



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

█
Docket No: 9001-22

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) 10 U.S.C. § 1552
(b) USECDEF Memo of 25 Jul 18 (Wilkie Memo)

Encl: (1) DD Form 149 w/ enclosures

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 punitive discharge be upgraded to "Honorable," that his narrative reason for separation and separation code be changed to reflect "Secretarial Authority," that his reentry code be changed to "RE-1J," that his rank be restored, that lost time be removed from his discharge record, and that he be issued the Global War on Terrorism Service Medal (GWOTSM) and the Good Conduct Medal if he is eligible for either award. Enclosure (1) applies.

2. The Board, consisting of █, █, and █, reviewed Petitioner's allegations of error and injustice on 22 December 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, applicable statutes, regulations, and policies, to include the references.

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's application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider the case on its merits.

b. Petitioner enlisted in the Marine Corps and began a period of active duty on 19 June 2001. He served approximately 18 months without incident, to include over 12 months attached to █, before receiving counseling in █, December of 2002 for an unauthorized absence (UA) from formation.

c. Petitioner executed permanent change of station (PCS) orders and began leave incident to his PCS on 3 February 2003. After reporting to his new command, he took a urinalysis on 28 February 2003.

d. Due to suspected wrongful use of controlled substances, Petitioner was placed into pre-trial confinement on 15 May 2003, but released following his magistrate hearing. His request for a pre-trial agreement (PTA) was approved on 6 June 2003 with terms that suspended all confinement in excess of 45 days. His defense counsel advised him of his appellate rights, on 10 June 2003, and he elected to execute a special power of attorney, waiving personal service of documents and communications for his post-trial matters to ensure receipt of such communications by his attorneys.

e. On 13 June 2003, Petitioner pled guilty at Special Court-Martial (SPCM) to two specifications of violating Article 112a of the Uniform Code of Military Justice (UCMJ) due to wrongful use of marijuana, a controlled substance. He was sentenced to 60 days of confinement, reduction to E-1, forfeitures of pay, and a Bad Conduct Discharge (BCD). The convening authority approved the adjudged sentence, suspended all confinement in excess of 45 days per the terms of the PTA, and ordered the sentence executed with the exception of the BCD, pending appellate review.

f. Following his trial, Petitioner waived his right to submit matters for consideration of clemency. Although this document affirmed that his waiver did not relieve his detailed defense counsel from the obligation to provide comments regarding clemency, his defense counsel submitted a letter stating that he had no comments, corrections, or rebuttal to the legal review of the SPCM.

g. Petitioner completed his period of confinement and, on 8 August 2003, began appellate leave. The three-year date for his eligibility for the Good Conduct Medal would have arrived on 24 August 2003 had he not been subject of disciplinary action prior to that date.

h. Appellate review of Petitioner's SPCM was completed on 30 August 2004 without assignment of error by his appellate defense team, and he was discharged on 6 December 2004.

i. Petitioner contends that his post-discharge good character merits consideration for an upgrade based upon a grant of clemency, arguing that he manages a restaurant franchise, supervising 30 employees for an annual production of over \$600,000, and is entrusted to handle large daily cash deposits. He additionally states that he is a pillar of his community, a member of his neighborhood policing resource, inspires change through exercising his voting rights, volunteers, has a spotless post-discharge criminal record, and is active in his children's education. He does not deny his in-service use of marijuana, but alleges multiple assignments of error in relation to his trial proceedings, to include but not limited to: that his guilty plea failed to conform to the instructions in the Military Judges' Benchbook, that governing laws and regulations were inequitably applied to include the circumstances of his urinalysis tests and their potential admissibility as evidence at trial, that the convening authority was supposed to "remit" his BCD but that it was executed due to administrative error, that he was deprived of his right to

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participate in his own defense while in appellee status due to the handling of his appellate matters, and that the current rules would result in a less harsh outcome because a military judge sitting alone may not award a punitive discharge. For purposes of clemency and equity consideration, the Board noted Petitioner submitted an advocacy letter in addition to other documents in support of his arguments for relief.

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. The Board determined that Petitioner's SPCM conviction rendered him ineligible for the Good Conduct Medal, but that his service met the criteria for award of the GWOTSM. Accordingly, the Board determined that it is in the interest of justice to grant partial relief only with respect to Petitioner's GWOTSM.

Regarding Petitioner's other requested relief, the Board reviewed his application under the guidance provided in references the references and found no other evidence of error or injustice. In this regard, the Board considered Petitioner's misconduct in the wrongful use of marijuana in spite of his awareness of Marine Corps' policy on illegal drug use. 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. The Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. Therefore, the Board found that Petitioner's misconduct was wrongful and an appropriate basis to support his SPCM sentence that included a BCD. As regards his assignments of error to his SPCM, the Board observed that Petitioner was afforded all applicable rights and due process during his trial proceedings, that he voluntarily negotiated a PTA and entered a plea of guilty to the charge and specifications, and that his conviction and sentence were upheld following full appellate review. After thorough review of all arguments and evidence presented in support of his contentions of legal error, the Board found Petitioner's claims unpersuasive; moreover, the Board noted that, while it possess the authority to upgrade a punitive discharge adjudged by a court-martial, the Board is not the appropriate forum before which to contest allegations of legal error in finalized criminal trial proceedings. To the extent that Petitioner contended his post-discharge character merits an upgraded characterization of service, the Board concluded that it would need supporting evidence to substantiate Petitioner's claims prior to further consideration an upgrade on that potential basis. As a result, the Board concluded Petitioner's conduct constituted a significant departure from that expected of a service member and continues to warrant a BCD. While the Board carefully considered Petitioner's assertions of his post-discharge accomplishments and good character, 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 his requested relief relative to his misconduct or granting him 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.

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RECOMMENDATION:

That Petitioner be issued the GWOTSM and that an accompanying Correction to Certificate of Discharge or Release (DD Form 215) be issued reflecting his entitlement to that award.

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.

1/17/2023

[REDACTED]