



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

██████████
Docket No. 6466-22

Ref: Signature Date

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF ██████████
██████████

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 w/ enclosures
(2) Advisory Opinion (AO) of 3 Jan 23
(3) Rebuttal to AO of 8 Feb 2023

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 discharge be upgraded either to “Honorable” or to “General (Under Honorable Conditions),” that his narrative reason for separation and separation code be changed to “under Secretarial Authority” and “KND,” that his reentry code be changed to “RE-1,” and that he be reinstated to the final pay grade of Sergeant/E-5. Enclosures (1) through (3) apply.

2. The Board, consisting of ██████████, reviewed Petitioner's allegations of error and injustice on 24 February 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.

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b. Petitioner enlisted in the Marine Corps and commenced a period of honorable active duty on 15 July 1982 that ended on 26 June 1985, at which time he was issued a Certificate of Release or Discharge from Active Duty (DD 214). He immediately reenlisted and commenced another period of active duty on 27 June 1985.

c. The day Petitioner's second period of enlistment concluded, on 30 July 1990, he was subject to a command urinalysis. He was discharged and immediately reenlisted, on 1 August 1990, but not issued a separate DD Form 214 for his second period of enlistment.

d. On 20 August 1990, Petitioner was charged for a violation of Article 112a of the Uniform Code of Military Justice for wrongful use of cocaine, following a positive result from the command urinalysis during his second period of enlistment.

e. Petitioner requested separation in lieu of trial (SILT) and submitted a statement of apology for his offense. His request was approved by the Commanding General, [REDACTED] Marine Division, and he was discharged under Other Than Honorable (OTH) conditions on 30 November 1990. At the time his DD Form 214 was issued, it omitted the statement in the block 18 remarks identifying his period of continuous Honorable service from 27 June 1985 until 30 July 1990.

f. Petitioner contends that his request merits relief on the basis of equity upon consideration of his post-discharge character. He cites to the evidence in his service record of his overall positive, honest, and faithful service which, in conjunction with his post-discharge behavior and actions, he believes outweighs the isolated, nonviolent negative aspect of the single instance of misconduct which resulted in his discharge. He states that he suffered racial discrimination, malice, and blatant disrespect while serving as the career planner at his last unit, which resulted in depression, low self-esteem, and weight gain. He claims that, although he raised concerns for his stress, anxiety, and depression, he was "brushed off" by leadership. He also asserts that he feared making a complaint to his command regarding the racism. He asserts that his cocaine use was a poor attempt to self-medicate, although he acknowledges that he was not medically diagnosed with a mental health disorder until after his discharge. Submitting evidence of his post-discharge mental health diagnosis which is attributed to his military service, he believes that the mental health issues he suffered at the time of his discharge would receive a different response today and would not have resulted in the same outcome under existing policies.

g. Petitioner's evidence of post-discharge character includes his academic transcripts and associates degrees in the fields of electronics and industrial electricity, as well as seven letters of support attesting to his general good character and trustworthiness, his employment and academic efforts, and his commitment to his family and children.

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

There is no evidence that he was diagnosed with a mental health condition, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition during military service. Post-service, he has provided medical evidence of treatment of recurrent depression beginning more

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than ten years post-service. He has provided lay statements in support of depression symptoms in service. Unfortunately, available records are not sufficiently detailed to provide a nexus with his misconduct, particularly given the lack of evidence that he was unaware of his misconduct or not responsible for his behavior. Additional records (e.g., active duty or post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

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

i. Petitioner submitted evidence in rebuttal to the AO, which was received on 8 February 2023 and reviewed by the AO to assess any impact on the original opinion. The AO noted that Petitioner had provided a lab report from November 1995 with no context and a partially redacted note from January of 2016 regarding depression and substance use. The AO advised that the rebuttal evidence did not provide substantially different evidence than that originally submitted.

j. Petitioner also submitted additional evidence for consideration which included several recent favorable decisions the Board issued in regard to other cases and Petitioner's credit reports reflecting his credit history.

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.

In regard to its grant of partial relief, the Board noted that Petitioner served the entirety of his second period of enlistment without any identified or documented misconduct, notwithstanding that his wrongful use of cocaine logically must have occurred near the end of his second enlistment for his 30 July 1990 urinalysis to produce the positive result reported during his third period of enlistment. Regardless, the Board concluded that the omission of Petitioner's period of continuous Honorable service for his second period of enlistment from the remarks in block 18 of his DD Form 214 was a material error and violation of regulation meriting relief. In reaching this decision, the Board notes that correction of this error should effectively identify almost the entirety of Petitioner's active duty service as Honorable not only with respect to his discharge but also for the purposes of the Department of Veteran's Affairs in assessing his entitlement to services and benefits. Accordingly, the Board determined that it is in the interest of justice to grant partial relief correcting this error in Petitioner's discharge record.

With respect to Petitioner's specifically requested relief regarding his characterization, reason for separation, and reentry code, the Board carefully considered all potentially mitigating factors to

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determine whether the interests of justice warrant relief in Petitioner's case in accordance with references (b) through (e). After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that Petitioner's misconduct, as evidenced by his SILT request, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of Petitioner's misconduct and the fact it included a drug 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. Further, the Board concurred with the AO that Petitioner submitted insufficient evidence that his wrongful use of cocaine should be attributed to a mental health condition suffered during his military service. Although Petitioner presented evidence of a post-discharge diagnosis of major depressive disorder, the Board notes that his contentions state he suffered from both anxiety and depression during his military service. To this extent, the Board noted that Petitioner did not identify what in-service symptoms he suffered or the way in which his use of controlled substances might have, in his own perception, alleviated his symptoms at that time.

Separately considering Petitioner's contentions that evidence of his post-discharge character merits consideration of relief based upon clemency, the Board observed that Petitioner was an experienced non-commissioned officer with nearly two complete periods of enlistment by the time of his discharge. Although the Board acknowledged that Petitioner's single incident of documented misconduct was his wrongful use of cocaine, the Board found that Petitioner's lack of youth or inexperience, his clear knowledge of the wrongfulness of his actions, and the seriousness of his intentional use of cocaine, negated other favorable considerations, to include his evidence post-discharge character. Upon consideration of all favorable factors Petitioner submitted for consideration, the Board concluded that this evidence was outweighed by his wrongful use of cocaine. 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 any additional relief as a matter of clemency or equity.

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

RECOMMENDATION:

That Petitioner be issued a Correction to Certificate of Release or Discharge from Active Duty (DD Form 215), for the period ending 30 November 1990, indicating his "Continuous Period of Honorable Service from 27 June 1985 to 1 August 1990" in his block 18 remarks.

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

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

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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.

3/21/2023

[REDACTED]

Executive Director

[REDACTED]