



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

[REDACTED]
Docket No. 5710-22

Ref: Signature Date

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

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

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)
(f) MCO 1900.16C w/CH 7

Encl: (1) DD Form 149 w/ enclosures
(2) Advisory Opinion (AO) of 28 Nov 22

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 Other Than Honorable (OTH) discharge from the Marine Corps be upgraded to "General (Under Honorable Conditions)." Enclosures (1) and (2) apply.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 20 January 2023, 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, applicable statutes, regulations, and policies, to include references (b) through (e).

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. Petitioner served an Honorable enlistment in the Regular Army and two periods in the Army National Guard (ARNG) prior to enlisting in the Marine Corps and beginning a period of

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active duty on 5 November 1986. Within his first year of service, he received a nonjudicial punishment (NJP) in June 1987 for a violation of the Uniform Code of Military Justice (UCMJ) under Article 112a due to wrongful use of marijuana and, on 10 September 1987, a second NJP for a violation of Article 86 due to failure to go to his appointed place of duty at the dining facility by the prescribed time prior to 0500 hours.

c. Following his second NJP, he was issued administrative counseling warning him that further misconduct could result in adverse action, to include administrative separation. However, on 18 September 1987, he received a third NJP for another violation of Article 86 for failure to go to his appointed place of duty for more than a three-day period from 11 – 14 September 1987

d. As a result of his misconduct, Petitioner was notified of administrative separation proceedings, on 27 October 1987, for misconduct due to minor disciplinary infractions. He waived consultation with counsel and his right to a hearing before an administrative board. The 30 October 1987 recommendation for his separation under OTH conditions specified the basis of minor disciplinary infractions, which basis was approved, on 13 November 1987, by Commanding General, Marine Corps [REDACTED], under the authority of paragraph 6210.2 of reference (f). However, at the time of his separation on 18 November 1987, Petitioner's discharge record listed a narrative reason for separation of "Separation in lieu of Trial by court martial" citing a separation authority of "MARCORSEPMAN par 6419. CG ltr 1900 JA/438" and separation code of "KFS1."

e. Petitioner's previous application was considered by the Board on 8 July 2020, wherein he contended that he was under extreme duress at the time separation was presented to him and did not understand the type of discharge that was offered. Ultimately, his request was denied. In the time since, his medical records from the Department of Veterans Affairs (VA) reflect treatment for polysubstance abuse.

f. Seeking reconsideration, Petitioner contends his discharge characterization is inequitable, elaborating that he suffered from a mental health condition as a result of mistreatment during his Marine Corps service due to the racism of other enlisted members; he describes having been beaten up while returning on the 4th of July, 1987, from the [base enlisted] club when he "stopped some white Marines from beating up another black Marine because he was a small guy." He states that he reported the assault but that nothing was done to the individuals responsible for the assault, which caused him to lose trust in the Marine Corps and resulted in the behavior and misconduct for which he was discharged. He believes that his Honorable service in the Army and ARNG, both before and after his Marine Corps enlistment, serve as evidence of his good character. In addition to his 4-year period of "Honorable" service in the Army and two periods in the ARNG prior to his enlistment in the Marine Corps, Petitioner also served honorably in the ARNG from September of 1995 until November of 1999. In support of his contention that a mental health condition might mitigate his in-service misconduct, Petitioner submitted evidence of his VA treatment records.

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g. Because Petitioner contends a mental health condition, the Board also requested enclosure (2), the AO, for consideration. The AO stated in pertinent part:

The Petitioner contends that he suffered from undiagnosed mental health conditions while in service. Specifically, he indicated that he was the victim of racism. He submitted partial progress notes dated September 2021 to August 2022 from [REDACTED] VA Healthcare System. Notes indicate that he was being assessed for a 45 day inpatient substance abuse treatment program for cocaine, marijuana, alcohol and methamphetamine use. He had been diagnosed with several past diagnoses to include: Malingering, Antisocial Personality Disorder, PTSD, MDD (Major Depressive Disorder), Anxiety Disorder, Cannabis Abuse, ETOH (Alcohol) Abuse, Drug Induced Mood Disorder, Anxiety State NOS (not otherwise specified), and Depressive Disorder. One note from active duty with a non-legible date notes, "Drug eval. Long hx (history) THC (marijuana) use age 13." There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Evidence submitted from the [REDACTED] VA Healthcare System seem to indicate that the Petitioner has suffered from a long history of polysubstance abuse, and according to active duty records, that his substance abuse dates back to the age of 13. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct.

The AO concluded, "it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition."

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concluded that Petitioner's request warrants favorable action in the form of partial relief only. The Board reviewed the application under the guidance provided in references (b) through (e) intended to be covered by this policy.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief with regard to his request for an upgrade to his characterization of service. Specifically, the Board determined that Petitioner misconduct, as evidenced by his three NJPs within four months, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of Petitioner's misconduct and found that his conduct showed a complete disregard for military authority and regulations. In addition, the Board noted Petitioner drug abuse offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. Although the Board considered that Petitioner's

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misconduct appeared out of character in light of his previous periods of “Honorable” service” in the Army and ARNG, the Board concurred with the AO that Petitioner submitted insufficient evidence that his misconduct was attributable to a mental health condition which might mitigate his character of discharge, even when considered under a grant of liberal consideration. Further, the Board concurred with the AO that Petitioner’s personal statement lacked sufficient detail to confirm whether his experience of racism and assault resulted in the sort of trauma which might have resulted in his unauthorized absences following the assault on 4 July 1987 and, regardless, that this incident occurred after his admitted wrongful use of marijuana during his military service which it would therefore not mitigate. As a result, the Board concluded Petitioner’s conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. Even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants granting Petitioner the relief he requested or granting an upgraded characterization of service as a matter of clemency or equity.

However, the Board found that Petitioner’s discharge record contains errors with respect to his narrative reason for separation, separation code, and separation authority. Specifically, the records of Petitioner’s administrative separation clearly indicate that he was processed for the reason of misconduct due to minor disciplinary infractions, which basis was expressly approved less than 7 days prior to his discharge being effected. Given the clear documentation of this approved basis, and the absence of documentation supporting the basis of separation in lieu of trial (SILT) by court-martial, the Board concluded that the basis of SILT was erroneously entered into Petitioner’s discharge record. In support of this conclusion of error, the Board further noted that block 25 of Petitioner’s record of discharge references the Commanding General’s letter in which the administrative separation was approved but cites a different paragraph of reference (f) as the authority for the discharge. Further, the Board considered the comparative import of separation in lieu of trial by court-martial as opposed to separation for minor disciplinary infractions and concluded that, because the latter describes less serious misconduct, the error prejudices Petitioner and, therefore, merits correction. Accordingly, the Board determined that it is in the interest of justice to grant the partial relief with respect to Petitioner’s narrative reason for separation, separation code, and separation authority.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

That Petitioner be issued a new Certificate of Release or Discharge from Active Duty (DD Form 214) indicating that on 18 November 1987, his discharge was issued under the authority of “MARCORSEPMAN par 6210.2” for the narrative reason of “Misconduct (Minor Disciplinary Infractions)” with a separation code of “HKN.”

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

A copy of this report of proceedings be filed in Petitioner’s naval record.

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

2/1/2023

