



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

██████████
Docket No: 2838-21
3956-20
7497-09
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER ██████████, XXX-XX-██████████, USMC

Ref: (a) 10 U.S.C. § 1552
(b) SECDEF memo, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD," of 3 September 2014
(c) PDUSD memo, "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or TBI," of 24 February 2016
(d) PDUSD memo, "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment," of 25 August 2017
(e) USECDEF Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," of 25 July 2018

Encl: (1) DD Form 149 with attachments

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 reflect a general (under honorable conditions) characterization of service for his third enlistment.

2. The Board, consisting of ██████████, ██████████, and ██████████, reviewed Petitioner's allegations of error and injustice on 12 November 2021 and pursuant to its regulations determined the corrective action indicated below should be taken. Documentary material considered by the Board consisted of Petitioner's application together with all material submitted in support thereof, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies, to include the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or

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clemency determinations (Wilkie Memo). Additionally, the Board considered the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to Petitioner; all of the documents submitted by Petitioner in rebuttal; and the subsequent AOs.

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 enlisted and entered a period of active duty in the Marine Corps on 28 December 1976. He reenlisted two times, serving for a total of three enlistments. He served honorably during his first two enlistments. On 31 August 1984 Petitioner began his final period of active duty. On 17 April 1985 Petitioner received nonjudicial punishment (NJP) for wrongful and knowing use of marijuana as evidenced by a urinalysis in violation of Article 112a, Uniform Code of Military Justice (UCMJ). Petitioner was evaluated after testing positive for marijuana use and diagnosed with Passive-Aggressive and Anti-social Personality Disorders. Petitioner completed Level III substance abuse rehabilitation at a Naval Drug Rehabilitation Center on 19 July 1985 and successfully completed one year of an aftercare program. On 22 March 1988 Petitioner was convicted by Summary Court Martial (SCM) of wrongful use of marijuana in violation of Article 112a, UCMJ. On 7 April 1988 Petitioner submitted a statement indicating he did not use any illegal drugs and questioned the integrity of the testing process. On 19 July 1988 an administrative discharge board (ADB) convened. Petitioner testified sworn and took responsibility for drinking and smoking marijuana. He submitted nine character references on his behalf, eight from officers, and one from his brother who served in the Army. The ADB members substantiated that the misconduct had occurred and recommended Petitioner be separated with an other than honorable (OTH) characterization of service. On 1 August 1988 the separation authority directed that Petitioner be separated with an OTH characterization of service. Additionally, the separation authority directed that Petitioner's command notify him in writing of the name, address, and phone number of the nearest Department of Veterans Affairs (VA) medical facility, with alcohol and drug treatment capabilities, to his place of residence. Petitioner was discharged on 15 August 1988 with an OTH characterization of service.

c. Petitioner contends his command, the Naval Discharge Review Board, and this Board erred by considering the misconduct that occurred during his first two enlistments when denying his request to upgrade his characterization of service for his third enlistment. He further contends that his unit erred by not providing him with a physical and mental examination prior to discharge and for failing to provide him with VA treatment facility information in writing as directed by the Commanding General. He states he has incurred multiple TBIs due to an assault, motorcycle accident, motor vehicle accident, and martial arts training that occurred while in-service and it is unjust for him not to receive Veterans disability compensation due to his final characterization of service. He states he has had three careers he has left due to mental health issues and cannot work due to the injuries he sustained while on active duty. He contends his meritorious service during his career and third enlistment outweigh the discharge.

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d. In support of his application, Petitioner provided several hundred pages of Department of VA clinical records. The records indicated diagnoses in pertinent part of Personal History of TBI with loss of consciousness, Adjustment Disorder with Mixed Disturbance of Emotions/Conduct; Cannabis and Tobacco Use Disorders, and Depressive Disorder, not otherwise specified. Petitioner also noted in a personal statement that he graduated from college and also helped successfully raise four daughters and get them through college.

e. As part of the Board's review, a qualified mental health provider reviewed Petitioner's assertions and available records and provided an AO dated 12 September 2021. The initial AO concluded that the preponderance of objective evidence failed to establish Petitioner suffered from a TBI or other unfitting mental health conditions at the time of his military service, or his in-service misconduct could be attributed to TBI or other unfitting mental health conditions. Petitioner submitted several hundred pages of VA medical records and statements in rebuttal which were reviewed by the mental health provider. The subsequent AOs concluded that although Petitioner provided new and material information for review, the material did not provide any clinical evidence to indicate occupational impairment, or that Petitioner's in-service misconduct of drug abuse occurred as a result of a mental health disorder, or was mitigated by TBI or a mental health disorder.

f. Petitioner was previously denied relief by the Board on 28 July 2010 and 20 November 2020.

CONCLUSION:

The Board reviewed Petitioner's application under the guidance provided in references (b) through (e). Upon review and consideration of all the evidence of record, the Board concludes Petitioner's request warrants relief and that as a grant of clemency, his characterization of service should be corrected to reflect general (under honorable conditions).

The Board applied liberal consideration in accordance with the references. In particular, the Board noted Petitioner's contention that the injustice is that he incurred multiple injuries while in-service and received an OTH characterization of service during his final enlistment due to two instances of misconduct. Petitioner further states that his final characterization of service precluded him from receiving VA benefits. In its deliberations, the Board found that the AO was appropriately requested due to the nature of the TBI and mental health conditions involved in this case; however determined that the issue of finding a "nexus" between Petitioner's in-service conditions and misconduct was irrelevant because Petitioner did not assert that he used marijuana as a self-medicating strategy. Furthermore, the Board determined that assessing the misconduct in Petitioner's first two enlistments was not in error because as noted in the Staff Judge Advocate review of Petitioner's SCM, consideration of that information was properly considered for the purpose of considering the issue of retention, and not used to determine the final characterization of service. Nor did the Board find that the ADB decision was unjust as Petitioner tested positive twice for wrongful marijuana use in the same enlistment, both times at the rank of Sergeant.

In its deliberations, the Board also considered the totality of the circumstances to determine

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whether relief is warranted in the interests of justice in accordance with reference (e). In this regard, the Board considered, among other factors, Petitioner's candor; Petitioner's assertion that he has sought and received mental health treatment from the VA to rehabilitate himself; volunteered to serve in the Marines at the age of 17; the nonviolent nature of the misconduct; the passage of time of over 33 years since Petitioner's discharge; and post-service accomplishments.

RECOMMENDATION:

In view of the above, the Board directs the following corrective action:

That Petitioner be issued a new DD Form 214 reflecting his service for the period 31 August 1984 through 15 August 1988 was characterized as "Under Honorable Conditions."

That no further corrective action should be taken.

That a copy of this report of proceedings be filed in Petitioner's naval record.

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.

12/1/2021

[REDACTED]

Executive Director

[REDACTED]