



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

[REDACTED]
Docket No: 3187-22

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[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], reviewed Petitioner's allegations of error and injustice on 2 September 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

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

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, the statute of limitation was waived in accordance with the Kurta Memo.

c. The Petitioner originally enlisted in the Marine Corps and began a period of active service on 2 August 2000. Petitioner's pre-enlistment physical, on 24 September 1999, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

d. On 24 May 2002, Petitioner received non-judicial punishment (NJP) for unauthorized absence and failing to obey a lawful order by drinking underage. Petitioner did not appeal his NJP. On 19 July 2002, Petitioner's command issued him a "Page 11" warning (Page 11) documenting his NJP. The Page 11 expressly advised Petitioner that a failure to take corrective action may result in administrative separation. Petitioner did not submit a Page 11 rebuttal statement.

e. On 22 March 2005, pursuant to his guilty pleas, Petitioner was convicted at a Special Court-Martial (SPCM) of conspiracy to commit larceny and the sale of military property, dereliction of duty, the wrongful sale/disposition of military property, and larceny of military equipment. Petitioner was sentenced to confinement for ninety 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 appellate review, on 5 June 2006, Petitioner was discharged from the Navy with a BCD and assigned an RE-4 reenlistment code.

f. In short, Petitioner contended that due to blunt force trauma to the head resulting in a traumatic brain injury (TBI) and epilepsy, his cognitive skills and reasoning were compromised resulting in poor judgment. The Petitioner argued that his declining cognitive capabilities impaired his judgment and led to the misconduct underlying his BCD. The Petitioner argued that the Board must view his TBI and epilepsy as a mitigating factor to the misconduct underlying his discharge and upgrade his characterization of service.

g. 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 5 July 2022. The Ph.D. stated in pertinent part:

Petitioner provided evidence of in-service diagnoses of Major Depressive Disorder, and anxiety symptoms related to situational stress, as well as blunt head trauma. However, medical records contemporary to the time of his head trauma

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XXX XX [REDACTED] USMC

consistently documented no loss of consciousness, altered sensorium, or memory deficits. Subsequently, his in-service health record did not contain any entries indicating presentations or treatment for residual symptoms of TBI. His documented psychological symptoms were consistent with his in-service diagnoses of depression and situational anxiety. He further provided documentation of post-service diagnoses of TBI, PTSD, Bipolar Disorder, and Seizure Disorder. Unfortunately, Petitioner did not provide clarifying information about the trauma related to his PTSD or information about his MHC (i.e., when the trauma occurred, MHC diagnosis and accompanying symptoms). Petitioner was represented by counsel at his Special Court-Martial and there is no indication there was concern for Petitioner's competency (i.e., ability to aide in his defense). Although a head injury can contribute to poor impulse control and executive dysfunction, there is no indication Petitioner exhibited these symptoms. For example, the misconduct leading to his Special Court Martial occurred over a time frame of approximately a year and a half and included necessary planning to carry it out.

The Ph.D. concluded, "[b]ased on the available evidence, it is my considered clinical opinion, there is insufficient evidence of PTSD or another MHC that can be attributed to military service, or that his in-service misconduct could be attributed to PTSD or another MHC. There is sufficient evidence of a post-service diagnosis of TBI; however, there is insufficient evidence the circumstances surrounding his separation could be attributed to TBI.

h. In response to the AO, Petitioner provided a rebuttal from his caregiver and advocate that reiterated the position that his TBI was a determinate factor in his misconduct and separation from the Marine Corps.

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) Petitioner's cognitive skills and reasoning were compromised resulting in poor judgment, (b) Petitioner's declining cognitive capabilities and disability impair his judgment and day-to-day functioning, and (c) prior to Petitioner's TBI his job performance excelled and all detrimental behavior occurred after the TBI. However, given the totality of the circumstances, the Board determined that the request does not merit relief with the exception of making a minor administrative change to Petitioner's DD Form 214.

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In accordance with the Hagel, Kurta, and Wilkie Memos, the Board gave liberal and special consideration to Petitioner's record of service, and his contentions about any traumatic or stressful events he experienced and their possible adverse impact on his service. However, even under the liberal consideration standard, the Board concluded that there was no nexus between any mental health conditions and/or related symptoms and Petitioner's SPCM 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 BCD. As a result, the Board concluded that Petitioner's SPCM misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that Petitioner's SPCM misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of his 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 he was unfit for further service. The Board also determined 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.

Further, 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. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, 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 serious misconduct clearly merited his receipt of a BCD.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite Petitioner's contentions this is not a case warranting any clemency. The Board carefully considered any matters submitted regarding Petitioner's character, post-service conduct, and personal/professional 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 that Petitioner's DD Form 214 listed the incorrect person as Petitioner's father and nearest relative. The Board noted that Petitioner's service record contained his birth certificate listing both his birth father and mother. Accordingly, the Board noted that a purely administrative change was necessary to reflect Petitioner's actual father and his nearest relative in Block 19b.

RECOMMENDATION:

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

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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 05 June 2006, to indicate the following changes:

Block 19b: [REDACTED] (Father), Same as blk 7b."

Following the correction to the DD-214 for the period ending 05 June 2006, 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.

9/9/2022

[REDACTED]
Executive Director
[REDACTED]