



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

[REDACTED]
Docket No: 4447-21

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED], USMC, XXX-XX-[REDACTED]

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 Post Traumatic Stress Disorder," of 3 September 2014 (Hagel Memo)
(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) USD 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 (Kurta Memo)
(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 (Wilkie Memo)

Encl: (1) DD Form 149 with attachments
(2) Case summary

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 upgrade his characterization of service and to make other conforming changes to his DD Form 214.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 22 October 2021, and, pursuant to its regulations, determined that 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 clemency

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determinations (Wilkie Memo). Additionally, the Board also considered an advisory opinion (AO) furnished by a qualified mental health provider.

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. Although enclosure (1) was not filed in a timely manner, it is in the interests of justice to review the application on its merits.

c. The Petitioner enlisted in the Marine Corps and began a period of active service on 22 October 2001. Petitioner's pre-enlistment physical on 30 March 2001 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

d. On 27 January 2004 Petitioner was issued a "Page 11" counseling warning (Page 11) documenting an unauthorized absence (UA) from his appointed place of duty lasting over eleven hours. The Page 11 warned Petitioner that a failure to take corrective action may result in administrative separation or limitation on further service. Petitioner did not make a rebuttal statement to the Page 11. On 12 March 2004 Petitioner was issued another Page 11 documenting a pattern of misconduct after failing to obey orders on three separate occasions. The Page 11 warned Petitioner that a failure to take corrective action may result in administrative separation or limitation on further service. Petitioner did not make a Page 11 rebuttal statement.

e. On 17 March 2004 Petitioner received non-judicial punishment (NJP) for UA lasting seven days. Petitioner did not appeal his NJP. On 14 June 2004 Petitioner commenced a period of UA that terminated after 443 days on 31 August 2005 with his arrest by civilian authorities in [REDACTED].

f. On 19 October 2005 Petitioner was convicted at a Special Court-Martial (SPCM) of his long-term UA. Petitioner was sentenced to confinement for seventy days, a reduction in rank to the lowest enlisted paygrade (E-1), forfeitures of pay, and a discharge from the Marine Corps with a bad conduct discharge (BCD). Following the completion of SPCM post-trial appellate review, on 20 September 2006 Petitioner was discharged from the Marine Corps with a BCD and assigned an RE-04 reenlistment code.

g. At the time of Petitioner's separation from the Marine Corps, his overall active duty trait average was 3.20 in conduct as assigned on his periodic evaluations. Marine Corps regulations in place at the time of his discharge required a minimum trait average of 4.0 in conduct/military behavior to be eligible and considered for a fully honorable characterization of service.

h. On 13 March 2014, Petitioner petitioned the Naval Discharge Review Board (NDRB) for a discharge upgrade. Petitioner contended, in part, that PTSD mitigated his misconduct. As a result of Petitioner's claim of a mental health condition, the NDRB included a member who was

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a physician, clinical psychologist, or psychiatrist. Following a personal hearing, on 8 May 2014 the NDRB denied relief and determined that the characterization of service was proper as issued. After a complete review of the Petitioner's service records, post-service medical records, and statements from the Petitioner and his family, the NDRB concluded PTSD did not mitigate his misconduct and clemency was not warranted.

i. On 25 February 2020 NDRB reversed its earlier 2014 decision and granted an upgrade to an other than honorable characterization of service (OTH), but did not change either the narrative reason for separation, SPD code, or reentry code. The NDRB determined that Petitioner's post-service documentation provided by him, supported the Petitioner's contention that his PTSD was a mitigating factor associated with the in-service misconduct. Moreover, the NDRB determined that the unique circumstances of this individual case, coupled with the documented PTSD diagnosis and the Petitioner's service in combat, warranted additional consideration in the determination of overall characterization of service. Accordingly, the NDRB found that the awarded characterization of service was inequitable and concluded that relief in the form of an upgrade in the characterization of service to OTH is warranted.

j. However, on 23 October 2020 the Director, Secretary of the Navy Council of Review Boards in his role as the designated Secretarial Review Authority (SRA), disagreed with the NDRB decision and found Petitioner's characterization of service proper and equitable. The SRA determined that given the seriousness of Petitioner's misconduct, the SRA did not find the Petitioner's mental health issues alone mitigated his actions, particularly because there was no evidence he sought help from either mental health providers or his chain-of-command prior to his UA. The SRA determined that the BCD received by the Petitioner was comparable to that received by others convicted of similar offenses and that clemency was not warranted. The SRA then set aside the NDRB decision and determined that the discharge characterization shall remain a BCD.

k. In short, Petitioner contends that he was suffering from PTSD due to his combat deployment to Iraq in support of Operation Iraqi Freedom (OIF). The Petitioner outlines multiple harrowing combat-related experiences during OIF and describes how his mental health challenges continued post-service. The Petitioner argues that the Board must view his mental health condition as a mitigating factor to the misconduct underlying his discharge and upgrade his characterization of service.

l. As part of the review process, the BCNR Physician Advisor, who is a licensed clinical psychologist (Ph.D.), reviewed Petitioner's contentions and the available records and issued an AO on 13 October 2021. The Ph.D. initially observed that Petitioner submitted VA treatment progress notes addressing PTSD due to combat trauma, and diagnoses of depressive disorder, generalized anxiety disorder, PTSD, binge eating disorder, alcoholism, history of cocaine abuse, and moderately severe major depression. The Ph.D. observed that Petitioner's active duty records do not contain evidence of a mental health diagnosis, but noted that Petitioner submitted extensive post-service civilian treatment records with a PTSD diagnosis from combat. The Ph.D. also noted that Petitioner's active duty misconduct occurred after his combat service, and thus determined his behavior was consistent with PTSD irritability and avoidance symptoms. The

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Ph.D. concluded by opining that there was evidence Petitioner incurred PTSD on active duty and that there was evidence that Petitioner's misconduct could be attributed to PTSD symptoms.

CONCLUSION:

Upon review and liberal consideration of all the evidence of record and in light of the favorable AO, the Board concluded that Petitioner's request warrants partial relief. Additionally, the Board reviewed his application under the guidance provided in the Hagel, Kurta, and Wilkie Memos.

In keeping with the letter and spirit of the Hagel, Kurta, and Wilkie Memos, the Board felt that Petitioner's PTSD mitigated the misconduct used to characterize his original BCD. The Board concluded that the Petitioner's PTSD-related conditions and/or symptoms as possible causative factors in the misconduct underlying his discharge and characterization were not outweighed by the severity of Petitioner's post-deployment misconduct. With that being determined, the Board concluded that no useful purpose is served by continuing to characterize the Petitioner's service as having been under BCD conditions especially given his exemplary combat service, and that a discharge upgrade to "General (Under Honorable Conditions) (GEN)" is appropriate at this time.

Notwithstanding the recommended corrective action below, the Board was not willing to grant a full upgrade to an honorable discharge. The Board did not believe that the Petitioner's record was otherwise so meritorious to deserve an honorable discharge. The Board concluded that significant negative aspects of the Petitioner's conduct and/or performance greatly outweighed the positive aspects of his military record even under the liberal consideration standard for mental health conditions. The Board believed that, even though flawless service is not required for an honorable discharge, in this case a GEN discharge and no higher was appropriate. The Board also concluded that the evidence of record did not demonstrate that Petitioner was not mentally responsible for his conduct or that he should not be held accountable for his actions.

The Board also observed Petitioner's overall active duty trait average in conduct (proper military behavior) during his enlistment did not meet the Marine Corps' required minimum trait average in that category for a fully honorable characterization of service. Lastly, in light of the Wilkie Memo, and while not necessarily excusing or endorsing the Petitioner's UA, the Board still similarly concluded after reviewing the record holistically, and given the totality of the circumstances and purely as a matter of clemency, that the Petitioner merits a discharge upgrade to GEN and no higher.

The Board did not find a material error or injustice with the Petitioner's reentry code. The Board concluded the Petitioner was assigned the correct reentry code based on the totality of his circumstances, and that it was all proper and in compliance with Department of the Navy directives and policy at the time of his discharge.

RECOMMENDATION:

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

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That Petitioner's character of service be changed to "General (Under Honorable Conditions)," the narrative reason for separation should be changed to "Secretarial Authority," the separation authority be changed to "MARCORSEPMAN par. 6214," and the separation code be changed to "JFF1."

Petitioner shall be issued a new DD Form 214, Certificate of Release or Discharge from Active Duty.

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 Regulations, 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.

10/27/2021

[REDACTED]

Executive Director

Signed by: [REDACTED]