



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

██████████
Docket No: 2864-21
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF ██████████
USN, XXX-XX-██████████

- Ref:**
- (a) 10 U.S.C. § 1552
 - (b) 10 U.S.C. § 1370
 - (c) SECNAVINST 1920.6C, 15 Dec 06
 - (d) SECDEF Memo, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder," 3 September 2014
 - (e) OSD 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," 25 August 2017
 - (f) OSD Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations," 25 July 2018

- Encl:**
- (1) DD Form 149 w/attachments
 - (2) DD Form 214 (19870909 – 19920827)
 - (3) NAVPERS 1420/3, Officer Precedence Record
 - (4) CNO Memo Ser N1/127147, subj: Retirement Grade Determination ICO [Petitioner], 24 September 2007
 - (5) NAVPERS 1626/7, Report and Disposition of Offense(s), 3 January 2007
 - (6) Navy Region ██████████ CO Memo Ser N00J/0085, subj: Punitive Letter of Reprimand, 28 February 2007
 - (7) Petitioner Memo, subj: Acknowledgment of Receipt of Punitive Letter of Reprimand, 6 March 2007
 - (8) Navy Region ██████████ CO Memo Ser N00J/0102, subj: Nonjudicial Punishment Report ICO [Petitioner], 26 March 2007
 - (9) NPC Memo Ser 834/351, subj: Notification of Retirement Grade Determination Proceedings, 29 May 2007
 - (10) Petitioner Memo, subj: Retirement Grade Determination, 5 June 2007
 - (11) Petitioner Letter, subj: Retirement in Grade Determination ICO [Petitioner], 11 June 2007
 - (12) DD Form 214 (19920828 – 20071031)
 - (13) Petitioner's Medical Progress Notes, 24 June 2008

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(14) Department of Veterans Affairs Letter 341/2121/smd/259, 19 June 2011

(15) NPC OLC (PERS-00J) Memo, subj: Advisory Opinion ICO [Petitioner], 26 May 2021

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 reflect that he was retired in the grade of lieutenant commander (LCDR).

2. The Board reviewed Petitioner's allegations of error or injustice on 20 July 2021 and, pursuant to its regulations, determined that no corrective action should be taken on Petitioner's naval record. 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 of the facts 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.

b. Petitioner enlisted in the Navy and began a period of active duty service on 9 September 1987. He served honorably as an enlisted Sailor until he was discharged on 27 August 1992 to accept a commission as an officer in the U.S. Navy Reserve (USNR). See enclosure (2).

c. Effective 28 August 1992, Petitioner was appointed as an ensign in the USNR. He was subsequently transferred from line to staff, and his date of rank to ensign was adjusted to 7 August 1992. Petitioner continued serving on active duty as a commissioned officer, and was promoted to the grade of LCDR effective 1 July 2002. See enclosure (3).

d. In March 2006, Petitioner deployed for a one-year assignment in Afghanistan as the officer-in-charge of a small contingent of Sailors attached to an Army unit training member of the [REDACTED] operating the [REDACTED] in [REDACTED]. See enclosure (1).

e. On 21 January 2007, Petitioner submitted a voluntary retirement request, to be effective after completion of 20 years of creditable service. See enclosure (4).

f. On 23 February 2007, Petitioner received nonjudicial punishment (NJP) for failing to obey a lawful written order by allowing a person of the opposite sex to enter his quarters between July 2006 and September 2006 at [REDACTED] in [REDACTED] in violation of Article 92, Uniform Code of Military Justice (UCMJ); conduct unbecoming an officer and gentleman by wrongfully and dishonorably engaging in an unduly familiar relationship, which included sexual intercourse, with a female enlisted Sailor, in violation of Article 133, UCMJ; and for adultery and fraternization with the same enlisted Sailor, both in violation of Article 134, UCMJ. See enclosure (5).

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g. Petitioner received a punitive letter of reprimand as a result of his NJP. This reprimand stated that Petitioner had previously been advised of his rights, including the right to refuse the imposition of NJP, and that Petitioner had elected to accept NJP. It also noted that Petitioner was the supervisor of the female enlisted Sailor with whom he engaged in an inappropriate sexual relationship. See enclosure (6).

h. By memorandum dated 6 March 2007, Petitioner acknowledged receipt of his punitive letter of reprimand, and elected not to appeal his NJP or to submit a written statement for inclusion in his official record. See enclosure (7).

i. By memorandum dated 26 March 2007, Petitioner's commander favorably endorsed the retirement request that Petitioner had made on 21 January 2007. He recommended that Petitioner not be detached for cause or required to show cause for retention in the Navy, and suggested that the interests of justice, the Navy, and Petitioner's family would be best served by approving Petitioner's retirement request. See enclosure (8).

j. By memorandum dated 29 May 2007, Petitioner was notified that his voluntary retirement request was being forwarded to the Secretary of the Navy (SECNAV) for a retirement grade determination based upon his NJP. This memorandum notified Petitioner of his right to submit a rebuttal or decline to make a statement, and to confer with appointed military counsel or civilian counsel at no expense to the government. It also informed Petitioner that the recommended grade for his retirement was lieutenant (O-3). See enclosure (9).

k. By memorandum dated 5 June 2007, Petitioner acknowledged receipt of enclosure (9). In this acknowledgment, he indicated his desire to confer with both a judge advocate and a civilian counsel, indicated that he had done so. See enclosure (10).

l. By letter dated 11 June 2007, Petitioner submitted his rebuttal to enclosure (9). In this rebuttal, he requested reconsideration of the recommendation that he be retired in the grade of lieutenant, and apologized for failing to do the right thing. He also listed a number of points that he hoped would be considered positively in his request. These points included: (1) that his behavior was consistent with his now-diagnosed bipolar mental disorder, which was made worse by the level of stress under which he was operating both in preparation for and while deployed in Afghanistan; (2) the price paid by his dependents for his indiscretion; (3) the financial penalty that would result from his retirement in a lesser grade, to include both the decrease in his retirement pay and his reduced civilian employment opportunities; (4) that he was not informed of the possibility of a retirement grade determination when he elected to accept NJP; (5) that his career had been unblemished prior to his deployment and that he had volunteered for tough assignments, and that his accomplishments should mitigate the charges given their occurrence in a combat zone environment, his mental health condition, and the extreme stress he was under; (6) that he deployed four times since 2004; and (7) that during a previous deployment he was first on scene to discover the exploded human remains from a suicide attack against U.S. security personnel and two Iraqi oil terminals. Petitioner also questioned whether a retirement grade determination was warranted given all of the circumstances, since such determinations are normally reserved for O-5s and above. See enclosure (11).

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m. By memorandum dated 24 September 2007, the Deputy Chief of Naval Operations (Manpower, Personnel, Training and Education) (N1) recommended to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) that Petitioner be retired in the grade of lieutenant. See enclosure (4).

n. On 28 September 2007, the ASN (M&RA) approved Petitioner's retirement in the grade of lieutenant (O-3). See enclosure (4).

o. Effective 31 October 2007, Petitioner was retired in the grade of lieutenant (O-3E) with an honorable characterization of service. See enclosure (12).

p. In July 2008, Petitioner was diagnosed with post-traumatic stress disorder (PTSD) related to a traumatic event during one of his deployments in the Navy by a Department of Veterans Affairs (VA) mental health provider. Petitioner was also diagnosed with bipolar disorder. See enclosure (13).

q. Effective 30 June 2010, the VA awarded Petitioner a 100 percent disability rating for service-connected PTSD.¹ See enclosure (14).

r. Petitioner, through counsel, asserts three material errors in his retirement grade determination:

(1) Petitioner was never provided notice of a grade review board. Petitioner's counsel asserts that reference (c) requires an officer to be notified in writing that his voluntary retirement request is being forwarded to the SECNAV for a grade determination, and that the officer had a right to provide a rebuttal or decline to make a statement. He asserts that no such written notification was provided in this case.

(2) There was a sub-rosa agreement for Petitioner to accept NJP and apply for retirement. Petitioner's counsel contends that Petitioner accepted this resolution with "blinders on," not knowing that a grade review board would result. He contends that this lack of knowledge rendered his decision to retire involuntary, citing case law utilizing the same "blinders on" language, and asserts that the Navy failed to notify Petitioner that he would be subject to a grade review.

(3) Petitioner served satisfactorily in the grade of LCDR for over five years, as evidence by his fitness reports. He contends that each of the factors cited by reference (c) for SECNAV to consideration in determining whether service in grade was satisfactory weigh heavily in favor of Petitioner.²

¹ The evidence reflects that Petitioner had previously been awarded a 30 percent disability rating for PTSD, and that it was increased to 100 percent in 2010. It is not clear from the record what prompted this increased disability rating.

² The factors to be considered in this determination listed by Petitioner included the nature and severity of the alleged misconduct; the effect of the misconduct on performance of military duties; all fitness reports in the current grade; time in current grade and relation to misconduct; any other relevant matters; and the recommendation of the chain of command.

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See enclosure (1).

s. Reference (b) provides that “a commissioned officer (other than a commissioned warrant officer) ... of the ... Navy ... who retires ... shall be retired in the highest permanent grade in which such officer is determined to have served on active duty satisfactorily.” It further provides that the determination of satisfactory service for an officer in Petitioner’s grade shall be made by the SECNAV.

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board found insufficient evidence of any error or injustice to warrant relief.

As a preliminary matter, the Board notes that the guidance of references (d) and (e) do not apply to retirement grade determinations. By their own terms, these policies apply to requests to modify discharges, not retirement grade determinations.³ Although Petitioner did not specifically request that his mental health condition(s) be taken into account in determining his appropriate retirement grade, he did provide evidence that he has been diagnosed with PTSD and bipolar disorder, and that the VA has determined the former to be service connected. Although the guidance of references (d) and (e) did not apply to the Board’s review of Petitioner’s application, the Board nonetheless considered Petitioner’s diagnosed mental health conditions among the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice, as discussed below.

The Board found Petitioner’s contention that he was not provided written notice of the SECNAV grade determination review, as required by reference (c), to be unsupported by the evidence. Petitioner was notified that his voluntary retirement request was being forwarded to the SECNAV for a retirement grade determination, and that he could submit a rebuttal or decline to make a statement and confer with appointed military counsel or civilian counsel in enclosure (9). He acknowledged this notification in enclosure (10), and indicated he had already consulted with both a judge advocate and civilian counsel. He subsequently submitted his rebuttal to the recommended grade determination in enclosure (11), providing reasons why his retirement grade determination should be resolved in his favor. It is clear from the record that the provisions of reference (c) were followed in Petitioner’s retirement grade determination review process, so Petitioner’s first contention of error or injustice has no merit.

The Board found Petitioner’s contention that his retirement request was involuntary because he was unaware of the possibility of a retirement grade determination when he submitted his retirement request to be without merit. At the time of his retirement request, Petitioner was a field grade officer approaching almost 20 years of service. Given this experience, it is inconceivable that he was unaware that he could be subjected to such a determination given that he was pending NJP for his misconduct. Accordingly, the Board did not find credible the contention that Petitioner had “blinders on” regarding the possibility of a retirement grade

³ Per paragraph 20 of reference (e), the term “discharge” includes the characterization, narrative reason, separation code, and re-enlistment code.

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determination review board when he submitted his retirement request while pending NJP for engaging in an inappropriate sexual relationship while deployed with a married enlisted female Sailor under his supervision. He simply could not have been unaware the satisfactory nature of his service as a LCDR would not come into question under these circumstances.

Finally, the Board finds no error or injustice in the determination that Petitioner did not serve satisfactorily in the grade of LCDR. The evidence reflects that he engaged in an inappropriate relationship while deployed with a married enlisted female Sailor under his supervision from approximately June through September 2006. The Board does not question the fact that Petitioner's service as a LCDR was otherwise satisfactory and that he had favorable fitness reports. However, it did believe that Petitioner's blatant misconduct as a LCDR clearly outweighed the otherwise favorable aspects of his conduct in grade. Accordingly, the Board found no error or injustice in the ASN (M&RA)'s determination that Petitioner failed to serve satisfactorily in the grade of LCDR.

Finally, the Board considered the totality of the circumstances to determine whether relief is warranted in the interests of justice in accordance with reference (e). In this regard, the Board considered, among other factors, that Petitioner has been diagnosed with PTSD as a result of his exposure to traumatic event(s) while in the Navy, as well as bipolar disorder; Petitioner's otherwise meritorious service, to include his multiple deployments; that Petitioner volunteered for the deployment during which his misconduct occurred; Petitioner's contention that he was unaware of the possibility that he could be retired in a lesser grade when he submitted his retirement application or when he accepted NJP; the financial impact of the decision to retire Petitioner in a lesser grade; and the passage of time since Petitioner's discharge. Even considering these potentially mitigating circumstances, however, the Board determined that equitable relief is not warranted given the totality of the circumstances. Reference (b) provides that officers shall be retired in the highest grade in which they served satisfactorily, and Petitioner clearly did not serve satisfactorily in the grade of LCDR. His otherwise honorable and meritorious service warranted his retirement in the grade of lieutenant, but does not change the nature of his service in the grade of LCDR.

RECOMMENDATION:

In view of the above, the Board recommends that no corrective action be taken on 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 titled matter.

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

9/1/2021

[REDACTED]

Executive Director

ASSISTANT SECRETARY OF THE NAVY (MANPOWER AND RESERVE AFFAIRS)
DECISION:

Board Recommendation Approved (Deny Relief)

EP

SEP 28 2021

Petitioner's Request Approved (Correct Petitioner's naval record to reflect that he was retired in the grade of LCDR; Scrub Petitioner's naval record to remove all references to the grade determination review process which determined that the highest in which Petitioner served was Lieutenant; Refer this Record of Proceedings to DFAS to determine what, if any compensation Petitioner is due as a result of this change to his naval record.)

[REDACTED]

Acting Assistant Secretary of the Navy
(Manpower and Reserve Affairs)