



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. 4648-24

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 11 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 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 an advisory opinion (AO) furnished by qualified mental health provider. Although you were provided an opportunity to respond to the AO, you chose not to do so.

You enlisted in the U.S. Marine Corps and began a period of active duty service on 15 July 1991. Your enlistment physical examination, on 9 November 1990, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 9 February 1993, your command issued you a "Page 11" retention warning (Page 11) documenting your lack of initiative, dependability, and honesty, your failure to maintain the high standards of USMC uniform and grooming standards, and your lack of motivation and poor

attitude. The Page 11 advised you that a failure to take corrective action may result in administrative separation or limitation of further service. You elected not to submit a Page 11 rebuttal statement.

On 20 June 1994, your command issued you a Page 11 documenting your unauthorized wearing of military attire in the civilian community. The Page 11 advised you that a failure to take corrective action may result in administrative separation or judicial proceedings. You elected not to submit a Page 11 rebuttal statement.

On 22 November 1994, contrary to your not guilty pleas, you were convicted at a Special Court-Martial (SPCM) for: (a) resisting apprehension/arrest, and (b) larceny of property in aggregate value in excess of \$100 of another Marine (automobile stereo components). You were sentenced to confinement for five (5) months, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD).

On 13 January 1995, your separation physical examination and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On the same day, the Convening Authority (CA) approved the SPCM sentence as adjudged. On 21 March 1995, your command placed you on involuntary appellate leave to await your discharge.

On 13 May 1996, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the SPCM findings sentence as approved by the CA. On 24 September 1997, the U.S. Court of Appeals for the Armed Forces affirmed the NMCCA decision. Upon the completion of SPCM appellate review in your case, on 8 January 1998, you were discharged from the Marine Corps with a BCD and were assigned a 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) you were not diagnosed with bipolar depression until years after your time of service, (b) bipolar disorder is a mental health condition that causes extreme mood swings that include emotional highs (mania or hypomania) and lows (depression) that can lead to reckless/extremely self-destructive behavior which you exhibited at the time, (c) your therapist concluded it is more than likely you went undiagnosed until 2010, (d) once you began therapy and taking medication to regulate your brain chemistry, your behavior and life began to change, (e) you applied to have your records expunged with the state of ██████████ and made full restitution, and your application was granted in 2018, and (f) since getting therapy you have had no issues and have remained a productive citizen in good standing. For purposes of clemency and equity consideration, the Board considered the totality of the evidence you provided in support of your application.

A licensed clinical psychologist (Ph.D.) reviewed your contentions and the available records and issued an AO dated 21 August 2024. As part of the Board's review, the Board considered the AO. The AO stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation.

Temporally remote to his service, he has received treatment for mental health concerns. Some post-service records indicate his mental health symptoms may have onset during military service. Unfortunately, available records are not sufficiently detailed to provide a nexus with his misconduct. The Petitioner consistently stated that his flight from the scene was to avoid apprehension, rather than due to grandiose views of his ability to elude authorities or another symptom that could be consistent with a mental health condition.

The Ph.D. concluded, “it is my clinical opinion there is post-service evidence from a civilian provider of a mental health condition that may have been experienced during military service. There is insufficient evidence to attribute his misconduct 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, the Board concluded that there was no convincing evidence of any nexus between any mental health conditions and/or related symptoms and your misconduct and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the serious misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such 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 determined 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.

Additionally, the Board determined that your 2016 ██████████ Order of Expunction (NCOE) was not persuasive. Your SPCM conviction under the Uniform Code of Military Justice was a federal conviction and not impacted by the NCOE.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this was not a case warranting any clemency as you were properly convicted at a SPCM of serious misconduct. The Board determined that characterization with a BCD appropriate when the basis for discharge is the commission of an act or acts constituting a significant departure from the conduct expected of a Marine.

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,

10/29/2024

