



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

██████████
Docket No. 4970-24

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF ██████████
██████████

Ref: (a) 10 U.S.C. § 1552
(b) 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 5 July 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 reference (b).

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, it is in the interests of justice to review the application on its merits.

c. The Petitioner enlisted in the U.S. Navy Reserve (USNR) on 30 March 2005. Petitioner was initially assigned to a reserve unit close to his home of record drilling out of ██████████, ██████████. In 2009, Petitioner deployed in support of ██████████ between 23 January 2009 and 16 December 2009.

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d. On or about 7 April 2011, Petitioner appeared for a polygraph examination in connection for a position with the U.S. Secret Service's Uniform Division. Prior to the examination's commencement a Special Agent questioned Petitioner.

e. During the questioning, Petitioner, voluntarily admitted to, *inter alia*, viewing and downloading child pornography, and subsequently provided a written statement regarding the pornography he viewed. In Petitioner's statement, he stated he visited child pornography sites many times between 2003 and February 2011. Petitioner also admitted to downloading approximately 200 images of child pornography and had last downloaded images in February 2011.

f. On or about 8 April 2011, local authorities executed a search authorization/warrant of Petitioner's apartment and seized certain items as evidence. A forensic computer analyst's examination of Petitioner's computers revealed no evidence that he viewed, downloaded, or traded child pornography. Petitioner declined any further interviews regarding the admissions he made during his Secret Service interview and provided no further details regarding what images he saved to an external hard drive. Based on the examination results from the seized evidence, local authorities decided not to pursue any enforcement action against Petitioner.

g. On 21 October 2011, Petitioner's command notified that he was being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense related to child pornography. On or about 4 November 2011, Petitioner elected to consult with counsel, and subsequently elected his right to present his case to an administrative separation board (Adsep Board).

h. In the interim, on 9 February 2012, Petitioner underwent his own privately funded polygraph examination. In the opinion of the civilian examiner, the polygraph was exculpatory in relation to the listed questions involving Petitioner's alleged viewing, downloading, and storing of child pornography.

i. On 26 February 2012, an Adsep Board convened in Petitioner's case. The senior member of the Adsep Board panel was a Navy Judge Advocate holding the rank of Commander (O-5), and the other two Adsep Board members were a Commander (O-5), and Lieutenant Commander (O-4), respectively. At the Adsep Board, Petitioner was represented by both civilian counsel at his own expense, as well as military counsel (a Navy Judge Advocate). The Secret Service Special Agent who originally interviewed Petitioner testified at the Adsep Board on behalf of the government and was subject to cross-examination by Petitioner's attorneys. Five witnesses testified on Petitioner's behalf, and Petitioner also testified at the Adsep Board.

j. Following the presentation of evidence and witness testimony, the Adsep Board members determined by a majority vote that the preponderance of the evidence supported the basis for separation as alleged in the notification. Subsequent to the misconduct finding, the Adsep Board members recommended by majority vote that Petitioner be separated from the USNR with a General (Under Honorable Conditions) (GEN) characterization of service. On 5 April 2012, the Commanding Officer for ██████████ recommended to the Separation Authority (PERS-913)

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that Petitioner be separated due to the commission of a serious offense in accordance with the Adsep Board recommendation.

k. However, on 1 June 2012, the Separation Authority approved and directed that Petitioner instead be separated with an under Other Than Honorable conditions (OTH) discharge characterization along with an RE-4 reentry code. On the same date, Petitioner was discharged from the USNR for misconduct with an OTH characterization of service and assigned an RE-4 reentry code.

l. For purposes of clemency and equity consideration, the Board considered the entirety of the evidence Petitioner provided in support of his application.

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 did determine that it was improper and contrary to Navy administrative separation regulations and policy for the Separation Authority to direct a discharge characterization that was less favorable than what the Adsep Board recommended. Accordingly, the Board initially determined that the Petitioner should have received a GEN characterization of service on 1 June 2012.

Notwithstanding, the Board determined that Petitioner's Adsep Board was legally and factually sufficient and in accordance with all Department of the Navy directives and policy at the time of his discharge. The Board noted that the Petitioner was afforded any and all due process in connection with his Adsep Board and processing for his administrative discharge. The Board further noted that Petitioner was represented by counsel at his Adsep Board, he presented witnesses on his own behalf, and Petitioner's attorneys were afforded the opportunity to cross-examine any government witnesses, as well as to object to any government exhibits. The Board unequivocally concluded the evidentiary record substantiated Petitioner's misconduct and concurred with the Adsep Board findings. The Board was not willing to re-litigate the well-settled facts of Petitioner's case that are no longer in dispute absent any reliable and/or credible new evidence to the contrary. The Board also determined that the Adsep Board's findings and decision were by no means arbitrary or capricious, but rather reflected careful and thoughtful consideration of all of the evidence and issues presented before the Adsep Board.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in accordance with the Wilkie Memo. After thorough review, the Board concluded any potentially mitigating factors were insufficient to warrant further relief. 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.

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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 GEN or 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 Sailor.

Therefore, while the Board carefully considered the evidence Petitioner provided in mitigation, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an error or injustice exists to warrant upgrading Petitioner's characterization of service above a GEN or granting additional clemency in the form of an HON characterization of service and/or making other conforming changes to the NAVPERS 1070/613 Administrative Remarks documenting his USNR discharge.

Ultimately, the Board did not find a material error or injustice with the Petitioner's original narrative reason for separation, separation code, and reentry code. The Board concluded the Petitioner was assigned the correct narrative reason for separation, separation code, and reentry/reenlistment code based on the totality of his circumstances, and that all such notations were proper and in compliance with Department of the Navy directives and policy at the time of his discharge.

RECOMMENDATION:

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

That Petitioner's character of service be changed to "General (Under Honorable Conditions)," but that no other changes be made from the original NAVPERS 1070/613 Administrative Remarks entry dated 1 June 2012 documenting Petitioner's USNR discharge.

Petitioner shall be issued a new NAVPERS 1070/613 Administrative Remarks page from "Navy Operational Support Center [REDACTED]," documenting Petitioner's USNR discharge that reflects the following:

"12JUN 01: Discharged this date.
Type of Discharge: General (Under Honorable Conditions).
Reason for Discharge: Misconduct – Commission of a Serious
Offense.
Reenlistment Code: RE-4.
SPD Code: GKQ.
Authority: MILPERSMAN 1910-142.
Not recommended for reenlistment."

That the original NAVPERS 1070/613 dated 1 June 2012 reflecting Petitioner's OTH discharge characterization shall be removed from Petitioner's service record/OMPF in its entirety.

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[REDACTED]

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.

7/16/2024

