



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

█
Docket No: 798-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER █, USN,
█ [PRESENTLY █]

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 her naval record be corrected to upgrade her characterization of service and to make other conforming changes to her DD Form 214.

2. The Board, consisting of █, █, and █, reviewed Petitioner's allegations of error and injustice on 1 April 2022, 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 determinations (Wilkie Memo). Additionally, the Board also considered an advisory opinion

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(AO) furnished by a qualified mental health provider. Although Petitioner was afforded an opportunity to submit an AO rebuttal, and she did not do so.

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 originally enlisted in the Navy and began a period of active service on 10 September 1997. Petitioner's pre-enlistment physical examination on 22 March 1997 and self-reported medical history both noted no psychiatric or neurologic issues, conditions, or symptoms. On 19 July 2001, Petitioner reenlisted for a period of six (6) years.

d. On 15 January 2003, an Abbreviated Limited Duty Medical Board (LIMDU Board) at Naval Medical Center [REDACTED] noted Petitioner's chronic pelvic pain and endometriosis. The LIMDU Board placed Petitioner on period of LIMDU for six months and recommended a re-evaluation to occur prior to the expiration date.

e. On 18 June 2003, a Medical Board (Med Board) diagnosed Petitioner with both: (i) chronic pelvic pain, existing prior to entry (EPTE) – not service aggravated, and (ii) interstitial cystitis, EPTE – not service aggravated. The Med Board found Petitioner not fit for full duty, but fit for LIMDU. The Med Board placed Petitioner on another six-month LIMDU period and opined that Petitioner should be fit for a return to full duty at such time.

f. On 2 September 2003, the Navy Drug Laboratory (Drug Lab) in Jacksonville, Florida informed Petitioner's command she tested positive for cocaine at a level of 131 ng/mL. The urine samples tested were received by the Drug Lab on 28 August 2003. On 8 October 2003, the Drug Lab drafted a summary report (Summary Report) concerning Petitioner's tested urine sample. The Summary Report noted the test results indicated Petitioner's urine specimen contained the cocaine metabolite equal to or greater than the immunoassay standard of 150 ng/mL for both immunoassay screening tests, and the "GC-MS" test confirmed the cocaine metabolite at a level of 131 ng/mL, above the Department of Defense cut-off standard of 100 ng/mL.

g. On 17 October 2003, the Petitioner received non-judicial punishment (NJP) for the wrongful use of cocaine. As punishment, she was awarded a reduction in rank to E-4 and forfeitures of pay. Petitioner did not appeal her NJP.

h. Following the NJP, on 17 October 2003, Petitioner's command initiated administrative separation proceedings by reason of misconduct due to drug abuse. Petitioner elected her rights to consult with counsel and to request an administrative separation board (Adsep Board).

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i. On 26 November 2003, an Adsep Board convened to hear Petitioner's case. At the Adsep Board, Petitioner was represented by civilian legal counsel, who was also a retired Navy Captain. Petitioner testified under oath on her own behalf. During her testimony, Petitioner: (i) denied using cocaine in this instance, (ii) denied ever previously using cocaine, (iii) objected to the drug test results, and (iv) stated she had no idea why her urine test came back positive. A Drug Lab expert (Expert) also testified. The Expert stated that the prescription drugs Petitioner was taking at the time would not cause a positive test for cocaine, individually or collectively. The Expert also testified that the only substance that would cause a positive drug test result for cocaine would be cocaine itself, and further opined that the detection window for cocaine after normal use is three to four days.

j. Following the presentation of evidence and witness testimony in the case, the Adsep Board members unanimously determined the Petitioner committed the misconduct as charged and unanimously recommended her separation from the Navy with an other than honorable (OTH) characterization of service. On 6 January 2004, the Separation Authority approved and directed an OTH characterization of service for misconduct due to drug abuse with an RE-4 reentry code. Ultimately, on 9 February 2004, Petitioner was discharged from the Navy for misconduct with an OTH characterization of service and assigned an RE-4 reentry code.

k. As part of the review process, the BCNR Physician Advisor, who is a licensed clinical psychologist (Ph.D.), reviewed Petitioner's original contentions and the available records and issued an advisory opinion (AO) on 14 February 2022.

l. The Ph.D. initially observed that Petitioner's active duty records contained evidence of her medical conditions, but not contain evidence of a mental health diagnosis. The Ph.D. noted that no concerns noted warranting referral to mental health resources. The Ph.D. also noted that Petitioner provided some post-service medical evidence she may have incurred depression during military service, possibly as a result of medication interactions. However, the Ph.D. determined that Petitioner's personal statement and medical records were not sufficiently detailed to establish a nexus with her misconduct, given that cocaine use would tend to increase depression symptoms following its use and Petitioner denied cocaine use on active duty. The Ph.D. concluded by opining that although there is some evidence Petitioner may have incurred an unfitting mental health condition (depression) on active duty, there was insufficient evidence Petitioner's misconduct could be attributed to an unfitting mental health condition.

CONCLUSION:

Upon review and liberal consideration of all the evidence of record, the Board concluded that Petitioner's request does not warrant relief.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to: (a) admitting that her failed urine test was a result of self-

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medication and chronic physical and mental pain arising on active duty was, in Petitioner's mind, degrading her self-worth and perceived strength as a Navy sailor, (b) the Petitioner was untruthful during her Adsep Board testimony when she stated she denied using cocaine, (c) Petitioner's denial was due to her embarrassment and mental anguish, something Petitioner deeply regrets, (d) it was only after her physical conditions began causing her such pain leading to depression that Petitioner's behavior changed and led her to abuse cocaine in the hope of alleviating such pain, (e) Petitioner made a one-time mistake while off-duty to use cocaine to self-medicate to hopefully alleviate per physical pain and mental status, (f) the sheer number of medications Petitioner was prescribed, coupled with the incessant physical pain and depression directly influenced her poor decision to use cocaine to self-medicate, (g) Petitioner takes full responsibility for both her actions and her dishonesty during the Adsep Board, (h) Petitioner's constant anguish from physical injuries, coupled with severe over-medication of strong prescription drugs directly caused her mental depression, (i) other than this incident, Petitioner's record was impeccable, (j) Petitioner has had difficulty obtaining employment providing consistent health care coverage due to the stigma associated with an OTH discharge, and (k) in light of current policy guidance and her impressive and decorated service record, Petitioner's discharge should be upgraded. However, given the totality of the circumstances, the Board determined that the request does not merit relief with the exception of making minor administrative changes to Petitioner's DD Form 214.

In accordance with the Hagel, Kurta, and Wilkie Memos, the Board gave liberal and special consideration to Petitioner's record of service, and her contentions about any traumatic or stressful events she experienced and their possible adverse impact on her service. However, even under the liberal consideration standard, the Board concluded that there was no nexus whatsoever between any mental health conditions and/or related symptoms and Petitioner's misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of Petitioner's discharge. As a result, the Board concluded that Petitioner's misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that Petitioner's misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of her drug-related misconduct and her false official statements made in denying her misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that Petitioner's misconduct was willful and intentional and demonstrated she was unfit for further service. The Board also determined that the evidence of record did not demonstrate that Petitioner was not mentally responsible for her conduct or that she should not be held accountable for her actions.

The Board took issue with the Petitioner's morphing narrative surrounding her Adsep Board testimony. The Board determined that her Adsep Board testimony was indeed untruthful when she categorically denied using cocaine and had no explanation why her urine sample tested positive. The Board, contrary to Petitioner's Adsep Board testimony, instead determined that she lied at her Adsep Board because she knowingly, willfully, and wrongfully used cocaine, and the Board unequivocally concluded that her drug use was unrelated to any mental health concerns. The Board further concluded that any such suggestion or argument that mental health issues or

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symptoms played a part in Petitioners' purported "self-medication" with cocaine lacked credibility and, therefore, was without merit.

The Board noted the Petitioner's additional contention that had her sample been tested under today's testing procedures her sample would have tested negative. The Board determined that this argument was fundamentally flawed. The testing cutoff levels under the 2020 Department of Defense guidance provided by Petitioner for cocaine are exactly the same as they were at the time of Petitioner's urinalysis.¹

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. The Board did not believe that Petitioner's record was otherwise so meritorious as to deserve a discharge upgrade. The Board determined that illegal drug use by a Sailor is contrary to Navy core values, renders such Sailors unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. The Board noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. The Board determined that characterization under OTH conditions is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating certain VA benefits to include medical care, or enhancing educational or employment opportunities. Accordingly, the Board determined that there was no impropriety or inequity in Petitioner's discharge, and even under the liberal consideration standard for mental health conditions, the Board concluded that Petitioner's drug-related misconduct clearly merited her receipt of an OTH. In making this finding, the Board also took into consideration that Petitioner lied during her administrative separation board. The Board also carefully considered any matters submitted regarding Petitioner's post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that given the totality of the circumstances Petitioner's request does not merit relief.

Notwithstanding the discharge upgrade denial, the Board did note, however, that the NJP forming the basis of Petitioner's OTH discharge technically occurred during her second enlistment. Thus, the Board concluded that an administrative change to Petitioner's DD Form 214 should be made to reflect that her first enlistment was completed without any adverse

¹ Per the DoD Instruction 1010.16 (Testing Procedures for the Military Personnel Drug Abuse Testing Program) of 15 June 2020 cited by Petitioner, the initial screening test cutoff concentrations for cocaine metabolites are currently 150 ng/mL, and the confirmatory test cutoff concentrations are 100 ng/mL. Such cutoff levels were precisely the same in 2003 when Petitioner's urine sample was tested. Moreover, the Drug Lab's Summary Report dated 8 October 2003 noted that Petitioner's urine specimen contained the cocaine metabolite equal to or greater than the immunoassay standard of 150 ng/mL for both immunoassay screening tests, and the "GC-MS" test confirmed the cocaine metabolite at a level of 131 ng/mL, above the Department of Defense cut-off standard of 100 ng/mL.

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disciplinary action. The Board was aware that the Department of the Navy no longer issues a separate DD Form 214 to enlisted personnel at the completion of each individual enlistment, and instead makes appropriate notations in the Block 18 Remarks section upon their final discharge or retirement from the armed forces reflecting such previous enlistments.

The Board also determined that Petitioner's DD Form 214 reflects her incorrect designator and additional administrative changes are necessary. The Board noted that the designator in block 4a on the DD Form 214 is currently reflected as "(CBW)" when technically it should state "(SCW)."

RECOMMENDATION:

In view of the foregoing, the Board finds the existence of a material error warranting the following corrective action.

That Petitioner be issued a "Correction to DD Form 214, Certificate of Release or Discharge from Active Duty" (DD Form 215) for the period ending 09 February 2004, to reflect the following comment added to the Block 18 Remarks section:

"CONTINUOUS HONORABLE SERVICE FROM 10SEP1997 TO 18JUL2001."

That Petitioner's DD Form 215 for the period ending 09 February 2004, further indicate the following:

Block 4a: "ET2 (SCW)"

Following the corrections to the DD-214 for the period ending 09 February 2004, that all other information currently listed on such DD-214 remain the same.

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.

4/6/2022

