



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

██████████
Docket No: 3435-21
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER ██████████, USMC,
XXX-XX-██████████

Ref: (a) 10 U.S.C. § 1552
(b) USD Memo, "Guidance to Military Discharge Review Boards and Boards
for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency
Determinations" 25 July 18

- Encl: (1) DD Form 149 with enclosures
(2) DD Form 214 (19980316 – 20060131)
(3) NAVMC 763, United States Marine Corps Appointment Acceptance and Record, 1
February 2006
(4) NCIS 5580/26, Statement, 20 September 2006
(5) NCIS Report of Investigation, Control No. ██████████
(6) NAVMC 118(13), Record of Conviction by Court-Martial
(7) ██████████ CO Memo 1050 SEPS, subj: Involuntary Appellate Leave/Transfer by
Service Record, 28 July 2008
(8) Opinion of the Court in the case of *United States v. [Petitioner]*, in the United States
Navy-Marine Corps Court of Criminal Appeals, ██████████
(9) Opinion of the Court in the case of *United States v. [Petitioner]*, in the United States
Court of Appeals for the Armed Forces, ██████████
(10) Supplementary General Court-Martial ██████████
(11) ██████████ CG Memo 1920 C 06, subj: Notification of Board of Inquiry, 17 May 2010
(12) ██████████ Memo 1920 C 06, subj: Report of the Board of Inquiry in the case of
[Petitioner], 2 August 2010
(13) Detailed Military Defense Counsel Memo 5800 DEF/yjl, subj: Respondent's Written
Comments WRT the Board of Inquiry ICO [Petitioner], 9 August 2010
(14) CMC Memo 1920 JAMO, subj: Report of the Board of Inquiry in the case of
[Petitioner], 7 October 2020
(15) DD Form 214 (20060201 – 20101203)

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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 characterization of service be upgraded to honorable; that the narrative reason for his separation be changed to "Secretarial Authority"; and that all records referencing "unacceptable conduct" as the reason for Petitioner's discharge be removed from his record.

2. The Board reviewed Petitioner's allegations of error or injustice on 10 September 2021 and, pursuant to its regulations, determined that the corrective action is not warranted. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies, to include reference (b).

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 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 waive the statute of limitations and review Petitioner's application on its merits.

c. Petitioner enlisted in the Marine Corps and served honorably on active duty from 16 March 1998 until he was discharged on 31 January 2006 to accept an appointment as a warrant officer. See enclosure (2).

d. On 1 February 2006, Petitioner was appointed as a warrant officer in the Marine Corps. He remained on active duty with no break in service. See enclosure (3).

e. On 20 September 2006, Petitioner's spouse made a statement to the Naval Criminal Investigative Service (NCIS) alleging that Petitioner possessed child pornography. She stated that she discovered pornographic files on their desktop computer, including "approximately fifty (50) files that had names associated with children, of those maybe twelve (12) were of children ranging in ages between 10 and 14 [years of age]." See enclosure (4). Twenty-eight (28) of the images recovered from the desktop computer were found to match known child victims, while an additional 12 images were found to include individuals under the age of 18 according to an analysis by the Armed Forces Center for Child Protection. See enclosure (5).

f. On 7 February 2008, Petitioner was convicted by a general court-martial (GCM) of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). Although Petitioner had been charged with possession of child pornography "on divers occasions," the military judge had excepted these words from the specification without explanation. He was sentenced to six months of confinement and a dishonorable discharge (DD). See enclosure (6).

g. On 14 April 2008, the convening authority approved the sentence of the GCM as adjudged. See enclosure (6).

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h. Upon the completion of his sentence to confinement, Petitioner was placed on involuntary appellate leave effective 29 July 2008 pending appellate review of his conviction. See enclosure (7).

i. On 4 December 2008, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found Petitioner's conviction to be correct in law and fact, and affirmed the findings sentence as adjudged.¹ See enclosure (8).

j. On 12 March 2010, the U.S. Court of Appeals of the Armed Forces (CAAF) reversed the decision of the NMCCA, and set aside Petitioner's conviction with prejudice. Specifically, the CAAF found that by removing the words "on divers occasions" from the specification upon which Petitioner was convicted, the military judge rendered ambiguous findings that were not capable of review under Article 66, UCMJ. In making this finding, the CAAF specifically found that the evidence was legally sufficient with respect to the presence of child pornography on at least two of the electronic media charged, but that the ultimate ambiguity in the specification for which Petitioner was convicted rendered his conviction unreviewable and therefore fatally defective. See enclosure (9).

k. On 23 April 2010, all rights, privileges and property of which Petitioner had been deprived by virtue of the set-aside GCM findings of guilty and sentence were restored. This included his return to duty. See enclosure (10).

l. By memorandum dated 17 May 2010, Petitioner was notified that a board of inquiry (BOI) would be convened to make a recommendation regarding his retention in the Marine Corps based under the information contained in the record of trial for his GCM. Specifically, the BOI would consider whether Petitioner should be separated for substandard performance of duties, as evidenced by his failure to demonstrate acceptable qualities of leadership required of and to properly discharge duties expected of an officer of Petitioner's grade and experience; and misconduct and morale or professional dereliction, as evidenced by commission of a military or civilian offense which could be punished by confinement of six months or more and sexual perversion. See enclosure (11).

m. On 1 July 2010, a BOI substantiated the allegation of misconduct as evidence by commission of a military or civilian offense which could be punished by confinement of six months or more,² and recommended by a vote of 2-1 that Petitioner be discharged from the Marine Corps under other than honorable (OTH) conditions.³ See enclosure (12).

n. By memorandum dated 9 August 2010, Petitioner, through counsel, provided written comments in response to the BOI findings. This response asserted serious legal and procedural

¹ The NMCCA substituted a date within the specification upon which Petitioner was convicted.

² The BOI did not substantiate the allegation of substandard performance of duty.

³ The minority member of the Board explained by separate memorandum dated 13 July 2010 that, while he believed that the misconduct was substantiated by a preponderance of the evidence and warranted separation, he had reasonable doubt regarding whether Petitioner's possession of child pornography was "knowing and wrongful." The Minority member also considered the severity of the disciplinary measures already received by Petitioner, which included six months of confinement and registration in four states as a sex offender. Accordingly, the Minority member recommended that Petitioner's discharge be characterized as "general (under honorable conditions)."

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issues which prejudiced Petitioner's ability to show cause for retention at the BOI. First, the response asserted that the Board's substantiation of misconduct based upon commission of a military or civilian offense which could be punished by confinement of six months or more, or if prosecuted under the UCMJ, would require specific intent for conviction, was erroneous because the Board members were misled to believe that mere possession of child pornography is a violation of Article 134, UCMJ. In support of this assertion, Petitioner contended that the BOI members indicated after the BOI was concluded that they did not realize that "knowing" and "wrongful" were actual elements of an offense for child pornography under Article 134, UCMJ. Next, Petitioner asserted that he was not able to properly cross-examine all necessary witnesses, as he was denied the ability to cross-examine all of the witnesses who testified at Petitioner's GCM during the BOI hearing. Third, Petitioner contended that the BOI members were misled by the CAAF decision which stated that the possession element of the child pornography charge appeared solid, as the CAAF did not consider other elements of the charge because sufficiency of the evidence was not one of the grounds of appeal before the court. Finally, Petitioner asserted that the evidence did not support that he knowingly and wrongfully possessed child pornography, as the Government's own witness stated that a reasonable person would delete child pornography if they innocently came across it which is what Petitioner's reportedly did. Petitioner further asserted that he had been assured by his appellate defense counsel that he could not be directed to show cause for retention if returned to active duty following the set-aside of his conviction, and that he would not have sought return to active duty if he thought a BOI was a possibility. See enclosure (13).

o. On 26 August 2010, the General Officer Show Cause Authority concurred with the findings of the BOI and the recommendation that Petitioner be separated from the Marine Corps under OTH conditions. See enclosure (14).

p. After review of the BOI, Petitioner's response to the BOI, and the chain of command endorsements, the Acting Deputy Commandant of the Marine Corps for Manpower and Reserve Affairs (DC (M&RA)) recommended to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) that Petitioner be separated from the Marine Corps under OTH conditions. See enclosure (14).

q. On 1 November 2010, the ASN (M&RA) approved the DC (M&RA)'s recommendation, directing Petitioner's separation from the Marine Corps under OTH conditions. See enclosure (14).

r. On 3 December 2010, Petitioner was discharged from the Marine Corps under OTH conditions for unacceptable conduct. See enclosure (15).

s. Petitioner contends that his characterization of service and narrative reason for separation are unjust and legally inaccurate, as they do not reflect that CAAF decision. He also contends that he was well beyond his time-in-grade and time-in-service obligations upon the set aside of his conviction, so he could have elected to leave active duty with an honorable discharge, but did not pursue this course of action based upon assurances he received that he could not be subject to a BOI if he returned to active duty. He also reiterated his contentions made in his response to the BOI findings that the members did not understand the elements required to sustain a conviction

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for possession of child pornography. Apart from his objection to the BOI proceedings, Petitioner also argues that the economic and social stigma imposed by his characterization of service is unwarranted and grossly disproportionate given his overall record in the Marine Corps.

CONCLUSION:

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

The Board found no merit in Petitioner's contention that his discharge was contrary to the finding of the CAAF. The CAAF did not dismiss the charge of possession of child pornography against Petitioner based on any question of the evidence. In fact, the CAAF specifically stated that the evidence was sufficient with respect to the possession of child pornography on at least two of the electronic media charged. Rather, the CAAF dismissed the charge against the Petitioner because the military judge had inexplicably removed the words "on divers occasions" from the specification, thus adding ambiguity which made appellate review impossible. While the CAAF was legally obligated under the circumstances to set aside the conviction and eliminate the criminal consequences for the Petitioner, this action did not negate the underlying misconduct for which Petitioner was convicted. Despite the set-aside of his conviction, the fact remains that a legally-trained military judge found Petitioner guilty of wrongful possession of child pornography in violation of Article 134, UCMJ, and that this conviction was upheld by a panel of legally-trained military judges at the NMCCA. During the GCM, Petitioner would have had the opportunity to cross-examine all of the witnesses against him, and the military judge certainly would have understood the elements required to support a conviction for the wrongful possession of child pornography in violation of Article 134, UCMJ. Finally, the Board noted, as Petitioner did in enclosure (1), that the sufficiency of the evidence with regard to the elements of the charge was not at issue throughout Petitioner's appellate process. The absence of this question on appeal suggests that there was no issue with the sufficiency of the evidence in this regard. Accordingly, the Board found no error or injustice in Petitioner's discharge under OTH conditions for misconduct. The fact of the original conviction, combined with the fact that the conviction was overturned based on a legal technicality and not due to any evidentiary deficiency, convinced the Board that there was more than sufficient evidence to uphold the BOI's findings, which are subject to a far lower standard of proof than in a court-martial conviction.

The Board was also not persuaded by Petitioner's contention that the BOI members did not understand the elements necessary to support the charge of wrongful possession of child pornography in violation of Article 134, UCMJ. There was no evidence that this was the case. However, even if there was such evidence, the fact remains that Petitioner was convicted of wrongful possession of child pornography beyond a reasonable doubt by a legally-trained and experienced military judge, and it was not the sufficiency of the evidence which resulted in the conviction being set aside. This alone provides a sufficient basis to conclude that the evidence was sufficient to support the BOI's findings. Further, the fact that a minority report was prepared which discussed the "knowing and wrongful" element of the charge suggests that the BOI members did understand and considered the requirement. Finally, the Board noted that Petitioner was represented by counsel at the BOI, so if there was some question about whether

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the elements of the offense were met then that should have been highlighted for consideration by the board members during the proceedings.

The Board was also not persuaded by Petitioner's contention that he had been misled to believe that he would not be required to show cause if he remained on active duty, and that he would have elected to be honorably discharged if he knew otherwise. The Board found no evidence to support Petitioner's contention that he was misled in this regard. Under the circumstances, it was obvious that Petitioner would be required to show cause for retention in the Marine Corps. He had a substantiated allegation of possession of child pornography; Petitioner had served in the Marine Corps long enough to know that virtually any Marine officer would have to show cause for retention under those circumstances. Further, Petitioner was informed in paragraph (4) of enclosure (7) that he may be ordered to return to active duty for a rehearing or other disposition of his case if the punitive discharge was disapproved. Petitioner's contention that he reasonably believed that he would not have to show cause for retention under these circumstances is simply not credible.

Finally, the Board considered the totality of the circumstances to determine whether relief was warranted in the interests of justice in accordance with reference (b). In this regard, the Board considered, among other factors, Petitioner's entire service record, the majority of which was honorable and which included deployment to Afghanistan; the social and economic stigma associated with Petitioner's characterization of service and narrative reason; that Petitioner completed the entire sentence to confinement for a conviction which was later set-aside; that the CAAF set-aside Petitioner's conviction with prejudice; Petitioner's contention that he was misled with regard to the likelihood of being required to show cause for retention; Petitioner's contention that the BOI members misunderstood the elements of the serious offense for which he was separated; that the minority member of the BOI recommended that Petitioner's service be characterized as general (under honorable conditions); and the passage of time since Petitioner's discharge. Even considering these factors, however, the Board determined that relief is not warranted given the totality of the circumstances. The Board had no reason to doubt the sufficiency of the evidence upon which Petitioner was convicted of possession of child pornography in violation of Article 134, UCMJ. He was convicted of the offense beyond a reasonable doubt by a military judge. That conviction was upheld by the NMCCA. The CAAF specifically stated that there was no evidentiary issue with Petitioner's possession of the child pornography when it set aside the conviction for a fatal error in the specification, and the wrongful or knowing nature of the possession was never at issue on appeal as it would be if any such concern existed. Finally, the BOI unanimously found that Petitioner committed the misconduct. While it is true that one of the BOI members found reasonable doubt regarding Petitioner's wrongful and knowing possession of the child pornography, proof beyond a reasonable doubt is not the evidentiary standard at a BOI. The wrongful possession of child pornography in violation of Article 134, UCMJ, is a very serious offense, and certainly one that warrants an OTH characterization of service. This serious misconduct far outweighed all of the other potentially mitigating factors, so the Board determined that relief was not warranted given the totality of the circumstances.

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

10/28/2021

[REDACTED]

Executive Director

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

Board Recommendation Approved (Deny Relief)

NOV 03 2021

Petitioner's Request Approved (Full Relief – Upgrade Characterization of Service to Honorable; Change Narrative Reason for Separation to “Secretarial Authority”; Removal All Records Associated with Petitioner's BOI and Separation Action from Petitioner's Naval Record)

Petitioner's Request Partially Approved (Partial Relief – Upgrade Characterization of Service to Honorable; No Change to Narrative Reason for Separation)

Petitioner's Request Partially Approved (Partial Relief – No Change to Characterization of Service; Change Narrative Reason for Separation to “Secretarial Authority”)

[REDACTED]

Acting



THE ASSISTANT SECRETARY OF THE NAVY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

NOV 03 2021

From: Acting Assistant Secretary of the Navy (Manpower and Reserve Affairs)
To: Chairman, Board for Correction of Naval Records

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED], USMC,
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Ref: BCNR Docket No. 3435-21

Pursuant to my authority under Section 1552 of Title 10, United States Code, I approve the recommendation of the Board for Correction of Naval Records as set forth in the reference.

[REDACTED]

[REDACTED]

Acting