



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

[REDACTED]
Docket No. 7640-22

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 23 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 to "General (Under Honorable Conditions)." 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.

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b. Petitioner enlisted in the Marine Corps as a minor with parental consent and began a period of active duty on 28 June 1973. He served without incident for his first year of service but, on 18 July 1974, received nonjudicial punishment for a violation of the Uniform Code of Military Justice under Article 86 due to an unauthorized absence from 21 June 1974 until 9 July 1975 when he failed to report by the date prescribed in his transfer orders.

c. On 21 August 1974, the Marine Corps received a Congressional inquiry pertaining to Petitioner's medical care. On 9 September 1974, the Commandant of the Marine Corps forwarded the inquiry to Petitioner's gaining command via a speed letter. His medical record from that same date indicates that he was referred for a psychiatric evaluation because he believed he had been pending a medical board for nervous trouble prior to his transfer but his medical records were not available at that time.

d. The medical officer who conducted Petitioner's neuropsychiatric evaluation found no previous documentation of nervous problems; however, following his evaluation, the medical officer recommended that he be separated due to an existing character and behavior disorder. At the time this recommendation was forwarded to petitioner's unit on 17 September 1974, he was still under a minority enlistment.

e. Petitioner was counseled the following day for failing a uniform inspection. On 26 September 1974, the day after his 18th birthday, he received his second NJP for a violation of Article 86 due to a 45-minute period of UA and Article 92 for violation of a lawful general regulation because he appeared to need to shave.

f. Subsequent responses to the Congressional inquiry reiterated the facts identified in the medical officer's letter, to include that Petitioner had received a psychiatric evaluation which recommended his separation from the service due to unsuitability. An interim supplemental response indicated that Petitioner's immediate commanding officer concurred with the recommendation for separation and had forwarded it for final action; however, Commanding General [REDACTED], disapproved his discharge on the basis that he found insufficient non-medical evidence to warrant a discharge, believing that Petitioner could still be an asset to the Marine Corps with proper supervision and guidance.

g. On 22 November 1974, Petitioner was administratively counseled regarding the disapproval of his unsuitability discharge, advised of procedures for requesting a hardship discharge due to his family situation, and warned regarding his frequent involvement of a discreditable nature with military authorities. That same day, his mother received a letter advising her of the disapproval of his separation on the basis that he had an acceptable record of performance.

h. Petitioner was permitted to take authorized leave; however, on 6 December 1974, he failed to return from leave and was immediately declared a deserter. He terminated his UA with voluntary surrender on 22 March 1976 and submitted a request for separation in lieu of trial for the good of the service, stating his purpose to avoid the stress of further service, his unwillingness to make further effort to adjust to military life, and his wish to escape trial and

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likely punishment. His request for separation was approved and he was discharged under Other Than Honorable (OTH) conditions, on 20 April 1976, with a final conduct average of 3.8.

i. Petitioner contends that he had mental health concerns during his military service which he believes might have mitigated the circumstances of his undesirable discharge. He points out that he voluntarily enlisted during the Vietnam War prior to being subject to the draft and had no disciplinary issues during his initial service until he developed medical issues as well as personal problems at home such as his grandmother's illness without a care taker and the mother of his children abandoning them. He states that he returned to service once he was able to rectify the hardship issues he was facing at home and that, since his discharge, he has received medical care for issues of anxiety and depression that stem from his discharge characterization. He also states that he has led a law-abiding life since his discharge.

j. Because Petitioner contends that his mental health adverse affected the circumstances of his discharge, the Board also requested the AO for consideration. The AO noted in pertinent part:

Petitioner was appropriately referred and properly evaluated for mental health concerns during his enlistment. His personality disorder diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed by the mental health clinician. A personality disorder diagnosis is pre-existing to military service by definition, and indicates lifelong characterological traits unsuitable for military service. There is no medical evidence of another mental health condition. His in-service misconduct appears to be consistent with his diagnosed personality disorder, rather than evidence of another mental health condition incurred in or exacerbated by military service. 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 mental health condition that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to a mental health condition, other than his diagnosed personality disorder."

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 relief. The Board reviewed the application under the guidance provided in references (b) through (e) intended to be covered by this policy.

In this regard, the Board noted Petitioner's misconduct and does not condone it; nevertheless, the Board concurred with the AO that Petitioner was duly diagnosed during his military service with a personality disorder (PD) which identified that he was unsuitable for military and to which his

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misconduct is largely attributable. Although the Board acknowledged that a PD, considered by itself, would not normally be considered as a mitigating factor with respect to misconduct, the Board observed that both the medical officer, who was most familiar with the import of Petitioner's diagnosis, and Petitioner's immediate commanding officer, who was most familiar with Petitioner's contemporaneous misconduct for which he was administratively counseled, recommended administrative separation based on their agreement that Petitioner was not suited to further service. They both believed that, if retained, Petitioner would likely commit further misconduct or cause continued disruption to good order and discipline. To the extent that Petitioner's Commanding General exercised discretion in disapproving his administrative separation, whether solely for the reasons expressed in said denial or after accounting for additional considerations such as the ongoing conflict, the Board found that his decision was neither arbitrary nor capricious on its face nor likely to have constituted reprisal for Petitioner's protected communication with his elected officials. However, factoring the totality of circumstances to include Petitioner's youth, documented evidence of hardship circumstances in his records, reliable recommendations that it was in both his and the Marine Corps' best interest to permit his discharge prior his unsuitability causing irreparable harm, and the acknowledgement by the Commanding General that Petitioner would ultimately suffer the consequence of his misconduct if he did not remedy his diagnosed characterological disorder, the Board concluded that Petitioner's subsequent OTH discharge resulted in an inequitable outcome and, therefore, constituted an injustice. As a result, the Board found that the favorable factors in support of relief outweighed the UA which resulted in Petitioner's separation in lieu of trial. Accordingly, the Board determined, purely as a matter of clemency and equity, that it is in the interest of justice to grant the requested relief.

Notwithstanding the recommended corrective action below, the Board was not willing to grant an upgrade to an Honorable discharge. The Board determined that an Honorable discharge was appropriate only if the Marine's service was otherwise so meritorious that any other characterization of service would be clearly inappropriate. The Board concluded by opining that certain negative aspects of the Petitioner's conduct and/or performance outweighed the positive aspects of his military record even under the liberal consideration standards for mental health conditions, and that a General (Under Honorable Conditions) discharge characterization and no higher was appropriate.

Additionally, the Board concluded Petitioner's narrative reason for separation, separation code, and reentry code remain appropriate in light of his misconduct. Ultimately, the Board determined that any injustice in Petitioner's record is adequately addressed by the recommended corrective action.

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 20 April 1976, he was discharged with a "General (Under

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Honorable Conditions)” characterization of service.

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]