



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

█  
Docket No: 5727-22

Ref: Signature Date

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF █  
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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 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 █, 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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]  
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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 Marine Corps and began a period of active service on 10 June 1997. Petitioner's pre-enlistment physical examination, on 23 May 1996, and self-reported medical history noted no psychiatric or neurologic conditions of symptoms. Petitioner continuously served on active duty leading up to his last reenlistment that occurred on 20 February 2004.

d. On 24 May 2007, Petitioner entered into a plea agreement with the San Bernardino District Attorney's Office and plead guilty to "Continuous Sexual Abuse and Sexual Penetration/Genital with a Child 10 Years of Age and Younger." Petitioner was sentenced to twenty-seven (27) years in state prison.

e. On 30 August 2007, Petitioner's command notified him that he was being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense. On 17 September 2007, Petitioner waived his rights to consult with counsel and to request an administrative separation board. Ultimately, on 12 February 2008, Petitioner was discharged from the Marine Corps for misconduct with an Other Than Honorable (OTH) conditions characterization of service, administratively reduced in rank to Lance Corporal (E-3), and assigned an RE-4B reentry code.

f. On 16 July 2020, the VA granted a service-connection for treatment purposes only for PTSD. On 29 October 2020, the Naval Discharge Review Board denied any discharge upgrade relief, but determined that Petitioner was assigned erroneous separation and reentry codes related to drug abuse, and directed the appropriate corrections be made to Petitioner's DD Form 214 consistent with his civilian conviction. However, at the time of the Board, the authorized changes had not yet been implemented by Headquarters, Marine Corps.

g. 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:

There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service, or that he exhibited any psychological

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

symptoms or behavioral changes indicative of a mental health condition during service. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct.

The Ph.D. concluded, “it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. Although Petitioner stated he was diagnosed with PTSD after his discharge from service, the information provided did not provide enough information to establish an onset and development of mental health symptoms or identify a nexus with his in-service misconduct.”

h. In response to the AO, Petitioner submitted a rebuttal statement that included an admission to the offense for which he was convicted.

#### 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 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 determined the administrative changes to Petitioner’s DD Form 214, as ordered by the NDRB, should be implemented.

Notwithstanding the administrative changes recommended above, the Board determined Petitioner’s request for a discharge upgrade should be denied. 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) the NDRB granted Petitioner certain relief that is not currently reflected in his service record, and (b) post-service the VA has diagnosed Petitioner with PTSD. For purposes of clemency and equity consideration, the Board noted Petitioner did not provide supporting documentation describing post-service accomplishments or advocacy letters.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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, 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. 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 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. Moreover, the Board concluded that Petitioner's specific criminal behavior involving the sexual abuse of a minor child would not be excused or mitigated by mental health conditions even with liberal consideration. 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 Marine.

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. The Board noted that VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only. Such VA eligibility determinations, disability ratings, and/or discharge classifications are not binding on the Department of the Navy (DoN) and have no bearing on previous active duty service discharge characterizations. 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 misconduct clearly merited his receipt of an OTH. 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 Petitioner's characterization of service or granting an upgraded characterization of service as a matter of clemency or equity.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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 12 February 2008, to reflect the following comment added to the Block 18 Remarks section:

"CONTINUOUS HONORABLE SERVICE FROM 10JUN1997 TO 19FEB2004."

Additionally, that such DD Form 215 reflect the following additional corrections: that Petitioner's separation code be changed to "HKB1," and the reentry code be changed to "RE-4," in accordance with the relief previously granted by the Naval Discharge Review Board in October 2020.

Following the corrections to the DD-214 for the period ending 12 February 2008, 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  
[REDACTED]