



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

[REDACTED]
Docket No: 8734-20
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD ICO [REDACTED],
[REDACTED] USN

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) PERS OOJ letter of 6 April 2021
(3) Senior Medical Advisor CORB letter 5220 CORB: 002 of 19 November 2021

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected to allow him to be evaluated by a medical board and be placed on the disability retirement list, receive back pay and allowances from his date of discharge, eliminate his debt to the government related to his advanced educational assistance, and destroy all military documents in his record not consistent with the relief requested.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 20 January 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of naval records, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner initially entered the Navy Reserve in April 1987 and served out his obligated service as a Hospital Corpsman until May 2002. In June 2002, he was commissioned as a Medical Corps Officer and enrolled in Uniformed Services University of the Health Sciences School of Medicine (USUHS). However, Petitioner is arrested by civilian authorities in April 2007 for attempted coercion and enticement of a minor and travel with intent to engage in illicit sexual conduct. He is convicted by a U.S. District Court in September 2007, placed into confinement, and disenrolled from USUHS. On 31 July 2008, while in confinement, Petitioner is notified of show cause proceedings. Through his counsel, he requests to be present at his Board of Inquiry (BOI) but the BOI proceed over his objects and recommends his discharge from the Navy with an Other than Honorable characterization of service. Subsequently, the

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Defense Finance and Accounting Service (DFAS) is notified that Petitioner owes recoupment of advanced educational debt in the amount of approximately \$30,463.16. DFAS asserts they notified Petitioner of his debt in February 2012.

c. After Petitioner's conviction is affirmed by the U.S. Court of Appeals for the [REDACTED] [REDACTED] in March 2013, Petitioner files suits in the U.S. Court of Federal Claims (Court) requesting back pay and separation pay. The Court concludes it lacks jurisdiction to award Petitioner the relief requested but finds that his discharge from the Navy was improper based on the denial of his request to be present at his BOI. Petitioner is released from confinement in 2018 and receives a disability rating of 70% from the Department of Veterans Affairs for Major Depressive Disorder in 2019. Petitioner's mental health provider submitted a letter dated 13 October 2020 that confirms his diagnosis of Depression/Anxiety and states he suffers from total social and occupational impairment. In 2020, Petitioner asserts his tax refund was seized by the Internal Revenue Service resulting in his initial notification that he owed a debt to the government as a result of his Navy service.

d. In correspondence attached at enclosure (2), the office having cognizance over Petitioner's request for back pay, elimination of his debt, and destruction of records determined that the evidence does not support relief. The opinion concluded that Petitioner failed to overcome the presumption of regularity associated with the BOI and his administrative separation. In correspondence attached at enclosure (3), the office having cognizance over Petitioner's request for placement on the disability retirement list determined the evidence does not support relief relying primarily on the fact Petitioner's Major Depressive Disorder diagnosis was not made over a decade after his misconduct that led to his discharge from the Navy. Both advisory opinions were previously provided to Petitioner for his comment.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting partial relief. Specifically, the Board determined that the preponderance of the evidence supports changing Petitioner's narrative reason for separation to Secretarial Authority to address the error identified by the U.S. Court of Federal Claims in their 2014 decision. The Board agreed with the court's rationale in making their determination.

Despite their finding that Petitioner's BOI proceedings were flawed resulting in his questionable discharge from the Navy, the Board concluded Petitioner's other requested relief was not supported by the preponderance of the evidence.

First, Petitioner's request for placement on the disability retirement list after a medical board review was not supported by the preponderance of the evidence. In making this finding, the Board substantially concurred with enclosure (3). Specifically, the Board found that Petitioner failed to show that he met any of the criteria for a finding of unfitness at the time of his release from active duty. While the evidence shows that Petitioner was treated early in his Navy career for mental health symptoms and diagnosed with Major Depressive Disorder and Anxiety upon his release from confinement, the Board found no evidence that these conditions created any occupational impairment during his active duty service. In particular, the Board noted Petitioner

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performed extraordinarily well as a Hospital Corpsman resulting in his acceptance into medical school and commissioning as a Medical Corps Officer. Petitioner's medical school transcripts showed he performed well academically. Based on these facts, the Board found that Petitioner was able to perform the duties of his office, grade, rank or rating despite the existence of any disability conditions that may have existed at the time. Therefore, in the Board's opinion, he did not qualify for referral to a medical board or placement on the disability retirement list. Further, the Board noted Petitioner was processed for administrative separation for misconduct that qualified for an Other than Honorable characterization of service. This led the Board to conclude, even if his symptoms were sufficiently impairing to qualify for a medical board referral, he was not eligible for disability processing since disability regulations at the time directed misconduct processing to supersede disability processing.

Second, the Board concluded the preponderance of the evidence does not support payment of back pay. In reaching this conclusion, the Board agreed with the Court of Federal Claims decision that Petitioner was not eligible for military pay as a result of his incarceration by civilian authorities. The Board relied on 37 U.S.C. § 503(a) in concluding that he was ineligible for any military pay since he was incarcerated and eventually released from active duty while still incarcerated.

Third, the Board concluded the preponderance of the evidence does not support eliminating Petitioner's debt to the government. The Board found no basis to remove Petitioner's debt to the government since his arguments revolve around notice from DFAS. Therefore, the Board concluded the basis for Petitioner's debt remains valid based on a presumption of regularity and evidence he received advanced educational assistance through his attendance at USUHS and failed to fulfill his active duty obligation as a result of his civilian conviction and confinement. Whether DFAS failed to properly notify Petitioner of his debt is a question the Board determined is outside the jurisdiction of this Board since it does not involve a military record under the control of the Department of the Navy.

Fourth, the Board determined the preponderance of the evidence does not support the destruction of any military records contained in Petitioner's Navy record. Despite evidence that Petitioner may have erroneously discharged Petitioner based on a flawed BOI, the Board found no basis to destroy records of Petitioner's misconduct, the BOI proceedings, or his discharge from the Navy. The Board found these records accurately document Petitioner's record of service in the Navy despite his assertions of error. As previously discussed, the Board felt the changing of his narrative reason for separation to Secretarial Authority appropriately addresses the error resulting from his BOI. Similar to the Court of Federal Claims case, the Board felt the requested relief by Petitioner was not consistent with the relief warranted in the case. The Board considered reinstating Petitioner to active duty for the purposes of reconvening the BOI but this relief was not requested by the Petitioner and, more likely than not, will result in the same result for Petitioner due to the seriousness of his misconduct that resulted in a civilian conviction that is now final. Based on this finding, they determined it was in Petitioner's favor to change his narrative reason for separation rather than order him into active service for another BOI. However, if Petitioner should feel otherwise, he may always request reconsideration of this Board's decision. Therefore, the Board found no additional error or injustice meriting further change to his record other than the recommended change to his narrative reason for separation.

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RECOMMENDATION

In view of the above, the Board directs the following corrective action. Petitioner's naval record be corrected by changing his narrative reason for separation to Secretarial Authority. Petitioner will be issued a DD Form 214 consistent with this change.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

1/22/2022

[REDACTED]

Deputy Director

[REDACTED]