



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

█
Docket No. 8253-22

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER █
XXX XX █ USMC

Ref: (a) Title 10 U.S.C. §1552
(b) SECDEF Memo of 13 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 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.

2. The Board, consisting of █, █, and █, reviewed Petitioner's allegations of error and injustice on 21 April 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, and applicable statutes, regulations, and policies, to include references (b) through (e). 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 enlisted in the U.S. Marine Corps and began a period of active service on 27 August 1980. Petitioner's pre-enlistment physical examination, on 30 May 1980, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

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d. On 22 January 1982, Petitioner received non-judicial punishment (NJP) for a two-day unauthorized absence. Petitioner did not appeal his NJP. On 14 October 1982, Petitioner received NJP for the wrongful possession of a controlled substance (marijuana), the wrongful possession of drug paraphernalia, and the wrongful possession of a concealed weapon. Petitioner did not appeal his second NJP.

e. On 11 February 1983, pursuant to his guilty plea, Petitioner was convicted at a Special Court-Martial (SPCM) for the wrongful possession of a controlled substance (marijuana) with an intent to distribute. Petitioner was sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), forfeitures of pay, confinement at hard labor for two months, and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). On 17 March 1983, the Convening Authority (CA) approved the SPCM sentence as adjudged. On 4 April 1983, Petitioner's separation physical examination noted no psychiatric or neurologic conditions or symptoms.

f. On 27 April 1983, the Navy-Marine Corps Court of Military Review affirmed the SPCM findings and sentence as approved by the CA. On 19 May 1983, the Naval Clemency and Parole Board denied Petitioner any clemency. Upon the completion of appellate review in Petitioner's case, on 2 August 1983, Petitioner was discharged from the Marine Corps with a BCD.

g. On 12 March 1984, the VA determined Petitioner's military service was under dishonorable conditions and that he was not entitled to health care or other VA benefits. On 26 March 1984, the Naval Discharge Review Board denied Petitioner's application for a discharge upgrade.

h. Based on his available service records, Petitioner's overall conduct trait average assigned on his periodic performance evaluations during his enlistment was approximately 3.87. Marine Corps regulations in place at the time of his discharge recommended a minimum trait average of 4.0 in conduct (proper military behavior), to be eligible and considered for a fully Honorable characterization of service

i. Petitioner requested clemency in the form of a discharge upgrade. In short, Petitioner contended he incurred Post Traumatic Stress Disorder (PTSD) on active duty from his military experiences, including false promises to play in the Marine Corps Band upon enlistment, almost being killed from a live grenade during a training exercise, and being denied the opportunity to return home for his grandmother's funeral. He contended his marijuana use was self-medication to cope with his experiences. Petitioner contended the Board must view his PTSD as a mitigating factor to the misconduct underlying his discharge and upgrade his characterization of service. For clemency and equity consideration, Petitioner submitted a personal statement and multiple character reference letters attesting to his good character and exemplary post-service conduct in the community.

j. As part of the review process, the BCNR Physician Advisor, who is a licensed clinical psychologist (Ph.D.), reviewed Petitioner's contentions and the available records and issued an AO on 22 February 2023. The Ph.D. stated in pertinent part:

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There is no evidence that 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. Post-service, the VA has provided medical treatment for mental health concerns attributed to military service, although there is no evidence of a specific diagnosis of PTSD. Unfortunately, available records are not sufficiently detailed to provide a nexus with his misconduct, particularly given his in-service statement that the marijuana was for distribution. Additional records (e.g., complete 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 Ph.D. concluded, "it is my clinical opinion there is insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is post-service evidence from the VA of mental health conditions that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD or another mental health condition."

k. Following a review of Petitioner's AO rebuttal submission, the Ph.D. did not change their original AO.

CONCLUSION:

Upon review and liberal consideration of all the evidence of record and notwithstanding the unfavorable AO, the Board concluded that Petitioner's request warrants partial relief based solely on clemency considerations. The Board somehow concluded under the unique factual circumstances of this case that no useful purpose is served by continuing to characterize the Petitioner's service as having been under BCD conditions, and that a discharge upgrade to "General (Under Honorable Conditions)" (GEN) was appropriate at this time.

In keeping with the letter and spirit of 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, the Board concluded that there was no convincing evidence of a 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 pattern of serious misconduct outweighed any and all mitigation offered by such mental health conditions.

However, in light of the Wilkie Memo, and while in no way excusing or condoning the Petitioner's serious misconduct, the Board still similarly concluded after reviewing the record holistically, and given the totality of the circumstances and purely as a matter of extraordinary leniency and clemency based on post-service conduct considerations, that the Petitioner merits a discharge upgrade to GEN.

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Notwithstanding the recommended corrective action below, the Board was not willing to grant an upgrade to an Honorable discharge. The Board did not believe that Petitioner's record was otherwise so meritorious to deserve an honorable discharge. The Board concluded that significant negative aspects of the Petitioner's conduct and/or performance greatly outweighed the positive aspects of his military record even under the liberal consideration standard for mental health conditions. The Board believed that, even though flawless service is not required for an honorable discharge, in this case a GEN discharge and no higher was appropriate given Petitioner's cumulative misconduct that was highly prejudicial to good order and discipline. The Board also concluded 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.

The Board did not find a material error or injustice with the Petitioner's original narrative reason for separation, separation code, and reentry code. The Board determined that the record clearly reflected Petitioner's misconduct was intentional and willful and indicated he was unfit for further service. Accordingly, the Board concluded the Petitioner was assigned the correct narrative reason for separation, separation code, and reentry code based on the totality of his circumstances, and that all such notations were proper and in compliance with Department of the Navy directives and policy at the time of his discharge.

RECOMMENDATION:

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

That Petitioner's character of service be changed to "General (Under Honorable Conditions)."

Petitioner shall be issued a new DD Form 214, Certificate of Release or Discharge from Active Duty.

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.

5/4/2023

[REDACTED]

Executive Director

Signed by: [REDACTED]