



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

██████████
Docket No: 6747-19
Ref: Signature Date

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

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

- Ref:
- (a) Title 10, United States Code, Section 1552
 - (b) SECNAVINST 5420.193
 - (c) SECDEF Memo, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder," of 3 September 2014 (Hagel Memo)
 - (d) PDUSD Memo, "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or TBI," of 24 Feb 16
 - (e) USD Memo, "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment," of 25 Aug 17 (Kurta Memo)
 - (f) USECDEF Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," of 25 Jul 18

- Encl:
- (1) DD Form 149 w/attachments
 - (2) DD Form 4/1 Enlistment Contract
 - (3) DD Form 214 of 15 Dec 05
 - (4) USMC Appointment Acceptance of 16 Dec 05
 - (5) NAVMC 118(11) Administrative Remarks ("Page 11") of 21 Oct 09
 - (6) Recommendation for Administrative Separation of 9 Dec 10
 - (7) Medical Record Entry of 21 Jan 10
 - (8) NAVMC 118(11) Administrative Remarks ("Page 11") of 14 Sep 10
 - (9) Notification of Recommendation for Administrative Separation of 16 Nov 10
 - (10) Acknowledgement of Notification of Separation Recommendation of 30 Nov 10
 - (11) Request for Resignation in Lieu of Involuntary Separation for Cause of 1 Dec 10
 - (12) Psychological Evaluation of 2 Dec 10
 - (13) Response to Recommendation for Admin Separation for Cause of 7 Dec 10
 - (14) First Endorsement - Recommendation for Admin Separation for Cause of 7 Jan 11

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- (15) Second Endorsement - Recommendation for Administrative Separation for Cause of 6 April 11 and ASN(M&RA) Decision of 27 May 11
- (16) DD Form 214 of 10 Jun 11

1. Pursuant to reference (a), Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting to set aside his administrative discharge or to upgrade his discharge from general (under honorable conditions) (GEN) to an honorable characterization of service, to remove the [REDACTED] psychological evaluation dated 2 December 2010 from his record, and to determine whether he should have been processed instead for a medical discharge.

2. The Board reviewed Petitioner's allegations of error and injustice on 23 June 2020. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval service records, and applicable statutes, regulations, and policies.

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 regulation within the Department of the Navy.

b. Although enclosure (1) was not filed in a timely manner, it is in the interest of justice to review the application on its merits.

c. On 9 June 2003, Petitioner enlisted in the United States Marine Corps (USMC). On 15 December 2005, Petitioner was discharged with an honorable characterization of service for the purpose of accepting a commission. Petitioner commissioned as a second lieutenant in the USMC on 16 December 2005 through an enlisted commissioning ground program. His primary military occupational specialty (MOS) as a commissioned officer was 3002 (ground supply officer). See enclosures (2) through (4).

d. On 21 October 2009, the Petitioner received a "Page 11" counseling warning (Page 11) documenting deficiencies in the Petitioner's conduct in the performance of his duties. The Page 11 specifically stated:

"Counseled this date concerning the following deficiencies: failure to be at your appointed place of duty and disobeying a direct order. On 091009 you were instructed to, and failed, to muster at 0800 with the HQ Company prior to securing for special liberty. This is the second time you were delinquent in following simple instructions with regard to special liberty. On 091017 you were assigned OOD for MSOR. You failed to post for duty at 0730 and received a citation on base at 0825 for speeding and expired state registration. This trend of delinquent behavior is unacceptable and unbecoming a Marine and commissioned officer." See enclosure (5).

e. On 23 October 2009 Petitioner was relieved from his current Supply Officer billet and reassigned due to poor performance, lack of aptitude, incompetence, and inability to task

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prioritize and manage his time. See enclosure (6), para. 7.

f. On 21 January 2010, the [REDACTED] Surgeon referred Petitioner for a medical exam due to concerns of medication usage, pain management, and non-compliance with the treatment plan. The Medical Officer noted in his write-up that Petitioner had a positive urinalysis after taking his spouse's pain medication. The Petitioner was diagnosed with ADHD EPTE (existed prior to entry) and back pain, possible TBI. See enclosure (7).

g. On 14 May 2010, Petitioner was relieved of his assignment due to dereliction in duties and lack of leadership. On 4 June 2010, Petitioner underwent a mental health evaluation. The Medical Officer recommended that Petitioner was non-deployable in his current condition due to his opiate dependency. On 25 August 2010, Petitioner's command suspended his security access to classified information due to his opiate dependency and improper past drug use. See enclosure (6), para. 4.b., 7.

h. On 14 September 2010, the Petitioner received a Page 11 counseling warning documenting deficiencies in his conduct in the performance of his duties. The Page 11 specifically stated:

"You are being counseled this date concerning the following deficiencies: failure to be at your appointed place of duty and disobeying a direct order. You were instructed and failed to muster at 0600, 100823 in order to commence HQ Co physical training; instead, you arrived at 0618, 100823. Also, you were instructed and failed to muster at 0700, 100908 in order to commence HQ Co physical training; instead, you arrived at 0716, 100908. In the afternoon, on 100907, your commanding officer reminded you of your appointed place of duty and specifically instructed you not to be late. In response, you informed the commanding officer that you would arrive at 0645. By the following morning, 100908, you failed to obey a direct order given to you by a senior commissioned, field-grade officer and failed to live up to your word/commitment. This trend of delinquent behavior is substandard and unbecoming of a Marine and commissioned officer. These types of infractions especially, when witnessed by the majority of HQ Co personnel (as what had occurred respectively on 100823 and 100908) are particularly aggravating and infringes upon your commanding officers responsibilities of creating and maintaining a professional work environment in which there is good order and discipline." See enclosure (8).

i. On 16 November 2010, Petitioner's Commanding Officer (CO) notified him of his intent to recommend that Petitioner be administratively separated for cause with a GEN discharge characterization. The specific factual basis supporting this recommendation was substandard performance of duty and professional dereliction. The specific reasons for Petitioner's separation were evidenced by the following:

(1) Substandard Performance of Duty. (a) A record of marginal service over an extended time as reflected in fitness reports covering two or more positions and signed by at least two reporting seniors; (b) failure to conform to prescribed standards of dress, weight, personal appearance, or military deportment; and (c) refusal to participate in a program of rehabilitation

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for personal abuse of drugs after being properly referred by competent medical personnel to such a program for methadone dependency; and

(2) Misconduct, moral or professional dereliction which is unbecoming an officer with the following specific bases. (a) Commission of a military or civilian offense which could be punished by confinement of six months or more and any other misconduct which would require specific intent for conviction; (b) intentional mismanagement or discreditable management of personal affairs; and (c) misconduct or dereliction resulting in the loss of professional status including the withdrawal or suspension of license, endorsement, or certification necessary to perform military duties in the officer's competitive category or MOS.

On 30 November 2010, Petitioner consulted with counsel and elected in writing to submit a statement, to be provided with documents supporting the proposed separation, and tender a resignation in lieu of separation processing. On 1 December 2010, Petitioner submitted a resignation request in lieu of an involuntary separation for cause. Petitioner contended that his performance issues are directly related to PTSD and continuing health problems. Had Petitioner's resignation request been accepted, Petitioner would have received an honorable discharge. See enclosures (9), (10), and (11).

j. On 2 December 2010, Petitioner was referred for a PTSD evaluation and underwent a mental health evaluation. The psychologist noted that Petitioner's apparent over-medication, a positive drug screen, and his subsequent work related problems are unrelated to his symptoms of PTSD or his past combat experiences. The medical officer also noted that Petitioner was diagnosed with ADHD and prescribed Ateral prior to his initial USMC enlistment. The medical officer diagnosed Petitioner with PTSD, somatization pain disorder, ADHD by history, substance abuse by history. However, the medical officer specifically opined that:

"The demise of his military career was brought upon himself by a series of poor choices beginning with medical care, his self-medication, and ending with his poor work performance. His preoccupation with his pain and bodily complaints contributed to his substance abuse of pain medication. His diagnosis of ADHD may be the reason for his current poor attention span and lack of concentration. TBI is continuing to be evaluated by a Neuropsychologist. *His inability to comport himself as a US Marine officer goes well beyond his symptoms of PTSD*" (emphasis added). See enclosure (12).

k. Petitioner submitted a lengthy rebuttal statement on 7 December 2010. On 9 December 2010, Petitioner's CO recommended denial of the resignation request and instead that Petitioner be separated through the administrative separation process with a GEN discharge. The CO addressed the Petitioner's rebuttal and provided a compelling case supporting Petitioner's separation. In his endorsement, the CO stated:

"SNO has an established record of marginal service that has grown worse each reporting period, culminating in two consecutive adverse fitness reports during his most recent reporting occasions. SNO has been counseled repeatedly for substandard performance...SNO is currently out of weight standards and has been so for the past 14 months despite the command's efforts to assist him in losing

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weight...SNO has had a past drug involvement and a relatively recent history with drug dependency, and refuses to participate in rehabilitation for the currently diagnosed dependency to opiates. SNO tested positive for oxymorphone in August 2006...and was enrolled in a Substance Abuse Rehabilitation Program (SARP) at that time. While in SARP, he informed his medical providers that he would take his wife's narcotic prescriptions so as to avoid his use of military treatment facilities...This incident alone, separate from his current opiate dependency, provides a basis for mandatory adsep processing... [I]t was discovered that SNO was being prescribed methadone, an opioid, by an [REDACTED] physician for the past two years. Although this physician is a TRICARE approved physician, SNO's properly proscribed treatment provider/facility is the Military Treatment Facility (MTF) aboard [REDACTED] SNO did not report his [REDACTED] doctor's prescriptions to his MTF...from January to March 2010, military medical personnel advised him to discontinue methadone as a pain management solution due to its high rate of addiction and incompatibility with his active military service.... On 4 June 2010, the mental health assessment confirmed SNO's history as consistent with a physiological dependence on Methadone. The report recommended the service member enroll in an inpatient detoxification and rehabilitation program...SNO related that he did not agree with the assessment of the MSOR Surgeon or the assessing psychiatrist, he felt that he did not need rehabilitation, and therefore refused to voluntarily undergo any treatment. All of the SNO's servicing medical professionals consulted in this matter agree that his opioid dependency is not compatible with military service.... SNO has a history of minor misconduct that has become a pattern that warrants this action...SNO has mismanaged his personal affairs, including his official USMC requirements related to his wife's special needs, that it amounts to intentional and discreditable conduct.. [REDACTED] members attempted to assist SNO in submitting for the Exceptional Family Member Program (EFMP) in June 2009, which is mandatory.... To date, SNO has not enrolled his wife in EFMP, yet continues to use his wife's medical condition as an excuse for his substandard performance.... SNO's dereliction of duty has led to revocation of his professional status, certifications and those requirements necessary to perform his military duties as a Supply Officer and as a Marine Officer, specifically his security clearance.... Due to SNO's incompetence, dereliction of duty, and suspended security clearance, SNO is essentially "unemployable" by [REDACTED]... I have considered SNO's potential of having a PTSD/TBI related condition or other type of mental health issue.... The psychological evaluation relates that his apparent over-medication, positive drug screen, and subsequent work related problems are unrelated to his symptoms of PTSD...also included is SNO's TBI screening, which notes no evidence to conclude that he suffers from TBI.... Nothing in this rebuttal discloses material facts that I did not consider, nor does it change my recommendation in this matter.... As he is a probationary officer, this recommended characterization of discharge will allow SNO to be expeditiously separated without the requirement for a hearing or board processing. I have closely considered the mitigating factors in this case, including [REDACTED] prior enlisted service, including his tours in Iraq while enlisted and

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commissioned, his PTSD symptoms, the likely strain in supporting his wife with her severe medical conditions and, most notably, his opiate dependency. His substandard performance and misconduct/dereliction correlate to the timeframe of his opiate dependency. I believe his service has been honest and faithful but with significant negative aspects of conduct and performance of duty, such that a General (Under Honorable Conditions) is most appropriate." See enclosures (6) and (13).

l. On 7 January 2011, the immediate superior in the chain of command recommended to the Commandant of the Marine Corps (CMC) that the resignation request be denied and that Petitioner be separated with a GEN discharge. On 6 April 2011, the CMC's Assistant Deputy Commandant for Manpower and Reserve Affairs concurred with the chain of command and recommended to ASN (M&RA) to deny the resignation request and separate Petitioner with a GEN characterization of service. In the CMC endorsement, the CMC's Assistant Deputy noted, *inter alia*:

[REDACTED] received two consecutive adverse fitness reports due to myriad reasons to include poor judgment, failure to maintain height and weight standards, and lack of professional and personal accountability. [REDACTED] a supply officer, was removed from all MOS related duties. [REDACTED] has been diagnosed with an addiction to Methadone, a Schedule II controlled substance. He was prescribed this medication by an [REDACTED] pain management specialist in June 2008 for lower back pain. On 4 June 2010, [REDACTED] was diagnosed with Methadone dependence and recommended to attend in-patient treatment for his addiction but has refused. In addition, he failed to enroll his ill spouse in the Exceptional Family Member Program as required, continues to violate TRICARE reporting guidelines, and is alleged to have been UA on multiple occasions, to include missing a required PFT. On 25 August 2010, [REDACTED] security clearance was suspended due to alleged improper drug use. [REDACTED] conduct and judgment constitute a significant departure from that expected of a Marine Corps officer." See enclosures (14) and (15).

m. On 27 May 2011, ASN(M&RA) approved the separation recommendation and directed a GEN discharge. On 10 June 2011 Petitioner was discharged from the Marine Corps with a GEN characterization of service. See enclosures 15, page 12 and enclosure (16).

CONCLUSION:

After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board carefully weighed all potentially mitigating factors and contentions as outlined in Petitioner's 7 December 2010 administrative separation response, and his additional contentions that included, but were not limited to, that:

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(a) Petitioner contended that his SECNAV directed PTSD/TBI evaluation was fraudulently "back dated" in order to route, or begin, his administrative separation for cause. He specifically alleged that the [REDACTED] Surgeon's actual evaluation was "back dated" two entire months in order to circumvent the fact that his final command, [REDACTED] had not duly noted nor duly executed the administrative separation process in the correct manner;

(b) The command-directed PTSD and TBI exam is supposed to occur before the routing of any administrative separation package; and

(c) His performance issues are directly related to PTSD and continuing health problems.

However, the Board determined these mitigating factors and contentions were not sufficient to warrant upgrading Petitioner's discharge, setting aside his administrative separation, or granting any other requested relief. The Board determined that Petitioner's proffered arguments were not persuasive and overall lacked merit. The Board determined that the timing issue of the PTSD/TBI examination was largely irrelevant to the analysis of the case, and also concluded that there was no evidence in the record regarding any command misconduct, improper motives, or abuses of discretion in the investigating, handling, and processing of his separation and discharge.

The Petitioner's contentions that he suffered from certain mental health conditions and related symptoms on active duty were also fully and carefully considered by the Board in light of the guidance provided by references (c) through (e), with particular attention to the Hagel and Kurta Memos. In accordance with the published guidance, 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, even under the liberal consideration standard, the Board concluded that there was insufficient evidence: (a) to support a nexus between any mental health conditions and/or mental health-related symptoms and Petitioner's substandard performance of duty or misconduct, or (b) to support the argument that any such mental health conditions or symptoms mitigated the underlying substandard performance or misconduct that formed the basis of his administrative separation. Even under the liberal consideration standard, the Board concluded that his substandard performance of duty and misconduct was not due to mental health issues or mental health-related symptoms. Additionally, the Board did not observe any irregularities with any of the Petitioner's mental health screenings or evaluations, and the Board also noted the Petitioner did not provide any convincing and credible evidence to corroborate his allegation that his PTSD/TBI evaluation was fraudulently backdated. Moreover, contrary to Petitioner's contention, at the time of Petitioner's discharge there was no absolute requirement that PTSD/TBI screening be performed *prior to* the commencement of administrative separation processing. PTSD/TBI screenings were only required prior to separation. Lastly, given that the Board determined there was no nexus between Petitioner's mental health conditions/symptoms and the bases underlying his administrative separation, the Board concluded Petitioner's processing for misconduct and substandard performance of duty in lieu of possibly pursuing a disability/medical discharge was appropriate and in compliance with all Department of the Navy directives and policy at the time of his discharge. Even with applying the liberal consideration

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standard, the Board found that Petitioner's misconduct and substandard performance of duty merited his receipt of a GEN discharge.

Additionally, the Board reviewed Petitioner's application under reference (f), the recent guidance provided in the Under Secretary of Defense's memorandum dated 25 July 2018 (USD Memo). The purpose of the USD Memo is to ease the process for veterans seeking redress and assist Boards for Correction of Military/Naval Records "in determining whether relief is warranted on the basis of equity, injustice, or clemency." The USD Memo noted that "increasing attention is being paid to...the circumstances under which citizens should be considered for second chances and the restoration of rights forfeited," and that "BCM/NRs have the authority to upgrade discharges or correct military records to ensure fundamental fairness." The USD Memo sets clear standards and principles to guide BCM/NRs in application of their equitable relief authority, and further explains that boards shall consider a number of factors to determine whether to grant relief, including any arrests, criminal charges, and convictions. However, even in light of the USD Memo, the Board still concluded that, given the totality of the circumstances, Petitioner's request does not merit relief.

RECOMMENDATION:

That Petitioner's request be denied.

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

That, upon request, the Department of Veterans Affairs be informed that Petitioner's application was received by the Board on 12 June 2019.

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. The foregoing action of the Board is submitted for your review and action.

8/24/2020

[REDACTED]

Executive Director

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ASSISTANT SECRETARY OF THE NAVY (M&RA) DECISION:

JUN 22 2021

Reviewed and Approved Petitioner Request (Grant Relief)

Reviewed and Approved Board Recommendation (Deny Relief)

[REDACTED]

Acting