



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

[REDACTED]
Docket No. 6976-22

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[REDACTED]

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 22 Dec 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 discharge be upgraded. Enclosures (1) and (2) apply.

2. The Board, consisting of [REDACTED], reviewed Petitioner's allegations of error and injustice on 17 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). In addition, the Board considered enclosure (2), an AO from a qualified mental health professional. Although Petitioner was provided an opportunity to respond to the AO, he chose not to do so.

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 enlisted in the Marine Corps, after receiving a pre-service drug use waiver, and began a period of active duty on 19 June 1991. During his first period of enlistment, he had an

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underage drinking offense while deployed to Operation [REDACTED]. He also deployed to [REDACTED] for Operations [REDACTED] and [REDACTED] from [REDACTED] through [REDACTED].

c. On 16 December 1994, Petitioner reenlisted for 4 years and later accepted a 14-month extension to accept permanent change of station orders. During his period, he had no documented misconduct or performance issues. He reenlisted a second time on 21 August 1999.

d. Petitioner's administrative counseling records indicate that he was assigned an "RE-3C" code, on 19 June 2000, due to having been placed on authorized permissive temporary additional duty (PTAD) orders for humanitarian reasons. The following month, a Naval Drug Lab message reported that his urinalysis from 10 July 2000 was positive for metabolites of marijuana and amphetamine. As a result, he was subject to nonjudicial punishment (NJP) and awarded 60 days of restriction, forfeitures of pay, and reduction to the pay grade E-4, for which he was issued an adverse fitness report for the period from 1 April 2000 through 22 July 2000. The comments in this unobserved report indicated that he had been either on leave or PTAD for 72 of the 113-day reporting period.

e. Character statements provided at the time of Petitioner's NJP for consideration with his mandatory processing for administrative separation stated that he had allowed personal problems to interfere with his duties, could not be trusted, and had misled the command. He was described as either an average or unsatisfactory performer, and his immediate supervisor noted it was "very possible" that Petitioner had abused drugs "as a temporary escape from his [personal] problems" which likely led him astray.

f. On 21 July 2000, when Petitioner was notified of processing for administrative separation by reason of misconduct due to drug abuse, he elected to waive his rights to consultation with legal counsel, to a hearing before an administrative board, and to submit a written rebuttal. His company commander forwarded a recommendation that Petitioner be discharged "as rapidly as possible," describing that Petitioner had exhibited questionable dedication, loyalty, and integrity by attempting on several occasions to deceive his command and place his personal problems above his commitments to the Marine Corps, to include attempting to avoid returning to his unit days before a deployment.

g. Petitioner was interviewed by his Sergeant Major on 3 August 2000 who noted that, although Petitioner was adamant in his denial that he intentionally used drugs, he offered no explanation how such drugs might have come to be in his system at the time of his urinalysis. Additionally, when asked, Petitioner indicated a desire to be discharged.

h. Petitioner's commanding officer forwarded a recommendation for his separation under Other Than Honorable (OTH) conditions which was positively endorsed on 16 August 2000. This endorsement specifically documented that Petitioner's pre-service drug use waiver was only considered for purposes of the recommendation against his retention and not for his characterization of service. He reiterated that Petitioner had been interviewed and had expressed "in no uncertain terms that he [had] no desire to remain" in the Marine Corps. This endorsement

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also addressed the additional, new adverse matters not alleged in Petitioner's notification, elaborating that "[b]ased on conversations with his chain of command, it is clear [he] used manipulative and deceptive tactics in an effort to avoid deploying with this [REDACTED], culminating in a last-minute request for a humanitarian reassignment that was denied by HQMC."

i. The Commanding General, [REDACTED] Marine Expeditionary Force, approved Petitioner's discharge under OTH conditions for drug abuse on 11 September 2000. His final decision did not address the additional adverse matters raised following Petitioner's initial notification or whether Petitioner had been afforded and opportunity to review these additional allegations or, if desired, to submit a written rebuttal.

j. At the time of Petitioner's discharge, on 22 September 2000, his Certificate of Discharge or Release from Active Duty (DD Form 214) omitted his period of continuous honorable service from 19 June 1991 through 20 August 1999 from the remarks in block 18 of his discharge record.

k. Petitioner contends that he was a career Marine with honorable service who had received personal awards and had just reenlisted prior to his administrative separation, but that he was discharged without due process based on an improper urinalysis. His application to the Naval Discharge Review Board (NDRB) in 2014 previously elaborated on this contention, specifying that the urinalysis was improperly conducted and that he was also told he had no right to a trial or to a lawyer based on his pay grade. He denied use of illegal drugs and stated that another Marine in his unit who was tested had admitted to smoking marijuana but received a negative test result. He stated that he passed multiple drug use screening tests with his current employer and does not believe that his single positive urinalysis warranted an OTH characterization.

l. Because Petitioner also contends that he suffers post-traumatic stress disorder (PTSD), the Board also requested enclosure (2), the AO, for consideration. The AO stated in pertinent part:

There is no evidence 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. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct, particularly as he denies the misconduct. Additional records (e.g., 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 insufficient evidence of a diagnosis of PTSD. There is insufficient evidence his misconduct could be attributed to PTSD."

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concluded that Petitioner's request warrants partial relief only with respect to the omission of his period of continuous honorable service from his block 18 remarks. The Board reviewed the application under the guidance provided in references (b) through (e).

In this regard, the Board noted Petitioner's misconduct and concurred with the AO regarding the insufficiency of evidence submitted in support of Petitioner's contended PTSD; in fact, the Board could not identify any specific traumatic experience to which Petitioner might attribute his contended PTSD, nor did he address his operational experiences or the circumstances of his humanitarian PTAD.

Likewise, noting that Petitioner bears the burden of proof regarding allegations of either error or injustice, the Board observed that Petitioner submitted no evidence to substantiate his contention of irregularity in the conduct of the urinalysis which returned his positive results. Further, the Board observed that Petitioner was stationed on board a naval vessel at the time of his NJP and, therefore, did not have a right to refuse NJP.

To the extent that Petitioner asserts he was denied the opportunity to consult legal counsel, the Board found that he voluntarily elected to waive his right to consult legal counsel in addition to waiving his right to a hearing before an administrative board and, instead, expressed his desire to be discharged at multiple junctures during his administrative separation processing. Finally, although Petitioner only generally expressed that he was denied due process during his separation, the Board specifically considered any potential evidence of denial of due process, to include whether Petitioner should have been provided with a supplementary notification of the additional adverse matters raised after his initial election of rights. To that extent, the Board found that Petitioner's wrongful use of marijuana and amphetamine drugs conclusively support the final decision regarding his administrative discharge under OTH conditions; therefore, the Board concluded that, even if Petitioner had been entitled to the right to review this additional adverse material and, if desired, to submit a written response, such potential error did not materially impact the final decision on his discharge, which is entirely consistent with substantially similar instances of drug abuse misconduct. In fact, the Board viewed it as especially aggravating that Petitioner's drug use occurred at the time of his second reenlistment, as a senior noncommissioned officer scheduled to deploy in support of expeditionary operations, and during a period when he had been graciously afforded leave and PTAD for humanitarian reasons. As a result, the Board found that the potentially favorable factors submitted for consideration were clearly insufficient to outweigh the multi-drug abuse misconduct which resulted in Petitioner's administrative discharge under OTH conditions. 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 relief as a matter of clemency or equity.

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

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RECOMMENDATION:

That Petitioner be issued a Correction to Certificate of Release or Discharge from Active Duty (DD Form 215) indicating that his block 18, Remarks, include his "Continuous Honorable Service from 19 Jun 91 – 20 Aug 99" and no other corrections.

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 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.

3/2/2023

[REDACTED]
Executive Director
[REDACTED]