



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. 6155-24
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 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 18 November 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, 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)/mental health condition (MHC) (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, dated 25 September 2024, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the Marine Corps and began a period of active duty on 10 July 1972. Upon your enlistment, you admitted a pre-service arrest for petty larceny. On 7 February 1973, you received nonjudicial punishment (NJP) for assault. On 13 March 1973, you were accused by another Marine of same sex sexual assault involving forced sodomy. On 18 May 1973, you were convicted by special court martial (SPCM) for a period of unauthorized absence (UA) from appointed place of duty and two instances of disobedience of a lawful order, and sentenced to forfeiture of pay. On 29 May 1973, you were evaluated by a medical officer as a result of sexual deviation due to previous accusations of sodomy. During the evaluation, you admitted being charged of theft on three occasions. Subsequently, the medical officer noted there were no psychiatric illnesses and recommended that you return back to duty.

On 13 June 1973, you received a second NJP for disrespect towards a commissioned officer. On 26 July 1973, you received a third NJP for UA from appointed place of duty, two instances of disobedience of a lawful order, and disrespectful in language towards an NCO. On 23 August 1973, an Administrative Discharge Board (ADB) was convened to consider the accusation of homosexual acts. The ADB voted (3) to (0) that there was not preponderance evidence to prove that you engaged in homosexual acts. Subsequently, your commanding general approved the ABD recommendation to retain you in the Marine Corps. On 27 December 1973, you received a fourth NJP for disrespect towards a superior commissioned officer, willful disobedience of a lawful order, and failure to obey a lawful order. On 4 January 1974, you received a fifth NJP for willful disobedience of a lawful order. On 7 January 1974, you were counseled concerning deficiencies in personal conduct and performance of duty. You were advised that failure to take corrective action could result in administrative separation.

On 22 February 1974, you were convicted by civil authorities for possession of marijuana. Consequently, you were notified of the initiation of administrative separation proceedings by reason of misconduct due to frequent involvement; at which point, you requested a hearing by an ADB. On 11 April 1974, the ADB voted (3) to (0) that you were unfit for military service. Consequently, the ADB recommended that you were administrative separated from the Marine Corps with an OTH discharge characterization by reason of unfitness due to frequent involvement. After your administrative separation proceedings were determined to be sufficient in law and fact, the separation authority approved the recommendation and, on 6 June 1974, you were so discharged.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) you began to experience depression issues during your first assignment, (b) your behavior got worse as you began oversleeping, not showing up to assignments, and basically acting out, (c) you got sent to the brig instead of being counseled and finding out the reason for your actions, (d) your actions while on active duty show that you were suffering from some mental health issues, (e) you are in need of a discharge reevaluation so that you may be at least get some type of Department of Veterans Affairs benefits. For purposes of clemency and equity consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board's review, the Board considered the AO. The AO stated in pertinent part:

Petitioner was appropriately referred for psychological evaluation during his enlistment and properly evaluated. The absence of formal mental health diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed by the mental health clinician. He has provided no medical evidence to support his claims. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his separation from service) may aid in rendering an alternate opinion.

The AO concluded, “it is my clinical opinion that there is insufficient evidence of a diagnosis of a mental health condition that may be attributed to 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. Specifically, the Board determined that your misconduct, as evidenced by your NJPs, SPCM, and civil conviction, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included drug related offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. The Board noted that marijuana use is still against Department of Defense regulations and not permitted for recreational use while serving in the military. Further, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Your conduct not only showed a pattern of misconduct but was sufficiently serious to negatively affect the good order and discipline of your command. Additionally, the Board concurred with the AO that there is insufficient evidence that your misconduct could be attributed to a mental health condition. As explained in the AO, you provided no medical evidence in support of your claim. Therefore, the Board 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. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans’ benefits or enhancing educational or employment opportunities.

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. 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. 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 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,

12/10/2024

