



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

█
Docket No. 2968-23

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER █, █,
USN, XXX-XX-█

Ref: (a) 10 U.S.C. § 1552
(b) USECDEF Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," of 25 July 2018 (Wilkie Memo)

Encl: (1) DD Form 149 with attachments
(2) Case summary

1. Pursuant to the provisions of reference (a), Petitioner filed enclosure (1) with the Board for Corrections of Naval Records (Board), requesting that his naval record be corrected to upgrade his characterization of service, set aside administrative board findings, and to remove certain derogatory material from his service record.

2. The Board, consisting of █, █, and █, reviewed Petitioner's allegations of error and injustice on 24 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 the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo).

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, it is in the interests of justice to review the application on its merits.

c. The Petitioner enlisted in the Navy and began a period of active service on 11 April 2013. Petitioner's pre-enlistment physical examination, on 3 October 2012, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED],
USN, XXX-XX [REDACTED]

d. Between 18 May 2015 and 19 May 2015 Petitioner was in an unauthorized absence (UA) status. The command documented the UA as “not excused” and charged Petitioner for one day of “lost time” and added one day to his EAOS.

e. On 1 June 2016, Petitioner’s command initiated administrative separation proceedings by reason of misconduct due to the commission of a serious offense. The allegations included the misuse of a government vehicle, sexual harassment, and the violation of a lawful order. Petitioner elected his rights to consult with counsel and to request an administrative separation board (Adsep Board).

f. On 10 August 2016, an Adsep Board convened to hear Petitioner’s case. At the Adsep Board, Petitioner was represented by a Navy Judge Advocate. Petitioner testified under oath on his own behalf. Following the presentation of evidence and witness testimony in the case, the Adsep Board members determined by majority vote the Petitioner committed the misconduct as charged. The Adsep Board members unanimously recommended Petitioner’s separation with a General (Under Honorable Conditions) (GEN) characterization of service. Ultimately, on 23 November 2016, Petitioner was separated from the Navy for misconduct with a GEN discharge and assigned an RE-4 reentry code.

g. Based on his available service records, Petitioner’s overall conduct trait average assigned on his periodic performance evaluations during his enlistment was 2.40. Navy regulations in place at the time of his discharge recommended a minimum trait average of 2.50 in conduct (proper military behavior), to be eligible and considered for a fully Honorable characterization of service.

h. Petitioner requested clemency relief in the form of: (i) a discharge upgrade, (ii) overturning the Adsep Board findings, and (iii) removing all references of misconduct from his records. In short, Petitioner argued, *inter alia*, that there was insufficient evidence supporting the misconduct charges forming the basis of his separation. The Petitioner also contended that the NDRB’s deficient review of his case in 2019 further compounded his injustice. Petitioner’s counsel proffered various arguments in support of Petitioner’s claims to include, but not limited to, factual sufficiency of the evidence, as well as legal/factual impossibility.

CONCLUSION:

Upon review and liberal consideration of all the evidence of record, the Board concluded that Petitioner’s request warrants partial relief.

The Board initially determined that Petitioner’s administrative separation was proper and in accordance with all Department of the Navy directives and policy. The Board determined the misconduct underlying Petitioner’s separation was substantiated after a thorough review of the evidence, and the Board was not willing to summarily overturn the Adsep Board findings and/or remove any misconduct documentation and adverse references from his service record. The Board noted that any NDRB findings or their alleged shortcomings in formulating their opinion were of no consequence to the BCNR given that the NDRB is a separate and distinct agency and their administrative decisions are not binding precedent for the BCNR.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED],
USN, XXX-XX [REDACTED]

The Board determined that the Petitioner misused a government vehicle on the day in question. Regardless of what guidance was specifically charged at the Adesp Board, the Board determined Petitioner embarked on an ill-advised detour on his return to Groton and violated Department of Defense/Department of the Navy guidance in the process. The Board determined that any error in the cited regulation was harmless, and that a citation to the proper punitive DoD/DoN policy/instruction/regulation/general order/lawful order would have yielded the same exact misconduct finding at the Adsep Board. The Board also determined that Petitioner actions and behavior on the way to and from the funeral detail (and especially in his apartment bedroom when he openly made an unwanted sexual advance towards a female shipmate) - even when viewed objectively - violated the SECNAV instruction prohibiting sexual harassment. Lastly, the Board determined that any impossibility or mens rea/specific intent arguments regarding the military protective order (MPO) were not persuasive. The Board determined the basic function of the MPO at its very core was to keep the Petitioner and victim separated. Regardless of the inherent difficulty of meeting the distance requirement, the Board determined it was the Petitioner's responsibility to ensure he stayed in his workspace, avoided situations where he would come into contact with the victim, and to work with his chain of command to ensure he complied with the spirit of the MPO in its most basic terms during the workday. The Board concluded that for Petitioner to take it upon himself to purposefully/intentionally leave his work center during the day, for whatever personal/professional reason, was not merely accidental, but was instead undertaken at his peril.

However, in light of the Wilkie Memo, and although the Board did not condone the Petitioner's misconduct, the Board noted that flawless service was not required for discharge upgrade consideration. The Board determined that certain overall positive aspects of the Petitioner's conduct and/or performance outweighed the negative aspects of his military record, and that despite his conduct trait average, an Honorable discharge characterization was still appropriate. Accordingly, while not necessarily excusing or endorsing the Petitioner's cumulative and substantiated misconduct, the Board reviewed the record holistically, and given the totality of the circumstances, and purely as a matter of extraordinary clemency, the Board determined no useful purpose is served by continuing to characterize the Petitioner's service as GEN, and that a discharge upgrade to Honorable is appropriate at this time. Furthermore, in the interests of justice, the Board determined it was also appropriate to change Petitioner's narrative reason for separation, separation authority and separation code to reflect a Secretarial Authority discharge.

Notwithstanding the recommended corrective action below, the Board determined that Petitioner's reentry code remains appropriate in light of his misconduct and continued unsuitability for further military service. Ultimately, the Board concluded that any injustice in Petitioner's record is adequately addressed by the recommended corrective action.

RECOMMENDATION:

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

That Petitioner shall be issued a new DD Form 214, Certificate of Release or Discharge from Active Duty, for the period ending 23 November 2016, indicating he was discharged with an

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED],
USN, XXX-XX [REDACTED]

“Honorable” characterization, with a narrative reason for separation of “Secretarial Authority,” under the separation authority “MILPERSMAN 1910-164,” and a separation code of “JFF.”

Petitioner shall be issued a new Honorable Discharge Certificate.

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.

[REDACTED] 5/4/2023

Executive Director
Signed by: [REDACTED]