



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

[REDACTED]
Docket No: 2163-22
Ref: Signature Date

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

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

Ref: (a) Title 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) USD memo, "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or Traumatic Brain Injury (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
(e) USD 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 w/attachments
(2) Advisory opinion (AO) by medical professional dated 9 May 2022
(3) Petitioner's response to AO received 10 June 2022

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 change by providing him a medical disability retirement and upgrade his discharge characterization to honorable.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 28 July 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of naval records, and applicable statutes, regulations and policies, and references (b) through (e). The Board also considered enclosure (2), an advisory opinion (AO) from a medical professional, as well enclosure (3), Petitioner's response to the AO.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

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a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. Although Petitioner did not file his application in a timely manner, the statute of limitation was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo).

b. Petitioner entered active duty with the Marine Corps on 13 November 2006. On 7 February 2008, Petitioner received nonjudicial punishment for disrespect, assault, and making racist comments. On 15 April 2018, Petitioner received nonjudicial punishment for missing restriction, disobeying an order to make restriction on three occasions, making a false official statement, wrongfully inhaling compressed air, and threatening his roommate. On 13 June 2008, Petitioner received a Page 11 warning concerning disrespect and violations of the Uniform Code of Military Justice. On 18 December 2008, the Petitioner was convicted by a special court-martial for disobeying an order by going to [REDACTED] without a special request chit, and two instances of wrongfully importing steroids. As part of his sentence at this special court-martial, the Petitioner was awarded a Bad Conduct Discharge (BCD). On 13 October 2009, the Petitioner was discharged with a BCD.

c. A review of the Petitioner's service and medical records reveals that, during his service, he had several medical contacts, which are set forth in more detail in the AO. Notably, in an undated medical record, during his enlistment, a provider found that the Petitioner was unsuitable for military service due to a personality disorder, but it noted that his legal matters superseded this finding.

d. In his petition, Petitioner contends that while he was in the Marine Corps, he was subject to constant verbal and physical harassment by fellow Marines that he was constantly on the defensive. He stated that a doctor diagnosed him with depression and a personality disorder. He further stated that he was attacked one evening while he slept, and that when evaluated after discharge, he was diagnosed with post-traumatic stress disorder (PTSD). He points to his assault as the triggering event. Finally, he contends he was railroaded by the Marine Corps when he was court martialed in 2008.

e. In order to assist it in evaluating the Petitioner's contentions, the Board obtained enclosure (2). The AO was considered partially favorable to Petitioner. The AO discussed the Petitioner's mental health status while he was on active duty, and concluded that the Petitioner's mental health condition can be attributed to his military service and some of his misconduct and behavior can be attributed to his mental health condition. In his response to the AO, Petitioner submitted enclosure (3). In it, he argued that his misconduct, in total, should be mitigated by his mental health condition, and, because the Petitioner's mental health condition began during his service, he should be entitled to a medical retirement.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting partial relief. Specifically, the Board determined that the interests of justice supports changing Petitioner's discharge characterization from bad conduct discharge to General

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(Under Honorable Conditions) purely as a matter of clemency. In reaching this conclusion, the Board reviewed the guidance set forth in references (b) through (e) and based its decision primarily in view of the factors set forth in the reference (e) Wilkie Memo as well as the insight provided by the AO and Petitioner's response to the AO. As a result of its review of the foregoing factors and the evidence of record, the Board acknowledged the Petitioner struggled with various mental health factors such as major depression during his service such that, under the facts of this petition, were sufficient to warrant a level of mitigation sufficient to support clemency in the form of an upgraded characterization of service.

Notwithstanding the recommended corrective action below, the Board was not willing to grant an upgrade to an Honorable discharge. The Board determined that an Honorable discharge was appropriate only if the Marine's service was otherwise so meritorious that any other characterization of service would be clearly inappropriate. The Board concluded by opining that certain negative aspects of the Petitioner's conduct and/or performance outweighed the positive aspects of his military record even under the liberal consideration standards for mental health conditions, and that a General (Under Honorable Conditions) discharge characterization and no higher was appropriate. Similarly, the Board concluded his narrative reason for separation, separation authority, separation code, and reentry code should all remain unchanged based on his record of misconduct. The Board ultimately concluded that sufficient clemency was granted to Petitioner through the recommended relief.

Further, the Board concluded the preponderance of the evidence does not support providing him a disability/medical retirement. Specifically, the Board found no evidence of unfitness based on any qualifying disabling condition during the Petitioner's period of active service. The Board observed the Petitioner's actual reason for separation was a result of his misconduct that resulted in his bad conduct discharge awarded as punishment by his special court-martial. Therefore, the Board concluded he was ineligible for disability processing based on his misconduct based discharge and any existing injustice in Petitioner's case is adequately addressed through the recommended relief.

RECOMMENDATION

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

In view of the above, the Board directs the following corrective action: Petitioner be issued a new Certificate of Release or Discharge from Active Duty (DD Form 214) reflecting that his characterization of service at the time of his discharge was General (Under Honorable Conditions).

That no further changes be made to Petitioner's record.

A copy of this report of proceedings shall 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

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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.

8/19/2022

[REDACTED]

Executive Director

Signed by: [REDACTED]