



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

█
Docket No. 6712-23
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy, and considered by this Board.

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

Ref: (a) Title 10 U.S.C. §1552
(b) SECDEF Memo, 13 Sep 14 (Hagel Memo)
(c) PDUSD Memo, 24 Feb 16 (Carson Memo)
(d) USD Memo, 25 Aug 17 (Kurta Memo)
(e) USECDEF Memo, 25 Jul 18 (Wilkie Memo)

Encl: (1) DD Form 149 w/attachments
(2) Certificate of Release or Discharge from Active Duty (DD Form 214), 1 Apr 05
(3) NAVMC 10132, Unit Punishment Book, 14 Jan 03
(4) NAVMC 118 (13), Record of Conviction by Court-Martial, 30 May 03
(5) NAVMC 118 (11), Administrative Remarks, 7 Aug 03
(6) NAVMC 10132, Unit Punishment Book, 21 Nov 03
(7) Meritorious Mast, 8 Mar 04 to 19 Aug 04
(8) Medical Documents/Progress Notes pages 45, 46, 49 through 57, printed, 24 May 18
(9) NAVMC 118 (11), Administrative Remarks, 22 Dec 04
(10) NAVMC 118 (13), Record of Conviction by Court-Martial, 19 Jan 05
(11) Notification of Separation Proceedings ltr 1910, DA 07-05, 27 Jan 05
(12) Acknowledgment of Rights ltr 1910, DA 07-05, 3 Feb 05
(13) Commanding General, █ 23 ltr 1910, █, 23 Mar 05
(14) Advisory Opinion by a Ph.D., Licensed Clinical Psychologist, 22 Mar 22
(15) BCNR Docket No. 565-22, 6 Jun 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 characterization of service be upgraded.

2. The Board, consisting of █, █, and █ reviewed Petitioner's allegations of error and injustice on 18 September 2023 and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies, to include references (b) through (e).

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3. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. Although enclosure (1) was not filed in a timely manner, it is in the interests of justice to waive the statute of limitations within the Department of the Navy. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board finds as follows:

a. Petitioner enlisted in Marine Corps and began a period of active duty service on 18 June 2002. See enclosure (2).

b. On 14 January 2003, Petitioner received his first non-judicial punishment (NJP) under Article 92, Uniform Code of Military Justice (UCMJ) for violating a lawful order by wearing an earring. See enclosure (3).

c. On 30 May 2003, Petitioner was found guilty at a Summary Court-Martial (SCM) under Article 92, UCMJ for failure to obey a lawful order and Article 134, UCMJ for breaking restriction. Sentence adjudged was 30 days' confinement. See enclosure (4).

d. On 7 August 2003, Petitioner was counseled concerning his numerous violations of Article 86, UCMJ for unauthorized absences, and advised that further violations of the UCMJ and deficient performance may result in disciplinary action, administrative reduction, administrative separation, and/or limitation of further service. See enclosure (5).

e. On 21 November 2003, Petitioner received a second NJP under Article 86, UCMJ for unauthorized absence from appointed place of duty (1 hour and 45 minutes) and Article 91, UCMJ for treating a Sergeant/E-5 with contempt. See enclosure (6).

f. Petitioner was deployed in support of Operation Iraqi Freedom II from 8 March 2004 to 19 August 2004. Post-service medical documents state that during April 2004, while Petitioner was at [REDACTED] an incident occurred regarding several explosions. Petitioner claims he was thrown against a wall, experienced brief loss of consciousness and confusion at the time of injury. He was treated for shrapnel wounds and reported after the blast injury, he continued to experience dizziness, poor coordination, loss of balance, headaches, forgetfulness, vision problems, irritability, and insomnia.¹ See enclosures (2), (7) and (8).

g. On 22 December 2004, Petitioner was counseled for failed his semi-annual physical fitness test on 16 December 2004, and advised that further unsatisfactory performance may result in disciplinary action, administrative reduction, administrative separation, and/or limitation of further service. See enclosure (9).

h. On 19 January 2005, Petitioner was found guilty at a second SCM under Article 112a, UCMJ for wrongful use of marijuana. Sentence adjudged was reduction in rank/grade, forfeiture of pay, and 30 days' confinement. See enclosure (10).

¹ No evidence of this incident in Petitioner's naval records.

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i. On 27 January 2005, Petitioner was notified of his commanding officer's (CO) intent to recommend his discharge from the Marine Corps by reason of misconduct due to drug abuse. Petitioner waived his right to a hearing before an administrative separation board on 3 February 2005. On 23 March 2005, the separation authority approved Petitioner's administrative separation from the Marine Corps under other than honorable (OTH) conditions by reason of misconduct due to drug abuse, and on 1 April 2005, Petitioner was discharged. See enclosures (2), (11), (12), and (13).

j. In Petitioner current application he contends he sustained post-traumatic stress disorder (PTSD) during military service from a combat injury while in Iraq. Specifically, his discharge was given unjustly due to unknown PTSD, his current discharge does not match his character, there was no one to help aid him, he was out of his mind, he is currently blind in one eye and has been unable to work for the past three years from his injuries; which still haunt him, a discharge upgrade would allow him and his family to move forward, his discharge characterization is undeserved, and "I beg to the receptor that you are able to reverse the damage that has been done and causing further suffering." Additionally, Petitioner provided two character letters from his former COs which absolutely support an upgrade to Petitioner's characterization of service. See enclosure (1).

k. Although Petitioner contends he incurred PTSD during military service, he did not provide evidence in support of his claim. As such, a new advisory opinion (AO) was not provided. However, the Board did review the AO dated 22 March 2022, which was from Petitioner's previous hearing of 6 June 2022. The AO stated in pertinent part:

Petitioner's OMPF did not contain evidence of a diagnosis of a mental health condition. His DD 214 indicated he served in Iraq during Operational Iraqi Freedom and his chronological record indicates he was likely in Iraq after June of 2003. Evidence submitted by Petitioner supported post-discharge diagnoses of PTSD and TBI. In regards to his misconduct, his breaking restriction and wearing an earring occurred prior to the purported trauma. Additionally, Petitioner's statement regarding his misconduct of breaking restriction and wearing an earring provided alternative reasoning for his misconduct. In contrast, his misconduct of unauthorized absence (UA), treating a Sgt. with contempt (yelling) and marijuana use appear to have occurred after the purported trauma. This behavior is consistent with symptoms of PTSD and/or TBI. For example, his yelling may be a sign of irritability and his UA and marijuana use may be his way of attempting to avoid triggers/symptoms of his PTSD/TBI.

The AO concluded, "[b]ased on the available evidence, it is my considered clinical opinion Petitioner's PTSD and TBI can be attributed to his military service. Additionally, some of his misconduct can be attributed to PTSD and TBI." Enclosure (14).

l. Petitioner was previously denied relief by this Board on 6 June 2022. See enclosure (15).

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CONCLUSION

Upon review and liberal consideration of all the evidence of record, and new matters submitted by the Petitioner and in light of the favorable AO, the Board concluded that Petitioner's request warrants relief. The Board was willing to overlook some of the factual discrepancies with Petitioner's narrative of event given the passage of time, and instead viewed the evidence in the light most favorable to the Petitioner. Additionally, the Board reviewed Petitioner's application under the guidance provided in references (b) through (e) intended to be covered by this policy.

In keeping with the letter and spirit of the Hagel, Kurta, and Wilkie Memos, the Board felt that Petitioner's mental health condition mitigated some of the misconduct used to characterize his discharge. The Board concluded that the Petitioner's mental health condition and/or symptoms as possible causative factors in the misconduct contributing to his discharge and characterization were not outweighed by the severity of Petitioner's misconduct. With that being determined, the Board concluded that no useful purpose is served by continuing to characterize the Petitioner's service as having been under OTH conditions, and that a discharge upgrade to General (Under Honorable Conditions) and no higher is appropriate.

Notwithstanding the recommended corrective action below, the Board was not willing to grant an honorable discharge. The Board did not believe that the 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 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 General (Under Honorable Conditions) discharge and no higher was appropriate. 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.

Lastly, in light of the Wilkie Memo, the Board still similarly concluded after reviewing the record holistically, and given the totality of the circumstances and purely as a matter of clemency, that the Petitioner only merits a General (Under Honorable Conditions) characterization of service and no higher.

RECOMMENDATION

In view of the above, the Board recommends that the following corrective action be taken on Petitioner's naval record:

That Petitioner be issued a new DD Form 214, Certificate of Release or Discharge from Active Duty reflecting that, on 1 April 2005, he was discharged with a "General (Under Honorable Conditions)" characterization of service. All other entries currently reflected in Petitioner's DD Form 214 are to remain unchanged.

That a copy of this report of proceedings be filed in Petitioner's naval record.

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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 titled 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 the reference, has been approved by the Board on behalf of the Secretary of the Navy.

11/14/2023

