



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

█  
Docket No: 5986-21  
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552  
(b) USD memo of 25 Jul 18, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations"

Encl: (1) DD Form 149 (NR20210005986)

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, filed enclosure (1) with this Board requesting an upgrade to his other than honorable discharge. Enclosure (1) and references (a) through (b) apply.

2. The Board consisting of █, █, and █ reviewed Petitioner's allegations of error and injustice on 15 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 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo).

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 interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner enlisted in the Navy and began a period of active duty on 11 February 1997. Petitioner service continuously until his immediate reenlistment on 28 October 2000.

d. On 19 May 2005, Petitioner entered into a Pre-Trial Agreement in which he agreed to enter a plea of guilty to violations of Article 92, Article 108, Article 121, and Article 134 (two

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specifications). Paragraph 21 of the Pre-Trial Agreement stated that Petitioner agreed to waive any administrative discharge board based on any act or omission reflected in the charges and specifications that were the subject of the Pre-Trial Agreement.

e. On 25 July 2005, Petitioner pleaded guilty and was found guilty at Special Court Martial of violating Article 92, Article 108, and Article 121 of the Uniform Code of Military Justice. The two specifications of Article 134 were withdrawn. The Court sentenced Petitioner to confinement for 30 days and reduction in rank to E-4.

f. On 29 July 2005, Petitioner was notified of administrative separation proceedings being initiated against him on the basis of Commission of a Serious Offense with the least favorable characterization of service of an other than honorable discharge. On 8 August 2005, Petitioner's defense counsel submitted a Clemency Recommendation and noted that at trial Petitioner waived his right to an administrative separation board in exchange for protection from a bad conduct discharge. As the Court did not sentence Petitioner to a bad conduct discharge, Petitioner did not benefit from the protection. Defense counsel requested that Petitioner be discharged with a general vice other than honorable discharge.

g. In August 2005, Petitioner waived his right to appear before an administrative separation board. On 9 September 2005, Petitioner was discharged from the Navy on the basis of Commission of a Serious Offense, and received an other than honorable discharge and a re-entry (RE) code of RE-4.

h. Commander, Naval Medical Center, [REDACTED] recommended in a 15 September 2005 letter to the Commander, Chief of Navy Personnel (CNPC) that Petitioner be discharged with an other than honorable characterization of service, citing the 25 July 2005 Special Court Martial.

i. The Naval Discharge Review Board (NDRB) reviewed Petitioner's request for an upgrade and a change to narrative reason for separation. On 19 February 2013, NDRB notified Petitioner that it found Petitioner's discharge proper as issued and determined that no change was warranted.

j. In his application to the Board, Petitioner requests an upgrade to his other than honorable discharge to reflect a general or an honorable characterization of service, and a change to his narrative reason for separation to reflect Secretarial Authority. Petitioner asserts legal error that he asserts requires either an upgrade or a set aside of the court martial findings. Petitioner contends that NDRB's analysis was both legally and factually incorrect, asserts that he has suffered the injustices of bearing an other than honorable discharge since 2005, and cites DODI 1332.14. Petitioner asserts that an other than honorable discharge can only be awarded if administrative separation board procedures are used, regarding of whether the board was held, when a member requests an other than honorable in lieu of trial by court martial. Petitioner states he did not request an other than honorable discharge in lieu of trial by court martial, as he was tried and convicted. Furthermore, Petitioner states that the Pre-Trial Agreement had a provision that allowed a punitive discharge to be approved as adjudged, and if adjudged it would be suspended for 12 months and either vacated or remitted at 12 months. Additionally, Petitioner notes that his sentence did not impose a punitive discharge. Petitioner claims that as

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nothing in his Official Military Personnel File shows that the Secretary of the Navy approved the other than honorable discharge, the discharge was erroneous under DODI 1332.14. Petitioner also stated that NDRB based its decision on a factual inaccuracy, specifically that “defense counsel and prosecutor made the deal for this discharge.”

## CONCLUSION

The Board reviewed Petitioner’s request in accordance with references (a)-(b) and carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in his case in accordance with the Wilkie Memo.

The Board first considered Petitioner’s contention that NDRB relied on an inaccuracy, specifically that defense counsel and prosecutor made a deal for the other than honorable discharge. The Board noted that the Pre Trial Agreement does not specifically contemplate defense counsel and trial counsel making a deal for Petitioner to be subjected to administrative discharge proceedings and receiving an other than honorable characterization of service. However, the Board considered that Paragraph 21 of the Pre Trial Agreement notes that Petitioner agreed to waive any administrative discharge board that was based on any act or omission reflected in the charges and specifications that were the subject of the Pre Trial Agreement. The Board found that NRDB’s phrasing was inartful and erroneously cited the prosecutor as a party to a “deal.” However, the Board found that Petitioner agreed in the Pre-Trial Agreement to waive his right to an administrative discharge board should administrative separation proceedings be initiated against him resultant from the acts or omissions reflected in the charges and specifications; Petitioner, his defense counsel and the convening authority, Commander, Naval Medical Center, [REDACTED], signed the Pre Trial Agreement.

The Board noted that Petitioner accurately points out that he did not request an other than honorable discharge in lieu of court martial. However, the Board found that Petitioner waived his right to an administrative separation board as part of his Pre Trial Agreement for which he agreed to plead guilty four charges of violating the Uniform Code of Military Justice in exchange for certain protections outlined in Part II of the Memorandum of the Pre Trial Agreement. The Board considered the 29 July 2005 notice in which Petitioner was notified of administrative discharge proceedings initiated against him on the basis of Misconduct, with a least favorable characterization of service of other than honorable, and noted that Petitioner waived his right to request an Administrative Board. The Board concluded that properly afforded notified of his rights and consistent with the terms of the Pre Trial Agreement which he signed with the benefit of defense counsel, Petitioner elected to waive his right to appear before an administrative separation board. The Board concluded that Petitioner’s administrative discharge proceedings were properly initiated against him. The Board noted that an other than honorable discharge is an unfavorable administrative discharge characterization, and that it is unlike a punitive discharge such as a bad conduct discharge or a dishonorable discharge, which can only be awarded pursuant to court martial proceedings.

The Board considered Petitioner’s contention that he was administratively discharged in violation of DODI 1332.14’s guidance that when the sole basis for separation is a serious offense that resulted in a conviction by a court martial that did not impose a punitive discharge, the

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members service may not be characterized Under Other Than Honorable Conditions unless such characterization is approved by the Secretary concerned. The Board noted that Commander, Navy Medical Center, [REDACTED] forwarded his recommendation for Petitioner's administrative discharge under other than honorable conditions to CNPC in [REDACTED], [REDACTED]. The Board considered Petitioner's contention that his Official Military Personnel File does not contain documentation of the Secretary of the Navy's approval of his administrative discharge. However, the Board considered that Petitioner's chain of command forwarded its recommendation to CNPC after Petitioner waived his right to appear before an administrative separation board, and that the discharge was effectuated with Petitioner's Certificate of Release or Discharge from Active Duty (DD Form 214). Applying the presumption of regularity, the Board determined that Petitioner's discharge was approved by an appropriate review authority in accordance with DODI 1332.14.

The Board found that Petitioner's misconduct as documented by the guilty findings at Special Court Martial meet the definition of Commission of a Serious Offense pursuant to MILPERSMAN 1910-142. The Board noted that MILPERSMAN 1910-142 defines Commission of a Serious Offense as an offense that would warrant a punitive discharge, but does not require adjudication by nonjudicial or judicial proceedings. The Board found that the preponderance of evidence (to include Petitioner's guilty pleas) substantiates the serious offense such that Petitioner's administrative discharge proceedings were properly based on Misconduct-Commission of a Serious Offense.

The Board took into consideration mitigating factors as articulated in the Wilkie memo to include Petitioner's length of service in the Navy, his achievement of the rank of E-5, and the length of time since his discharge. However, the Board found that Petitioner's conviction of violating Article 92, Article 108, and Article 121 before the 25 July 2005 Special Court Martial supported the other than honorable administrative discharge on the basis of Commission of a Serious Military or Civilian Offense.

The Board noted that on 28 October 2000, Petitioner signed an immediate reenlistment contract. In consideration of his honorable service from the start of active duty on 11 February 1997 through the date of his immediate reenlistment on 28 October 2000, the Board found that Petitioner is entitled to a reference to his continuous honorable service from 11 February 1997 through 28 October 2000 on his DD 214.

In view of the above, the Board directs the following partial corrective action.

**RECOMMENDATION:**

That Petitioner's Certificate of Release or Discharge from Active Duty (DD Form 214) be corrected to show "Continuous Honorable Service" from 11 February 1997 through 28 October 2000. That no further corrective action be taken.

That Petitioner be issued a new DD Form 214.

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

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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.

11/8/2021

[REDACTED]

Executive Director

[REDACTED]