



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

██████████
Docket No. 4058-22

Ref: Signature Date

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER ██████████
██████████

Ref: (a) 10 U.S.C. § 1552
(b) SECDEF Memo of 3 Sep 14 (Hagel Memo)
(c) PDUSD Memo of 24 Feb 16 (Carson Memo)
(d) USD Memo of 25 Aug 17 (Kurta Memo)
(e) USECDEF Memo of 25 Jul 18 (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, make other conforming changes to his DD Form 214, and to be considered for a disability retirement.

2. The Board, consisting of ██████████, reviewed Petitioner's allegations of error and injustice on 30 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 references (b) through (e). Additionally, the Board also considered an advisory opinion (AO) furnished by a 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, the statute of limitation was waived in accordance with the Kurta Memo.

c. The Petitioner enlisted in the Navy and began a period of active service on 16 June 1972. Petitioner's pre-enlistment physical, on 21 April 1972, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]

d. On 22 November 1972, Petitioner was involved in a motor vehicle accident (MVA) that seriously injured him and also killed his uncle who was riding in the car with Petitioner. Petitioner was initially treated in a civilian medical facility before being transferred to a Naval Hospital. Petitioner suffered a bilaterally contused lung, a fracture of the left humerus, and a fracture of the scapula in the accident. On 29 January 1973, a Navy Medical Officer noted gradual improvement in all of his signs and symptoms of injury and discharged Petitioner to full duty.

e. On 22 April 1973, Petitioner received non-judicial punishment (NJP) for the wrongful possession of marijuana. Petitioner did not appeal his NJP. On 21 August 1973, Petitioner received NJP for unauthorized absence (UA). Petitioner did not appeal his NJP. On 30 August 1973, Petitioner received NJP for UA. Petitioner did not appeal his NJP. On 26 September 1973, Petitioner received NJP for UA. Petitioner did not appeal his NJP.

f. On 26 October 1973, Petitioner received NJP for failing to obey a lawful order. Petitioner did not appeal his NJP. On 7 November 1973, Petitioner received NJP for assault and for communicating a threat. Petitioner did not appeal his NJP. On 13 June 1974, Petitioner received NJP for two separate specifications of UA, failing to obey a lawful order, and breach of the peace. Petitioner did not appeal his NJP. On 21 June 1974, Petitioner received NJP for five separate specifications of failing to obey a lawful order. Petitioner did not appeal his NJP.

g. On 2 July 1974, Petitioner was convicted at a Special Court-Martial (SPCM) of eleven (11) separate specifications of UA, two separate assault specifications, and two separate specifications of insubordinate conduct, one of which involved the assault of a brig sentry. Petitioner was sentenced to confinement for five months, forfeitures of pay for five months, and a discharge from the Navy with a Bad Conduct Discharge (BCD). Prior to the SPCM Petitioner underwent a mental health evaluation on 7 June 1974. The Medical Officer determined Petitioner was fully competent to stand trial.

h. On 16 October 1974, Petitioner underwent a mental health/neuropsychiatric evaluation. The Medical Officer noted Petitioner's 1972 MVA but determined Petitioner MVA-related injuries healed without sequelae. The Medical Officer concluded that the Petitioner did not suffer from any neurosis, psychosis, or organicity at the present time.

i. On 25 November 1974, the Convening Authority approved the adjudged sentence. On 18 December 1974, Petitioner received NJP for failing to obey a lawful order. On 22 January 1975 the Naval Clemency & Parole Board denied Petitioner's clemency request.

j. Between 12-14 February 1975, Petitioner was admitted to the Neuropsychiatric Service Ward. Other than suffering from a sexually transmitted disease, Petitioner's physical examination (including neurologic) was within normal limits. The Medical Officer noted that it became clear to hospital staff that Petitioner's behavior was consciously manipulative. The Medical Officer determined that further psychiatric hospitalization was not indicated at the time, and also concluded that the Petitioner would not benefit from any outpatient psychotherapy in a military setting. The Medical Officer diagnosed Petitioner with a passive-aggressive personality

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]

with overt manipulation. On 21 February 1975, Petitioner's separation physical examination did not endorse any psychiatric or neurologic conditions or symptoms.

k. On 16 June 1975, the Court of Military Review affirmed the SPCM findings and sentence. On 5 September 1975, the Court of Military Appeals denied Petitioner's petition for a grant of review. Ultimately, on 10 October 1975, Petitioner was discharged from the Navy with a BCD and assigned an RE-4 reentry/reenlistment code.

l. At the time of Petitioner's separation from the Navy, his overall active duty trait average was 1.533 in conduct as assigned on his periodic evaluations. Navy regulations in place at the time of his discharge required a minimum trait average of 3.0 in conduct/military behavior to be eligible and considered for a fully honorable characterization of service.

m. In short, Petitioner contended that he was suffering from Posttraumatic Stress Disorder (PTSD) and other mental health conditions originating from his MVA in November 1972. Petitioner provided post-service psychiatric treatment records with a dysthymic disorder diagnosis, 1977 treatment records for a self-inflicted gunshot wound, 1986 treatment records listing a paranoid schizophrenia diagnosis. Petitioner also provided 2001 and 2002 records listing diagnoses of major depressive disorder (MDD), moderate severity; PTSD, mild severity; and noting a history of head injury. Petitioner also submitted September 2021 records listing mental health diagnoses of PTSD and depression. He also provided the January 2002 Department of Veterans Affairs (VA) Compensation and Pension (C&P) exam report, listing diagnoses of MDD, recurrent, moderately severe; history of PTSD; and noting that Organic Brain Syndrome needed further information to be ruled out. Petitioner also provided the December 2003 VA disability determination granting 100% service connection for PTSD, MDD, and Organic Brain Syndrome "based on review of service medical records...which involved a serious head injury during service with emotional trauma." The Petitioner argued that the Board must view his mental health conditions as mitigating factors to the misconduct underlying his discharge and upgrade his characterization of service.

n. 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 13 September 2022. The Ph.D. stated in pertinent part:

During military service, the Petitioner was diagnosed with a personality disorder. This diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose to the mental health clinician, and the psychological evaluation performed following close observation during an inpatient hospitalization. The Petitioner's behavior and report was not consistent, and post-service VA clinicians have not all agreed on his status. However, the VA has determined service connection for PTSD and TBI-related diagnoses. It is possible that his behavior, identified as characterological during military service, has been re-conceptualized as related to PTSD and TBI with the passage of time and changes in understanding regarding mental health conditions. It is possible that

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
[REDACTED]

his misconduct, consisting of UA, disobedience, and irritability and assault, could be conceptualized as symptoms of PTSD and TBI.

The Ph.D. concluded, “it is my considered clinical opinion there is post-service evidence of TBI and a diagnosis of PTSD that may be attributed to military service. There is post-service evidence that his misconduct could be attributed to TBI or PTSD.”

CONCLUSION

Upon review and liberal consideration of all the evidence of record and in light of the AO, the Board concluded that Petitioner’s request warrants partial relief. Additionally, the Board reviewed his application under the guidance provided in the Hagel, Kurta, and Wilkie Memos.

In keeping with the letter and spirit of the Hagel, Kurta, and Wilkie Memos, and despite definitive evidence to the contrary from Petitioner’s active duty medical records, the Board felt that Petitioner’s mental health issues and symptoms mitigated his willful and persistent misconduct used to characterize his original BCD. The Board concluded that Petitioner’s PTSD and TBI-related conditions and/or symptoms as possible causative factors in the misconduct underlying his discharge and characterization were not outweighed by the severity of Petitioner’s pattern of misconduct. With that being determined, the Board concluded that no useful purpose is served by continuing to characterize the Petitioner’s service as having been under BCD conditions, and that a discharge upgrade to “General (Under Honorable Conditions)” (GEN) was appropriate at this time.

Notwithstanding the recommended corrective action below, the Board was not willing to grant a full upgrade to an Honorable discharge. The Board did not believe that the Petitioner’s record was otherwise so meritorious to deserve an Honorable discharge. The Board concluded that significant negative aspects of the Petitioner’s conduct and/or performance greatly outweighed the positive aspects of his military record even under the liberal consideration standard for mental health conditions. The Board also noted that some of the Petitioner’s intentional misconduct involving his multiple assaults would not be mitigated by any mental health conditions or symptoms. The Board believed that, even though flawless service is not required for an Honorable discharge, in this case a GEN discharge and no higher was appropriate given his cumulative misconduct that was highly prejudicial to good order and discipline. The Board also concluded 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.

The Board also observed Petitioner’s overall active duty trait average in conduct (proper military behavior) during his enlistment did not meet the Navy’s required minimum trait average in that category for a fully Honorable characterization of service. Lastly, in light of the Wilkie Memo, and while in no way excusing or condoning the Petitioner’s lengthy pattern of service-discrediting misconduct, the Board still similarly concluded after reviewing the record holistically, and given the totality of the circumstances and purely as a matter of extraordinary leniency and clemency, that the Petitioner merits a discharge upgrade to GEN and no higher.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
[REDACTED]

Further, the Board determined it was consistent with the aforementioned guidance to also change Petitioner's reason for separation to reflect a Secretarial Authority discharge. However, the Board did not find a material error or injustice with the Petitioner's RE-4 reentry code. The Board concluded the Petitioner was assigned the correct reentry code based on the totality of his circumstances, and that such reentry code was proper and in compliance with Department of the Navy directives and policy at the time of his discharge.

Finally, despite the Board's decision to grant relief as a matter of equity, the Board found no error with Petitioner's court-martial conviction and sentence. The Board noted that Petitioner received the full benefit of all required due process that included appellate review. As such, the Board determined Petitioner was appropriately discharged based on his court-martial imposed BCD and not eligible for disability processing at the time of his separation. In addition, based on the medical findings commensurate with his active duty service, the Board found insufficient evidence that Petitioner was unfit for continued naval service as a result of a qualifying disability at the time. Accordingly, the Board found insufficient evidence of error or injustice to grant Petitioner's request for a disability review or placement on the disability retirement list.

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 "General (Under Honorable Conditions)," the narrative reason for separation should be changed to "Separation for Other Good and Sufficient Reasons When Determined by the Secretary of the Navy," the separation authority be changed to "BUPERSMAN 3850220," the separation code be changed to "LFF."

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

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.

10/27/2022

[REDACTED]

[REDACTED]