unduly harsh in light of your service-connected disabilities, and, that you could have been medically retired at any point prior to your conviction rather than having waited for completion of the legal proceedings. For purposes of clemency and equity consideration, the Board noted you provided your counsel's brief, your personal statement, documentation of your service-connected disabilities from the Department of Veterans Affairs, a criminal record check from the Federal Bureau of Investigation, ten character

letters, a baptism certificate, a 25-year membership union card, medical records, and medical articles related to your contended mental health and TBI conditions.

Because you contend, in primary part, that PTSD, another mental health condition, and/or TBI affected the circumstances of the misconduct which resulted in your discharge, the Board also considered the AO. The AO stated in pertinent part:

During military service, the Petitioner was diagnosed with PTSD attributed to the MVA. There is also evidence of residual symptoms of head injury consistent with TBI related to the MVA. Temporally remote to his military service, the VA has granted service connection for treatment purposes for PTSD. It is plausible that his alcohol related misconduct could be attributed to self-medication for symptoms of PTSD following the MVA. Unfortunately, available records do not establish a nexus with the misconduct that resulted in his separation from service, as the MVA that precipitated his mental health concerns also contributed to the circumstances of his discharge.

The AO concluded, “it is my clinical opinion there is evidence of diagnoses of PTSD and TBI that may be attributed to military service. There is insufficient evidence to attribute the misconduct resulting in separation from service to PTSD or TBI.”

After reviewing your rebuttal evidence, the AO remained unchanged.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs and civil conviction, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the likely discrediting effect your conviction had on the Marine Corps. With respect to the findings and recommendations of your Medical Evaluation Board, the Board noted that disciplinary and conduct concerns take precedence over such proceedings. Although more recent policy changes now permit both proceedings to progress concurrently, disposition of misconduct matters continues to take precedence over medical separation or retirement in all but the most exceptional of circumstances, which the Board did not find applicable to your case. Therefore, the Board found that particular contention unpersuasive and concluded that no error or injustice occurred in regard to your medical conditions.

Additionally, the Board concurred with the clinical opinion of the AO that, although there is evidence of diagnoses of PTSD and TBI that may be attributed to your military service, there is insufficient evidence to attribute the misconduct which resulted in your separation from service to either PTSD or TBI. The Board observed that you were separated for the primary basis of your civilian conviction for vehicular manslaughter and reckless driving, which clearly occurred prior to you incurring either the TBI or PTSD which resulted from that incident. Therefore, notwithstanding your argument in rebuttal to the AO regarding the gap in time following the accident or your ensuing medical conditions, the Board concluded that neither of those conditions could reasonably have contributed to the accident or misconduct, which precipitated them and formed the basis for your OTH discharge. Rather, the gap in time between the accident and your discharge appears to have occurred as a result of your chain of command waiting for final disposition of the civilian charges prior to determining the appropriate action to take in

response to your underlying misconduct. Given that your misconduct resulted in death, the Board concluded, contrary to your contention that your discharge was unduly harsh, that the consequences you may have experienced due to your discharge are commensurate with consequences your misconduct caused to the friends and family of the deceased child.

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 and commends you for your post-discharge good character, 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 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,

11/12/2024

