



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

█
Docket No: 5712-22

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER █, USN,
XXX-XX █

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 █, █, and █, reviewed Petitioner's allegations of error and injustice on 4 November 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 an advisory opinion (AO) furnished by a 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 Navy and began a period of active service on 26 August 1991. As part of his enlistment application, on 13 December 1990, Petitioner signed and acknowledged the Navy "Drug and Alcohol Abuse Statement of Understanding." Petitioner's pre-enlistment physical examination, on 15 December 1990, and self-reported medical history both noted no psychiatric or neurologic conditions of symptoms. Petitioner continuously served on active duty leading up to his last reenlistment that occurred on 16 March 1997.

d. In September 1997, Petitioner was arrested by civilian authorities in [REDACTED] and charged with carrying a concealed firearm. He completed a one year probated sentence and paid the associated fines.

e. In November 1997, Petitioner was arrested for a domestic violence incident involving his ex-girlfriend. Petitioner was initially charged with aggravated assault which was later reduced to simple assault. As part of his sentence and probation, Petitioner was required to attend domestic violence counseling.

f. On 22 April 1998, Petitioner received non-judicial punishment (NJP) for the wrongful use of a controlled substance (marijuana). Petitioner did not appeal his NJP.

g. Following his NJP, Petitioner's command notified him that he was being processed for an administrative discharge by reason of misconduct due to drug abuse. Ultimately, on 17 July 1998, Petitioner was administratively discharged from the Navy for misconduct with an Other Than Honorable (OTH) conditions characterization of service and assigned an RE-4 reentry code.

h. As part of the review process, the BCNR Physician Advisor, who is a licensed clinical psychologist (Ph.D.), reviewed Petitioner's original contentions and the available records and issued an AO on 26 September 2022. The Ph.D. stated in pertinent part:

Unfortunately there is insufficient evidence that a nexus exists between his current PTSD diagnosis and his misconduct in service. Additionally, the letter from Ms. [REDACTED] as well his character references are not sufficiently detailed to support that

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PTSD contributed to his misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion that neither PTSD nor any mental health condition mitigated the circumstances that led to misconduct while in service. There is insufficient evidence of another mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to PTSD or another mental health condition."

i. In response to the AO, Petitioner submitted rebuttal evidence. Following a review of Petitioner's rebuttal evidence, the Ph.D. concluded by opining that while there was post-service evidence of a potential service-connected mental health condition, there still was insufficient evidence Petitioner's misconduct could be attributed to a mental health condition.

CONCLUSION:

Upon review and liberal consideration of all the evidence of record, the Board concluded that Petitioner's request warrants partial relief.

The Board noted that the misconduct forming the basis of Petitioner's OTH discharge technically occurred during his last enlistment period. Thus, the Board concluded that an administrative change to Petitioner's DD Form 214 should be made to reflect that his previous enlistment(s) was/were completed without any significant adverse disciplinary action. The Board was aware that the Department of the Navy no longer issues a separate DD Form 214 to enlisted personnel at the completion of each individual enlistment, and instead makes appropriate notations in the Block 18 Remarks section upon their final discharge or retirement from the armed forces reflecting such previous enlistments.

Additionally, the Board noted an administrative correction to Block 25 of Petitioner's DD Form 214 is required to accurately document the separation authority under which he was discharged.

Notwithstanding the Board's recommendation to make the aforementioned administrative correction, the Board determined Petitioner's request to upgrade his discharge characterization was not supported by the evidence. 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, his desire for a discharge upgrade and contentions that: (a) he fell into depression on active duty, (b) he suffered some traumatic experiences while attached to the USS [REDACTED], (c) he finished a portion of the Navy's Dental Hygiene Program before depression set in and started drinking alcohol heavily, (d) he used marijuana on one occasion to help him cope, (e) he did not receive any counseling or help for his PTSD/depression and substance abuse, (f) post-service, he received his dental hygiene license and works at an Army dental clinic, and (g) he is a very active member in his church and community, and has been married for twenty-three years and

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raised two children. For purposes of clemency and equity consideration, the Board noted Petitioner provided supporting documentation describing post-service accomplishments or advocacy letters.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. 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 and notwithstanding the AO, the Board concluded that there was no nexus between any mental health conditions and/or related symptoms and Petitioner's 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 discharge. As a result, the Board concluded that Petitioner's misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that Petitioner's misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of his cumulative misconduct 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.

Additionally, the Board did not believe that Petitioner's record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of his conduct and/or performance greatly outweighed any positive aspects of his military record. The Board determined that characterization under OTH conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. 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. The Board concluded that illegal drug use by a Sailor is contrary to Navy core values, renders that Sailor unfit for duty, and poses an unnecessary risk to the safety of fellow Sailors.

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. As a result, 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 misconduct clearly merited his receipt of an OTH. The Board also carefully considered all matters submitted regarding Petitioner's character, post-service conduct, and personal/career accomplishments, however, 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 upgrading

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Petitioner's characterization of service or granting an upgraded characterization of service as a matter of clemency or equity.

RECOMMENDATION:

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

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 17 July 1998, to reflect the following comment added to the Block 18 Remarks section:

"CONTINUOUS HONORABLE SERVICE FROM 26AUG1991 TO 15MAR1997."

Additionally, that such DD Form 215 reflect the following additional correction: that Petitioner's separation authority in Block 25 be changed to:

"MILPERSMAN 1910-146."

Following the correction to the DD-214 for the period ending 17 July 1998, 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.

11/8/2022

[REDACTED]

Executive Director

Signed by: [REDACTED]