



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

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Docket No. 2288-24  
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █, █,  
USN, █

Ref: (a) 10 U.S.C. § 1552  
(b) Official Military Personnel File (OMPF)  
(c) Uniform Code of Military Justice (UCMJ)  
(d) Joint Longitudinal Viewer (JLV) Electronic Medical Archives  
(e) MILPERSMAN 1910-156  
(f) SECNAVINST 1850.4E  
(g) SECDEF Memo of 13 Sep 14 (Hagel Memo)  
(h) USECDEF Memo of 25 Aug 2017 (Kurta Memo)  
(i) USECDEF Memo of 25 Jul 18 (Wilkie Memo)

Encl: (1) DD Form 149 w/enclosures  
(2) █ Docket No. 2288-24 Memo subj: Advisory Opinion ICO [Petitioner], 23 Oct 24  
(3) NAVPERS 1070/607, 25 Aug 09  
(4) NAVPERS 1070/613, 25 Aug 09  
(5) NAVPERS 1070/613, 22 Sep 09  
(6) NAVPERS 1070/613, 23 Sep 09  
(7) NAVPERS 1910/32, 27 Oct 09  
(8) CO, █, 1910 Ser N01L/0616 Memo, subj: Administrative Separation ICO [Petitioner], 29 Oct 09  
(9) DD Form 214  
(10) CO, █, 1910 Ser N01L/0631 Memo, subj: Report of Administrative Separation, 9 Nov 09

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 his record be corrected to reflect entitlement to disability retirement. Alternatively, he requests his characterization of service be upgraded and his narrative reason for separation changed to secretarial authority.

2. The Board, consisting of █, and █, reviewed Petitioner's allegations of error and injustice on 7 November 2024. The names and votes of the panel members will be furnished upon request. The allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of the Board. Documentary material considered by the Board consisted of the

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],  
USN, [REDACTED]

enclosures, relevant portions of the individual's naval record, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or 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. Although Petitioner did not file his application in a timely manner, the statute of limitation was waived in accordance with the Kurta Memo.

b. A review of reference (b), reveals Petitioner enlisted in the Navy on 7 September 2006 for four years and reported to the [REDACTED] on 27 August 2007. In the June 2008 to December 2008 timeframe, [REDACTED] deployed to the [REDACTED].

c. In his July 2009 Periodic Health Assessment, Petitioner disclosed he used alcohol five days a week, from eight to ten drinks per night. See enclosure (2).

d. On the evening of 12 July 2009, Petitioner presented to [REDACTED], Emergency Department due to "frustrated" feelings but not suicidal feelings. The following day, he submitted to sick call at [REDACTED], where he was diagnosed with Adjustment Disorder (Situational), referred to Fleet and Family Service Center for counseling, and directed to follow up weekly with the Squadron Undersea Medical Officer. See enclosure (2).

e. On 22 July 2009 and 6 August 2009, Petitioner was evaluated at [REDACTED], after complaints of "difficulty sleeping" and increasing stress in his work environment. He was assessed with "Sleep Disturbance" in July, prescribed a sleep aid, and upon reevaluation on 6 August found physically qualified for submarine duty. See enclosure (2)

f. Commanding Officer (CO), [REDACTED], imposed nonjudicial punishment (NJP) on 25 August 2009 for violation of Article 86<sup>1</sup> of reference (c), awarding forfeiture of pay, reduction to next inferior paygrade, and 45 days restriction and extra duties<sup>2</sup>. Additionally, CO, [REDACTED], issued Petitioner an Administrative Remarks (Page 13) entry for the NJP, advising him that he was being retained in the Naval Service. See enclosures (3) and (4).

g. A review of reference (d) indicates Petitioner submitted to [REDACTED], due to significant symptoms of anxiety which intensified and included racing heartbeat, inability to concentrate, diaphoresis, and subjective feelings of panic. On physical exam, Petitioner was anxious and "shaky" with congruent mood and affect. The provider diagnosed him with Anxiety Disorder, NOS (Not Otherwise Specified) with significant depressive symptoms, referred him for a psychiatric evaluation, and found him "Not Fit" for submarine duty. See enclosure (2).

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<sup>1</sup> The record does not indicate the period of unauthorized absence (UA) nor does it contain a charge sheet detailing the specifics of Petitioner's UA.

<sup>2</sup> The CO suspended the award of restriction and extra duties.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],  
USN [REDACTED]

h. According to reference (d), Petitioner's psychiatric exam at [REDACTED], resulted in a diagnosis of Major Depression, Recurrent and Generalized Anxiety Disorder. The Abbreviated Medical Evaluation Board Report (AMEBR) indicates he was prescribed several medications, scheduled for continued psychiatric follow-up, and referred for additional counseling through mental health social work services. Additionally, the reference (b) record indicates Petitioner was placed on Limited Duty (LIMDU) to allow a period of treatment from 17 September 2009 to 16 March 2010 for Major Depression (Recurrent) and Generalized Anxiety Disorder for symptoms of serious depression, panic attacks, and anxiety. During the LIMDU period, Petitioner's treating psychiatrist directed Petitioner receive medication management and therapy. Petitioner's duty limitations included no access to weapons, continental United States (CONUS) assignment within 30 miles of a Medical Treatment Facility (MTF), and no overnight watch. See enclosure (2).

i. On 22 September 2009, Petitioner transferred from [REDACTED] -- without a transfer evaluation -- to [REDACTED] See enclosure (5).

j. On 23 September 2009, CO, TPU, Norfolk, VA, issued Petitioner a Page 13 stating he was being retained in the naval service, "however, the following is identified: DIAGNOSIS: MAJOR DEPRESSION RECURRENT, GENERALIZED ANXIETY DISORDER." The Page 13 further states "[a]ll Navy personnel on active duty must be worldwide assignable and ready to deploy on short notice to fully execute their military duties. If you are found **Fit for Full Duty (FFD)** by your primary care physician, you are required to complete your sea/sub/overseas screening within 30 days from the day you are found FFD." The Page 13 further stated that if Petitioner failed to be found fully suitable for sea/sub/overseas screening and/or worldwide available, "[he] may be processed for administrative separation." Petitioner acknowledged the entry on 29 September 2009 but did not indicate whether he did/did not desire to make a statement. See enclosure (6).

k. According to reference (d), on 29 September 2009, Petitioner's psychiatrist continued Petitioner's diagnoses as Major Depression, Recurrent, and Generalized Anxiety Disorder and referred him for individual psychotherapy with a social work counselor. Again, on 15 October 2009, reference (d) reflects continued work with his psychiatrist for medication management, with his diagnoses remaining the same. On 19 October 2009, Petitioner's psychiatrist added a diagnosis of Agoraphobia and modified his medications. Additionally, Petitioner was maintained in his existing LIMDU status with continued follow-up scheduled with a psychiatrist and social work therapist. See enclosure (2).

l. On 27 October 2009, CO, [REDACTED] notified Petitioner that he was being processed for administrative separation by reason of unsatisfactory performance as evidenced by "NAVPERS 1616/26 dated 09SEP16<sup>3</sup>" in accordance with reference (e). Petitioner waived his rights and acknowledged receipt of the notice. See enclosure (7).

m. On 29 October 2009, CO, [REDACTED] directed Director, Personnel Support Detachment, Naval Station [REDACTED], to discharge Petitioner with a General (Under Honorable

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<sup>3</sup> NAVPERS 1616/26 is the Evaluation Report & Counseling Record (E1-E6). Petitioner's OMPF does not contain a NAVPERS 1616/26 for the listed date of 16 September 2009.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],  
USN, [REDACTED]

Conditions) characterization of service by reason of unsatisfactory performance, assigning a RE-4 reentry code. See enclosure (8).

n. On 4 November 2009, Petitioner was discharged with a General (Under Honorable Conditions) characterization of service by reason of unsatisfactory performance and assigned a RE-4 reentry code. See enclosure (9).

o. By memorandum of 9 November 2009, CO, [REDACTED], reported Petitioner's administrative separation to Commander, Navy Personnel Command (PERS 832), stating "I carefully reviewed his service record and documented previous disciplinary action and based on his misconduct<sup>4</sup>, I believe he has no potential for further naval service." See enclosure (10).

p. Petitioner contends the Navy erred by not referring him to the Disability Evaluation System (DES) for processing and unjustly discharged him for "unsatisfactory performance" despite a diagnosis of major depression during service that rendered him unfit for duty. The AMEBR -- that came two months after Petitioner visited a hospital seeking help for his mental health and nine months after returning from his 2008 deployment to the Persian Gulf -- diagnosed him with Major Depression, Recurrent, and Generalized Anxiety Disorder and placed him on [REDACTED]. Just a month into his six-month [REDACTED], found Petitioner to have no potential for future service and recommended him for discharge. Had he been properly referred to DES, Petitioner would have been found unable to meet retention standards by a Medical Evaluation Board (MEB) as shown by his documented symptoms, diagnosis, placement on [REDACTED], and finding that he had no potential for further naval service. Further, the MEB would have referred him to the Physical Evaluation Board (PEB) which would have been found Petitioner unfit for service and rated his disability as at least 30%. Petitioner contends the following:

(1) His mental health was cause for DES referral, but the Navy failed to follow the regulations governing referral to the DES. Specifically,

(a) "[S]ervice members shall be referred into the DES as soon as the probability that they will be unable to return to full duty is ascertained and optimal medical treatment benefits have been attained...All members shall be referred for evaluation within one year of the diagnosis of their medical condition if they are unable to return to military duty."

(b) Section 1005 of reference (f) provides that "line commanders, COs of MTFs and individual medical and dental officers shall promptly identify for evaluation by MEB and appropriate referral to the PEB...those members presenting for medical care whose physical or mental fitness to continue naval service is questionable." Further, section 8001(e) states that "any condition that appears to significantly interfere with performance of duty appropriate to a member's officer, grade, rank, or rating will be considered for MEB evaluation."

(c) Petitioner should have been referred to a MEB upon the determination by an

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<sup>4</sup> The only misconduct reported by the same memorandum -- and the only misconduct in Petitioner's OMPF -- was the UA on 25 August 2009 -- length unknown -- for which CO, [REDACTED], imposed NJP.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],  
USN, [REDACTED]

abbreviated MEB that he had Major Depressive Disorder, Recurrent, and Generalized Anxiety Disorder that warranted being placed on [REDACTED] for six months with a treatment plan of “medication management and therapy.” Clearly at that point, Petitioner’s mental fitness to continue naval service was questionable, and there was certainly a probability that he would be unable to return to full duty.

(2) Petitioner was unjustly discharged for unsatisfactory performance immediately after being diagnosed with depression and one month into [REDACTED]. The record is clear that to the extent he really had “no potential for further naval service” – as found by CO, [REDACTED] – it was due to his disability not due to misconduct. The sole blemish on Petitioner’s record could not, in itself, have reasonably led the CO to believe he had no potential for further naval service. The “UA” was, at worst, a mistake – on a single afternoon. There is no other documented misconduct in Petitioner’s record.

(3) The Board should apply liberal consideration to this inquiry. In [REDACTED], the Federal Circuit instructed military correction boards that liberal consideration must be given to a veteran’s application for discharge relief when the veteran asserts claims based on Post-Traumatic Stress Disorder (PTSD). Although there is no indication that his drinking itself affected his ability to perform his duties, Petitioner’s drinking before his diagnosis was consistent with self-medicating for Major Depressive Disorder and therefore caused by, mitigated by, or excused by his disability.

(4) Petitioner’s AMEBR was not proper DES processing. The AMEBR is not equivalent to the full MEB review required by DES processing and did not satisfy the Navy’s responsibility to refer Petitioner into the DES. AMEBR is part of the [REDACTED] process and is used to recommend a member on a first or additional periods of [REDACTED]. Although AMEBR is also used to place a service member on [REDACTED] for referral to PEB, it was not used for this purpose in Petitioner’s case and does not constitute MEB review for DES processing.

(5) Petitioner would have been medically retired had he been properly referred to DES processing. The preponderance of evidence indicates he was unfit to perform his duties on the basis of his disability. He had been placed on a six-month [REDACTED] because of “serious depression, panic attacks, and anxiety;” was restricted from accessing weapons; limited to CONUS assignment within 30 miles of a MTF; and restricted from overnight watch. A month later, CO, [REDACTED], stated Petitioner had no potential for further naval service. At that point, Petitioner was unfit for duty. Further, the evidence shows that had Petitioner been properly referred to DES and evaluated by the PEB, his disability would have received at least a 30% rating because shortly after his discharge, the Department of Veterans Affairs (VA) rated his mental disability as 50%, effective back to his discharge.

See enclosure (1).

q. Petitioner further contends that if the Board denies his request for medical retirement, it should alternatively change his discharge characterization to Honorable.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]  
USN, [REDACTED]

(1) Although the Naval Discharge Review Board denied Petitioner's past request, the Board should consider the Wilkie memo factors. Further, an honorable characterization is assigned when "the quality of the member's service generally met the standard of acceptable conduct and performance for naval personnel" whereas a general characterization is assigned when "the quality of the member's service has been honest and faithful; however, significant negative aspects of the member's conduct or performance of duty outweighed positive aspects of the member's service record."

(2) Petitioner contends his behavior and commendations during his tenure and deployment show that he should have been discharged with an honorable rather than a general characterization of service. Additionally, he contends the facts related to his UA weigh in favor of relief based on injustice because it was a single UA to attend a sonogram just days before his wife gave birth to their first child. Further, it was a minor, non-violent offense that occurred when he was 22 years old, depressed, and anxious after deployment. Therefore, Petitioner contends the absence was directly caused by a mitigating mental health condition

(3) Petitioner's post-discharge conduct also weighs in favor of relief. Since discharge, he has been diagnosed with PTSD; overcome alcohol abuse problems that occurred during service; had no arrests, criminal charges, or convictions; served his community as a foster parent, sheltering 25-30 children in need over a period of five years; and been a fulltime father and step-father.

See enclosure (1).

r. After review of all available objective clinical and non-clinical evidence, the Board Physician Advisor provided the Advisory Opinion (AO) at enclosure (2) which explains:

Petitioner was administratively separated for "Poor Performance" based on previous NJP (unrelated to Petitioner's mental condition) and counseling statements (following NJP and following diagnoses of Major Depression and Generalized Anxiety Disorder). Though the latter counseling statement cited that inability to be found qualified for overseas/operational screening may lead to administrative separation, this was contingent on being found Fit for Full Duty prior to screening. There were no evidence of this finding.

Petitioner's personal statements and clinical history indicated his psychological conditions began with his 2008 deployment to the Persian Gulf when he experienced stress and two traumatic events in the course of his duties as Sonar Tech on the [REDACTED]. Separate evaluations encompassing his pre-/early-deployment and later-deployment/post-deployment periods showed a decrease in individual trait average from 3.17 (4.00 in Teamwork) to 2.83 (2.0 in military bearing/character). Performance comments evidenced a more negative and less optimistic tone.

Narrative comments in the pre-/early-deployment evaluation included "newest member to SONAR team and has great potential," "impressive level of technical

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],  
USN, [REDACTED]

knowledge considering brief time on board,” “interest and knowledge in SONAR operations are impressive,” “selflessly supported the offgoing watch sections,” “inconsistent self-motivation,” “very intelligent and willing to perform, but has failed to maintain a goal oriented mindset,” “will certainly overcome his lack of motivation and elevate to top of peer group,” and “recommended for advancement to Petty Officer Third Class.”

Narrative comments in the later-/post-deployment evaluation included “untapped Potential but lacks the motivation,” “shown interest and ability to perform the supply duties...continued enthusiasm is anxiously anticipated,” “failed run during Spring 2009 PFA,” and “lacks the self-motivation need to perform at the high level of which he is capable.”

Post-discharge VA clinical records provided further evidence of diagnosable psychological conditions originating in-service to include Major Depressive Disorder, Generalized Anxiety Disorder, Adjustment Disorder, and PTSD. Disability Rating Decisions supporting Petitioner’s contention of in-service mental health conditions likely impairment of his occupational functioning from diagnoses of Adjustment Disorder and PTSD (previously rated as Adjustment Disorder/claimed as PTSD, Major Depressive Disorder, Anxiety and Panic Attacks) originally granted a 50% disability evaluation effective 1/5/2009 (the day after discharge) and rising to 100% disability evaluation effective 7/17/2018.

After review of all available objective clinical and non-clinical evidence, in my medical opinion, at the time of discharge from military service, the preponderance of evidence supports Petitioner’s contention that he did suffer from mental health conditions that prevented him from reasonably performing the duties of his office, grade, rank, MOS, or rating and should have been referred for evaluation in the DES.

The AO concluded that a correction of the record would result in the following, applied to the time of discharge:

Unfit for the following conditions with placement on the PDRL:

(1) Major Depressive Disorder, VA Code 9434, rated at 30%, permanent and stable, not combat related (NCR), non-combat zone (NCZ); and

(2) Generalized Anxiety Disorder (with Panic Disorder), VA Code 9400, rated at 30%, permanent and stable, NCR, NCZ – resulting in a combined rating of 50%.

s. Reference (e) states members may be separated when they are unqualified for further Naval Service as demonstrated by:

(1) one or more enlisted performance evaluation with 1.0 marks for any performance trait; or

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],  
USN [REDACTED]

(2) denial or revocation of security clearance (for cause), thereby precluding ability to perform duties in assigned rating; and

(3) violating a NAVPERS 1070/613, Administrative Remarks counseling/warning that specifically addresses these deficiencies.

## CONCLUSION

Upon careful review and consideration of all of the evidence of record, the Board concluded Petitioner is entitled to relief.

The Board noted Petitioner was little more than one month into his six-month period of [REDACTED] when he was notified of the intent to administratively process him for unsatisfactory performance. Therefore, relying on the AO and noting the record does not support Petitioner's administrative separation by reason of unsatisfactory performance, the Board concluded Petitioner should have been referred for evaluation in the DES and would have been found unfit for continue naval service by the Physical Evaluation Board for the conditions and ratings stated in the AO.

Additionally, the Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant an upgrade to Petitioner's characterization of service in accordance with the Kurta, Hagel, and Wilkie Memos. After thorough review, the Board concluded these potentially mitigating factors were sufficient to warrant relief. Specifically, the Board determined that Petitioner's diagnosed mental health condition was related to his misconduct and the severity of his misconduct did not outweigh the mitigation provided by his condition. Therefore, the Board determined it was in the interests of justice to upgrade Petitioner's characterization of service to Honorable.

## RECOMMENDATION

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

That Petitioner be placed on the PDRL, effective 4 November 2009, for the following condition:

(1) Major Depressive Disorder, VA Code 9434, rated at 30%, permanent and stable, not combat related (NCR), non-combat zone (NCZ) and

(2) Generalized Anxiety Disorder (with Panic Disorder), VA Code 9400, rated at 30%, permanent and stable, NCR, NCZ

Resulting in a combined rating of 50%.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],  
USN, [REDACTED]

That Petitioner be issued a new Certificate of Release or Discharge from Active Duty (DD Form 214), for the period ending 4 November 2009, indicating his characterization of service was Honorable and he was placed on the PDRL.

The Defense Finance and Accounting Service (DFAS) shall audit Petitioner's pay account for payment of back pay to the date of Petitioner's removal from the TDRL and any lawful monies owed.

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 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.

12/3/2024

