



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

██████████
Docket No. 8121-23
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER ██████████ ██████████
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Ref: (a) 10 U.S.C. § 1552
(b) SECDEF Memo of 13 Sep 14 (Hagel Memo)
(c) USD Memo of 25 August 2017 (Kurta Memo)
(d) USECDEF Memo of 25 July 2018 (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 and to make other conforming changes to his DD Form 214.

2. The Board, consisting of ██████████ reviewed Petitioner's allegations of error and injustice on 10 May 2024 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 (d). Additionally, the Board also considered an advisory opinion (AO) furnished by qualified mental health provider. Although the Petitioner was afforded an opportunity to review the AO and submit an AO rebuttal, he chose not to do so.

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 originally enlisted in the U.S. Marine Corps and began a period of active service on 18 April 1994. Petitioner's pre-enlistment physical examination, on 11 March 1994,

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[REDACTED]

and self-reported medical history both noted no psychiatric or neurologic conditions of symptoms. After periods of continuous Honorable service, Petitioner reenlisted on 2 March 1999 and 7 April 2002.

d. During Petitioner's first enlistment, on 19 October 1994, Petitioner received non-judicial punishment (NJP) for a period of unauthorized absence (UA) that lasted twenty-nine (29) days. Petitioner did not appeal his NJP.

e. Petitioner was selected for the Marine Corps Enlisted Commissioning Education Program (MECEP) and attended the MECEP Preparatory School from 2 May 2002 until 6 August 2002. Petitioner began his college studies at [REDACTED] in the fall of 2002. However, Petitioner earned a grade point average of 0.00 during his fall semester at NC State. Subsequently, a Performance Review Board (PRB) recommended Petitioner's MECEP disenrollment.

f. On 7 February 2003, Petitioner's command issued him two separate "Page 11" counseling warnings (Page 11). The first Page 11 documented, *inter alia*, multiple UAs, the PRB, and his poor academic performance. The Page 11 advised him that any further disciplinary infractions or continuation of deficient performance may result in disciplinary action and/or processing for administrative discharge. The second Page 11 documented a specific UA from Petitioner's appointed place of duty on 7 February 2003. The Page 11 advised him that any further disciplinary infractions will result in disciplinary action and/or processing for administrative discharge under other than honorable conditions (OTH).

g. On 11 February 2003, Petitioner was formally disenrolled from the MECEP. On 13 February 2003, Petitioner received NJP for twenty (20) separate UA specifications. Petitioner did not appeal his NJP. Following his MECEP disenrollment, Petitioner was reassigned to a command in [REDACTED] ([REDACTED]).

h. On 8 March 2006, Petitioner's command issued him a Page 11 advising him that he was in receipt of PCS orders and not to report later than 31 March 2006 to his new command at [REDACTED]. The Page 11 advised him that a failure to report to his appointed place of duty by such date will constitute a violation of Articles 92 and 86 of the Uniform Code of Military Justice. Petitioner elected not to submit a Page 11 rebuttal statement.

i. However, Petitioner refused to execute his PCS orders to his new command, despite receiving help, advice, and extensive support from his chain of command, to include his Sergeant Major and monitor. As a result, Petitioner's command charged him with an Article 92 UCMJ violation (failure to obey a lawful order).

j. Petitioner subsequently submitted a voluntary written request for an administrative undesirable discharge for the good of the service to avoid trial by court-martial for his failure to obey a lawful order by refusing to execute his PCS orders to a combat unit. As a result of this course of action, Petitioner was spared the stigma of a court-martial conviction, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a Military Judge.

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[REDACTED]

k. Petitioner's adverse detaching fitness report/performance evaluation (Eval) for the period ending 8 August 2006 repeatedly documented his willful orders violation. The Eval stated, in relevant part:

Section D-1, [REDACTED] refused to execute PCS orders to V3/4, despite receiving help, advice, and extensive support from his chain of command, to include his sergeant major and monitor. As a result, the Bn I-I charged him with violation of Article 92 of the UCMJ. [REDACTED] subsequently agreed to separation from the Marine Corps with an "Other Than Honorable" characterization of service in lieu of trial by court-martial. During the reporting period, [REDACTED] relieved of all responsibilities...Section E-1. Concerning "courage," [REDACTED] in this regard: "personal acceptance of responsibility and accountability, placing conscience over competing interests regardless of consequences." By refusing to execute lawful orders from HQMC to a combat unit, [REDACTED] not demonstrate satisfactory "personal acceptance of responsibility and accountability." He placed his own personal "competing interests" over his lawful and sworn duty to the Marine Corps and the United States...Section F-3...Refusal to execute orders to a combat unit in time of war because of competing personal interests or desires is not the hallmark of our SNCOs, who young Marines look up to as role models and mentors...DIRECTED COMMENTS: Sect A, Item 3a: This is DC fitness report due to administrative separation in lieu of trial by court-martial with an "Other Than Honorable" characterization of service and reenlistment code of RE-4...ADDITIONAL COMMENTS: [REDACTED] knowingly, consciously, and willfully violated Article 92 of the UCMJ by not reporting for duty with [REDACTED] on 31 March 2006---a rifle battalion then scheduled for a combat deployment to Iraq in late 2006...REVIEWING OFFICER COMMENTS. Adverse report mandatory due to Court Martial proceedings against SNM. Currently no rebuttal. SNM initially submitted rebuttal, report returned to RS for admin correction and SNM subsequently refused to make or update initial statement. Plea deal enabled SNM to separate with OTH discharge. Court Martial directly due to SNM's failure to execute orders to a combat unit. The simple fact is that SNM refused orders to a deploying combat unit. Some other Marine [REDACTED] went in his place...Yes, the SNM did deploy recently to OIF. However, many 0369s in the operating forces are currently on their third or fourth tours. SNM's action demonstrated the most self serving ego-centric behavior I have seen in my 20 years of service. This failure to execute orders and the circumstances have been evaluated by the entire chain of command, up to the Commanding General level. The conclusion reached at all levels resulted in SNM's OTH discharge. Only my desire to separate this Marine from my command as quickly as possible prevented a trial by court martial. SNM is not qualified for promotion or for any position of responsibility in the United States military in the future.

Ultimately, on 8 August 2006, Petitioner was discharged from the Marine Corps with an OTH characterization of service and assigned an RE-4 reentry code. Upon his discharge, he was issued a DD Form 214 that did not document his period of continuous Honorable service.

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1. As part of the review process, the BCNR ██████████, who is a licensed clinical psychologist (Ph.D.), reviewed Petitioner's original contentions and the available records and issued an AO on 2 April 2024. The Ph.D. stated in pertinent part:

Petitioner submitted a psychological evaluation dated November 2023 whereupon he was diagnosed with PTSD, Panic Disorder, Major Depressive Disorder (MDD), and Agoraphobia. There is no evidence that he followed-up with any therapy or recommendations following this evaluation. There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. He admitted to not seeking counseling for his personal problems (divorce) while in service. He submitted evidence of post-service diagnoses of PTSD, MDD, Panic Disorder and Agoraphobia that are temporally remote to service. His personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition."

CONCLUSION:

Upon review and liberal consideration of all the evidence of record, the Board concluded that Petitioner's request warrants partial relief. Specifically, the Board concluded that an administrative change to Petitioner's DD Form 214 should be made to reflect that his previous enlistment(s) was/were completed without any significant adverse disciplinary action. The Board was aware that the Department of the Navy no longer issues a separate DD Form 214 to enlisted personnel at the completion of each individual enlistment, and instead makes appropriate notations in the Block 18 Remarks section upon their final discharge or retirement from the armed forces reflecting such previous enlistments.

Regarding Petitioner's request for a discharge upgrade, the Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, his desire for a discharge upgrade and contentions that: (a) He is seeking an upgrade in order to be eligible to receive Department of Veterans Affairs (VA) benefits, (b) Petitioner was discharged because he refused to execute PCS orders he was unjustly issued, (c) Petitioner failed to execute his PCS orders for several reasons that were not taken into consideration by his command, (d) when Petitioner returned from his 2005 Iraq deployment he was suffering from both medical and psychological duress, and he was also on two months of bedrest as a result of a fistulotomy surgery, (e) Petitioner was suffering from undiagnosed PTSD which played a large role in his poor judgment, (f) the VA has evaluated Petitioner's PTSD, however his discharge

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[REDACTED]

characterization complicates him from receiving aid, (g) Petitioner served in excess of thirteen (13) years, and (h) Petitioner was meritoriously promoted four (4) times and received many accolades and awards. For purposes of clemency and equity consideration, the Board considered the entirety of the evidence Petitioner provided in support of his application.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. In accordance with 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, even under the liberal consideration standard, the Board concluded that there was no nexus whatsoever 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. Moreover, even if the Board assumed that Petitioner's misconduct was somehow attributable to any mental health conditions, the Board concluded that the severity of his misconduct clearly outweighed any and all mitigation offered by such mental health conditions. The Board determined the record reflected that Petitioner's misconduct was willful and intentional and demonstrated he was unfit for further service. The Board also determined 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.

Additionally, the Board did not believe that Petitioner's record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of his conduct and/or performance greatly outweighed any positive aspects of his military record. The Board determined that characterization under OTH conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Marine. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities.

As a result, the Board concluded Petitioner's conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. While the Board carefully considered the evidence Petitioner submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos and reviewing the record liberally and holistically, the Board did not find evidence of an error or injustice that warrants granting Petitioner the relief he requested or granting the requested relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence Petitioner provided was insufficient to outweigh the seriousness of his misconduct.

RECOMMENDATION:

In view of the foregoing, the Board finds the existence of material errors warranting the following corrective action.

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That Headquarters, U.S. Marine Corps (HQMC) review Box 12 of Petitioner's DD Form 214 for the period ending 8 August 2006 to verify Petitioner's periods of service, and to make any changes, modifications, and/or corrections as needed to blocks 12a through 12h.

That Petitioner be issued a "Correction to DD Form 214, Certificate of Release or Discharge from Active Duty" (DD Form 215) for the period ending 8 August 2006 reflecting such changes to Box 12.

That following the review and the making of any corresponding corrections to Box 12, that Petitioner's DD Form 215 also reflect his periods of continuous Honorable added to the Block 18 Remarks section with the appropriate dates as determined by HQMC.

Following the correction(s) to the DD-214 for the period ending 8 August 2006, that all other information currently listed on such DD-214 remain the same.

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.

5/16/2024

