



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

██████████
Docket No. 10560-23
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) SECDEF Memo of 3 Sep 14 (Hagel Memo)
(c) PDUSD Memo of 24 Feb 16 (Carson Memo)
(d) USD Memo of 25 Aug 17 (Kurta Memo)
(e) USECDEF Memo of 25 Jul 18 (Wilkie Memo)

Encl: (1) DD Form 149 w/ enclosures
(2) Advisory Opinion (AO) of 14 Feb 24

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 discharge be “converted” into retirement or, alternatively, that it be upgraded to “Honorable.” Enclosures (1) and (2) apply.

2. The Board, consisting of ██████████, ██████████, and ██████████, reviewed Petitioner's allegations of error and injustice on 26 April 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, applicable statutes, regulations, and policies, to include references (b) through (e). Additionally, the Board also considered the advisory opinion (AO) furnished by qualified mental health provider, which was previously provided to Petitioner. Although Petitioner was afforded an opportunity to submit a 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. Although Petitioner did not file his application in a timely manner, the statute of limitation was waived in accordance with the Kurta Memo.

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b. Petitioner enlisted in the Navy and began a period of active duty on 28 February 2001. At the time, he had previously served 11 years, two months, and 25 days of active duty service in the Marine Corps. He served honorably and reenlisted on 15 July 2005.

c. On 9 July 2008, Petitioner was convicted by the state of [REDACTED] for infliction of corporal injury upon his spouse and for making criminal threats. The court records indicate that he used a personal firearm or handgun in commission of the offense.

d. Petitioner was notified the following day of processing for administrative separation for misconduct due to commission of a serious offense and civilian conviction. He requested a hearing before an administrative separation board (ADB) to contest his proposed separation.

e. Petitioner's ADB hearing convened on 1 December 2008. The members of his administrative separation board found that the bases for separation were substantiated and warranted separation. However, they recommended that he be separated with a characterization of General (Under Honorable Conditions) (GEN) and that his discharge be suspended for a period of 12 months on the basis of the reasonable likelihood of his rehabilitation given the circumstances involved in his misconduct. Likewise, the letter of deficiency submitted by his representative counsel reiterated that the conflict between him and his spouse had been a one-time incident after his discovery that she was having an affair, that he had no prior history of abuse or violence, and that his injured spouse had a significant property interest in his military pension.

f. Petitioner's command forwarded his administrative separation records to Commander, Naval Personnel Command, (CNPC) concurring with the recommendation that his discharge be suspended. However, CNPC directed that he be discharged by reason of his civilian conviction for a serious offense, and Petitioner was discharged, on 10 April 2009, with over 19 years and four months of active service.

g. At the time of Petitioner's discharge, his Certificate of Release or Discharge from Active Duty omitted the block 18 remarks documenting his period of continuous Honorable service from 28 February 2001 through 14 July 2005.

h. Petitioner contends that he served over 19 years and four months of active duty, to include more than six years of foreign or sea service, prior to his involuntary separation within months of qualifying for retirement against the recommendation of his ADB and his chain of command. He notes that he accepted responsibility for his actions but believes that the consequences were out of proportion to the civil offenses for which he pleaded no contest and which he has since had expunged from his criminal record by the state of [REDACTED]. He also contends that his spouse's infidelity, in combination with his alcohol use due to his mental health condition of dysthymia (persistent depressive disorder), precipitated and contributed to his misconduct and, he believes, warrants liberal consideration of his discharge. For purposes of clemency and equity consideration, he submitted a personal statement, a letter and mental health evaluation from the Department of Veterans Affairs, record of the expungement of his civil offense, a clean background check from the Federal Bureau of Investigation, and six character letters supporting his post-discharge character and conduct.

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i. Because Petitioner contends that a mental health condition affected the circumstances of his discharge, the Board requested the AO at enclosure (2) for consideration. The licensed clinical psychologist noted that Petitioner's evidence included service connection for Dysthymic Disorder. However, the AO stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Petitioner contends his misconduct was isolated and uncharacteristic. Temporally remote to his service, the VA has granted service connection for a mental health condition. Unfortunately, available records are not sufficiently detailed to establish a nexus with his misconduct, particularly given claims that the behavior was a singular, atypical event. Cited medical records suggest that the mental health concerns may have onset following the legal stressors. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion. [Empasis added]

As a result, the AO concluded with a clinical opinion that "there is post-service evidence from the VA of a mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to a mental health condition."

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concluded that Petitioner's request warrants partial relief. Specifically, as discussed previously, the Board determined Petitioner's record does not properly document his previous period of continuous Honorable service with the Navy.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with references (b) through (e). These included, but were not limited to, Petitioner's previously discussed contentions.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that Petitioner's misconduct, as evidenced by his civil conviction, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the likely discrediting effect it had on the Navy. With regard to Petitioner's mental health contentions, the Board concurred with the AO that there is insufficient evidence to attribute the singular, atypical incident of his violent assault with a deadly weapon upon his former spouse to his post-service diagnosis of Dysthymic Disorder, which the licensed clinical psychologist observed to have developed after his misconduct at the time he was experiencing the stress of the legal and professional consequences of his actions. The Board determined that, while marital infidelity is, undoubtedly, a significant emotional stressor, Petitioner's response was drastically disproportionate, and potentially life threatening, notwithstanding his contended mental health issues or his evidence of post-discharge character. Without question, the misconduct which resulted in Petitioner's civilian conviction

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would have warranted a punitive discharge if tried before military courts-martial and the Board viewed his administrative discharge under honorable conditions, as recommended by the administrative separation board members and his chain of command, to constitute substantial evidence that the relevant mitigating factors were sufficiently accounted for at the time of his discharge processing. To the extent that CNPC did not concur that Petitioner's discharge should be suspended to permit his potential completion of 20 years of active service, such determination was fully within CNPC's authority and constituted neither an abuse of discretion nor an injustice. Therefore, the Board found no evidence of error or injustice to support Petitioner's request for constructive credit sufficient to qualify for a 20 year retirement.

Further, the Board concluded significant negative aspects of Petitioner's Navy service outweigh the positive aspects and continues to warrant a GEN characterization. While the Board carefully considered the evidence Petitioner submitted in mitigation and commends him for his post-discharge good character, 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 him 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.

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

RECOMMENDATION:

That Petitioner be issued a Correction to Certificate of Release or Discharge from Active Duty (DD Form 215) documenting in his block 18 remarks a "Period of continuous Honorable service from 28 February 2001 through 14 July 2005. "

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.

5/17/2024

[REDACTED]

Executive Director

Signed by: [REDACTED]