



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: 4946-21

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER █ USN, XXX-XX-█
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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 █, █, and █, reviewed Petitioner's allegations of error and injustice on 12 November 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

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clemency determinations (Wilkie Memo). Additionally, the Board also considered an advisory opinion (AO) furnished by 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 Navy and began a period of active service on 24 January 2008. Petitioner's pre-enlistment medical examination on 28 December 2007 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

d. On 28 October 2008 Petitioner received non-judicial punishment (NJP) for failing to obey a lawful order or regulation (underage drinking). The Petitioner did not appeal his NJP.

e. During the summer of 2011, Petitioner was notified he was being processed for an administrative discharge by reason of misconduct due to drug abuse. Petitioner was charged with taking one of his prescribed pain killers outside of the parameters of his prescription. Petitioner's command specifically alleged that his one prescriptions was too old and he should not have been taking those medications.

f. Unfortunately, some of the administrative separation (Adsep) documents are not in the Petitioner's electronic service record. Based on the information contained on the DD Form 214, the Board determined that Petitioner's command initiated Adsep proceedings by reason of misconduct due to drug abuse, and misconduct due to the commission of a serious offense. On 18 August 2011 an Adsep board convened to hear Petitioner's case. At the conclusion of the presentation of evidence and witness testimony, the Adsep board members determined Petitioner committed the misconduct as charged and voted to separate him with an other than honorable conditions (OTH) discharge characterization. Ultimately, on 30 November 2011 Petitioner was discharged from the Navy with an OTH discharge and assigned an RE-4 reentry code. The Board specifically noted on his DD Form 214 that the narrative reason for separation was "Misconduct (Drug Abuse)."

g. Upon his discharge, Petitioner's overall conduct trait average assigned on his periodic performance evaluations during his enlistment was 3.167. Navy regulations in place at the time of his discharge required a minimum trait average of 2.5 in conduct (proper military behavior) for a fully honorable characterization of service.

h. In short, Petitioner contended that there was no magic date at which a prescription is invalid unless the prescription so states, and that a valid prescription for a controlled substance provides the legal justification and authorization to use the prescribed medication for its intended

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purpose to treat a valid medical condition. The Petitioner also contended he completed approximately 223 convoys in Afghanistan in an active war zone causing him to suffer from service-connected injuries. The Petitioner submitted evidence that the VA granted him a service-connection for both PTSD and traumatic brain injury (TBI) with an assigned disability rating of 70%. The Petitioner argued that the Board must view his mental health conditions as a mitigating factor and upgrade his characterization of service.

i. As part of the review process, the BCNR Physician Advisor who is also a medical doctor (MD) and a Fellow of the American Psychiatric Association, reviewed Petitioner's mental health contentions and the available records and issued an AO dated 26 October 2021. The MD noted that although Petitioner did not provide a description of traumatic events or symptoms/behaviors indicative of PTSD/TBI, Petitioner's in-service and post-discharge documents cite behavioral changes suggestive of PTSD. The MD noted that Petitioner's contention of PTSD/TBI was further supported by the VA's post-discharge determination of service-connected disability due to PTSD with TBI. The MD also noted that Petitioner's in-service alcohol-related misconduct could be attributed to symptoms associated with PTSD/TBI including substance abuse, a frequent maladaptive coping mechanism for psychological distress. The MD concluded by opining that there was indirect evidence to support Petitioner's contention of PTSD (with TBI as a secondary related condition) incurred during his military service, and that Petitioner's in-service misconduct could be attributed to his PTSD/TBI experiences.

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 relief. Additionally, the Board reviewed his application under the guidance provided in the Hagel, Kurta, and Wilkie Memos. Specifically, the Board considered whether his application was the type that was intended to be covered by these policies.

In keeping with the letter and spirit of the Hagel, Kurta, and Wilkie Memos, the Board felt that Petitioner's diagnosed PTSD and other mental health concerns mitigated the misconduct used to characterize his discharge. The Board concluded that the Petitioner's PTSD-related conditions and/or symptoms as possible causative factors in the misconduct contributing to his discharge and characterization were not outweighed by the severity of Petitioner's misconduct. The Board also noted that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. The Petitioner's overall active duty trait average was 3.167 in conduct at the time of his discharge. The Board noted that the Petitioner's conduct trait average exceeded Navy requirements for a fully honorable characterization of service. Moreover, the Board questioned the legal and factual sufficiency of adverse action for using medication lawfully prescribed to Petitioner and concluded that Petitioner was justified in using his prescription medication in the absence of an expiration date or other evidence suggesting unlawful use. The Board also noted Petitioner's meritorious service in Afghanistan as well as his Good Conduct Medal, and the Board concluded that for purposes of this particular case flawless service is not required to receive an honorable characterization of service. With that being determined, the Board Majority concluded that no

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useful purpose is served by continuing to characterize the Petitioner's service as having been under OTH conditions, and that a discharge upgrade to "honorable" is appropriate at this time. Additionally, in light of the Wilkie Memo, the Board Majority still similarly concluded after reviewing the record holistically, and given the totality of the circumstances and as a matter of clemency, that the Petitioner merits an honorable characterization of service and the appropriate conforming changes to his DD Form 214.

RECOMMENDATION:

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

That Petitioner's character of service be changed to "Honorable," the narrative reason for separation should be changed to "Secretarial Authority," the separation authority be changed to "MILPERSMAN 1910-164," the separation code be changed to "JFF," and the reentry code be changed to "RE-1."

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

That Petitioner be issued a new Honorable Discharge Certificate.

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.

12/1/2021

[REDACTED]

Executive Director

Signed by: [REDACTED]