



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

[REDACTED]
Docket No: 4708-22
Ref: Signature Date

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

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

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) 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 change by providing him a medical disability retirement and his discharge characterization be upgraded.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 26 September 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), which 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 24 February 2016 guidance from the Principal Deputy Under Secretary of Defense regarding discharge upgrade requests by Veterans claiming PTSD or traumatic brain injury (TBI) (Carson Memo), the 25 August 2017 guidance from the Under Secretary of Defense for Personnel and Readiness regarding requests by Veterans for modification of their discharge due to mental health conditions, sexual assault, or sexual harassment (Kurta Memo), and the 25 July 2018 guidance from the Under Secretary of Defense

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

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. Although Petitioner did not file his application in a timely manner, the statute of limitation was waived in accordance with the Kurta Memo.

b. A review of the Petitioner's naval records reveals that he enlisted in the Navy and commenced a period of active duty on 2 July 2003. He commenced a period of unauthorized absence on 16 January 2004, which ended on 20 January 2004. He was in an unauthorized absence status again from 16 February 2004 to 15 March 2004, and again from 17 April 2004 to 25 April 2004. Upon his final return, he was placed into pretrial confinement. As a result of pending court-martial charges, the Petitioner was reviewed by a medical professional to determine whether he was mentally competent to stand trial. He was diagnosed with attention deficit hyperactivity disorder (ADHD), Major Depressive Disorder, and Antisocial Personality. On 29 October 2004, the Petitioner was convicted by a special court-martial for violation of a lawful order by engaging in underage drinking, disrespect to a commissioned officer, three instances of assault by choking a seaman, grabbing a lieutenant by his collar, and throwing water at a second-class petty officer, and disorderly conduct. The petitioner's sentence included eight months of confinement and to be discharged with a Bad Conduct Discharge (BCD).

c. On 3 November 2004, the Petitioner was referred to a medical evaluation board to assess his fitness for duty. On 20 December 2004, he was released from confinement and placed on appellate leave. On 23 December 2004, the Petitioner's medical board was cancelled due to his pending discharge due to misconduct. On 4 January 2005, he was admitted to a civilian mental health center due to depressed mood with suicidal thoughts along with thoughts to harm his wife. He was diagnosed with Major Depressive Disorder without psychotic features; Post-Traumatic Stress Disorder (PTSD), Bipolar Disorder, ADHD (in remission), with Borderline Personality Disorder traits. He was released from the hospital on 19 January 2005. On 28 March 2005, the Petitioner was diagnosed with Chronic Paranoid Schizophrenia. Records also reflect that on 15 September 2006, he was determined to be mentally incompetent to stand trial for attempted murder by civilian court. On 18 December 2007, the Petitioner's appellate review was completed and he was discharged with a BCD. On 12 April 2012, the Petitioner was diagnosed with Schizoaffective and Psychotic Disorder by [REDACTED].

d. On 24 November 2014, the Department of Veterans' Affairs (VA) determined that the Petitioner's mental health manifestations did not occur prior to his confinement. In 2014, the Petitioner submitted an application to the Naval Discharge Review Board (NDRB) seeking an upgrade to his discharge. In his application he contended that he was improperly diagnosed when he was in the Navy, he was incompetent to stand trial, and the Navy failed to refer him to a medical board. On 24 April 2014, the NDRB denied his application. He filed another application with the NDRB in 2017, contending that his misconduct should have been mitigated as a result of his undiagnosed PTSD, and that he should have been processed via a medical

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

board. On 13 Aug 2018, the NDRB denied his application, finding that his discharge was proper and equitable.

e. The Petitioner also filed several previous petitions with this Board. This Board initially denied the Petitioner's request for an upgrade to his characterization of service in 2015. He subsequently filed a petition with this Board seeking to be placed on the disability retired list and to have his discharge characterization upgraded. In connection with the review of that petition, this Board obtained an advisory opinion (AO) from a medical professional. That AO was considered unfavorable to the Petitioner's request, concluding that "had submission to the PEB occurred, the likely result would have been a finding of FIT to Continue Naval Service because the primary diagnosis at the time was Personality Disorder." That petition was denied by this Board on 25 January 2018.

f. On 18 September 2019, Petitioner's medical provider reported that he continued to be treated for bipolar disorder. On 20 September 2019, the [REDACTED] VA provided an opinion that his mental health condition contributed to his misconduct.

g. Thereafter, the Petitioner filed a request for reconsideration of his previously denied petition to this Board. On 2 January 2020, this Board again denied his request for reconsideration, finding, in part, that the misconduct that he engaged in while on active duty, which resulted in his punitive discharge from the Navy, took precedence over disability processing under the Navy's dual processing rules and, therefore, not while in receipt of basic pay. Finally, in 2022, the Petitioner filed another petition with this Board seeking a disability retirement and an upgrade to his characterization of service. On 8 February 2022, this Board issued its letter to Petitioner denying his requested relief.

h. In his current petition, Petitioner again seeks reconsideration of his prior petition for a disability retirement based on his currently diagnosed Adjustment Disorder, PTSD, and Schizoaffective disorder. He provided medical records and a written statement in support of his petition.

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 BCD to General (Under Honorable Conditions). 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 a result of its review of the foregoing factors and the evidence of record, including his prior petitions to this Board and applications to the NDRB, the Board acknowledged the Petitioner struggled with various mental health factors, which have grown worse over time since his discharge. The Board determined that clemency was appropriate based on the struggles faced daily by Petitioner based on his mental health conditions. In reaching its decision, the Board observed that the AO this Board obtained in a previous petition explained that, "while not compensable by the DON PEB [Physical Evaluation Board] these conditions are considered potentially mitigating." This factor, along with the fact that the Petitioner had initially been considered to be evaluated by a PEB, except for the fact that his misconduct took

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

precedence over the disability evaluation system, factored into the Board's decision-making. It appears that over the years, the Petitioner's mental health conditions have not improved, and, indeed, appear to have worsened. Accordingly, based on the foregoing, the Board determined that a measure of clemency was warranted in the form of upgrading the Petitioner's discharge characterization to General (Under Honorable Conditions).

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 Sailor'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.

Further, the Board concluded the preponderance of the evidence does not support any other relief requested by the Petitioner, including 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 substantially concurred with the AOs findings in this regard as well as its prior decisions relating to the Petitioner. 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. In the Board's opinion, this reason for separation remains appropriate based on Petitioner's record of misconduct. Ultimately, the Board determined the clemency afforded Petitioner by upgrading his characterization of service from a BCD to a General (Under Honorable Conditions) was significant and, therefore, sufficiently addresses any injustice in his record.

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 having assured compliance with its provisions, it is hereby announced that the foregoing

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

corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

10/18/2022

