



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

██████████
Docket No: 4019-21
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: 10 U.S.C. § 1552

- Encl:
- (1) DD Form 149 with enclosures
 - (2) CMC Memo 1920 JPL, subj: Report of Nonjudicial Punishment, Report of the Board of Inquiry, and Report of Misconduct in the case of [Petitioner], 8 May 2017
 - (3) Article 15, UCMJ, Proceedings, in the case of [Petitioner], 21 August 2015
 - (4) Notice of Entry of Judgment, in the Superior Court of ██████████ County of ██████████ filed 7 February 2014
 - (5) ██████████ CG Memo 1920 SJA, subj: Report of Misconduct in the case of [Petitioner], 8 February 2017
 - (6) ██████████ CG Memo 1920 SJA, subj: Report of Misconduct in the case of [Petitioner], 30 December 2016
 - (7) BCNR Ltr ██████████ Docket NO. 1989-18, 17 September 2018
 - (8) BCNR Memo ██████████ Docket No. 8765-20, subj: Review of Naval Record ICO Former Member [Petitioner], 26 January 2021

1. Pursuant to the provisions of the reference, Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting reconsideration of the Board's previous denials of his requests in Docket No. 1989-18 and Docket No. 8765-20 to correct his naval record to establish his eligibility for a disability discharge and severance pay, and to remove his non-judicial punishment (NJP) finding of guilty for adultery.

2. The Board reviewed Petitioner's allegations of error or injustice on 26 August 2021 and, pursuant to its regulations, determined that no corrective action is warranted. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval 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 regulations within the Department of the Navy (DON).

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b. Petitioner enlisted in the Marine Corps and began a period of active duty service on 21 May 2001. He became a warrant officer in 2013, and was promoted to the rank of Chief Warrant Officer Two on 1 August 2014. See enclosure (2).

c. In 2014, Petitioner entered into a sexual relationship with a married enlisted member. A child was conceived as a result of this relationship in approximately early March 2014.

d. On 21 August 2015, Petitioner received non-judicial punishment (NJP) for fraternization in violation of Article 92, Uniform Code of Military Justice (UCMJ), and for adultery in violation of Article 134, UCMJ. Petitioner pled guilty to the charge of fraternization in violation of Article 92, UCMJ, but not guilty to the charge of adultery in violation of Article 134, UCMJ, based on his argument that the enlisted member was already divorced prior to March 2014. Specifically, Petitioner admitted that he had an unduly familiar, intimate relationship with the enlisted member, but asserted that this relationship became sexual in nature only after the enlisted member was divorced on 7 February 2014. After reviewing the evidence, the officer imposing the NJP found Petitioner to be guilty of adultery, contrary to his plea. Specifically, the imposing officer relied upon the same court documentation relied upon by Petitioner, which suggested that the effective date of the termination of the enlisted member's marriage was 18 April 2014.¹ His punishment consisted of the forfeiture of half pay for two months.² See enclosures (3) and (4).

e. By memorandum dated 25 August 2015, Petitioner's commander recommended that Petitioner be required to show cause for retention on active duty. See enclosure (2).

f. On 14 September 2015, Petitioner elected not to submit matters for consideration. See enclosure (2).

g. On 16 December 2015, the show cause authority directed that Petitioner show cause for retention in the Marine Corps for substandard performance of duty, misconduct, and moral or professional dereliction. The specific bases for separation alleged were Petitioner's failure to demonstrate acceptable qualities of leadership required of an officer of his grade; failure to properly discharge duties expected of officer of his grade and experience; and commission of a military or civilian offense which could be punished by confinement of six months or more and any other misconduct which would require specific intent for conviction, specifically violations of Articles 92 and 134, UCMJ. See enclosure (2).

h. On 18 December 2015, Petitioner acknowledged that he would be required to show cause for retention. See enclosure (2).

i. On 18 February 2016, a board of inquiry (BOI) substantiated the allegation that Petitioner committed misconduct, or moral or professional dereliction, for commission of a military or civilian offense which could be punished by confinement of six months or more. The BOI did

¹ Petitioner contended that the date of judgment dissolving the marriage listed on the document, which was 7 February 2014, constituted the effective date of termination of the marriage. The court order, however, specifically stated that the effective date of termination of the marriage was 18 April 2014.

² One month of the adjudged forfeitures was suspended.

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not substantiate the allegation of substandard performance of duty, or failure to properly discharge duties expected of officers of Petitioner's grade and experience. The BOI unanimously recommended that Petitioner be separated from the Marine Corps with a general (under honorable conditions) characterization of service. See enclosure (2).

j. On 9 March 2016, Petitioner, through counsel, submitted a letter of deficiency alleging multiple errors and injustices in the show cause proceedings. Specifically, Petitioner's counsel contended that the enlisted member was no longer married when they began their romantic relationship; the BOI erroneously applied Navy regulations, and thus failed to meet the burden of proof to establish fraternization; the BOI members were biased based on their relationship with the commander; and that separating Petitioner with a general (under honorable conditions) characterization of service was inappropriate in relation to other adultery and fraternization cases. See enclosure (2).

k. On 9 May 2016, Petitioner submitted a statement in which he reiterated the arguments submitted by his counsel, as discussed in paragraph 3j above. He also claimed that the Government failed to meet its burden of proof regarding this alleged adultery and fraternization charges. See enclosure (2).

l. On 6 June 2016, Petitioner's commander forwarded the record of the BOI to the Secretary of the Navy via the chain of command, concurring with the BOI recommendation. See enclosure (5)

m. On 11 July 2016, new allegations of adultery were made against Petitioner. Specifically, a gunnery sergeant discovered 449 text messages, including 10 video/picture messages, between his wife and Petitioner. A command investigation confirmed the amount and frequency of the text messages,³ but was unable to substantiate the allegations of adultery. See enclosure (6).

n. By memorandum dated 30 December 2016, Petitioner's commander recommended that Petitioner not be required to show cause for retention in the Marine Corps for the misconduct discussed in paragraph 3m above. See enclosure (6).

o. On 13 February 2017, an informal Physical Evaluation Board (PEB) found Petitioner unfit for duty as a result of pain in his left knee and hip, and recommended that he be separated from active duty with severance pay. See enclosure (2).

p. By memorandum dated 8 May 2017, the Deputy Commandant 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 for misconduct with a general (under honorable conditions) characterization of service. See enclosure (2).

³ Petitioner's command suggested that this conduct constituted conduct unbecoming an officer and gentleman, in violation of Article 133, UCMJ.

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q. On 22 May 2017, the Acting ASN (M&RA) approved the recommendation of the DC (M&RA) that Petitioner separated from the Marine Corps for misconduct with a general (under honorable conditions) characterization of service. See enclosure (2).

r. On 29 June 2017, Petitioner was discharged from the Marine Corps for misconduct with a general (under honorable conditions) characterization of service.

s. On 30 August 2018, the Board denied Petitioner's first application requesting to change his narrative reason for separation to disability and to grant him severance pay in Docket No. 1989-18. Petitioner argued that he was treated disparately from other service members. The Board concluded that the DON acted appropriately in separating Petitioner from the Marine Corps based on evidence that he admitted to the misconduct that formed the basis for the BOI finding of misconduct and recommendation for separation. In addition, the Board considered the seriousness of Petitioner's misconduct and potential degradation of good order and discipline due to his misconduct. Ultimately, the Board concluded there was no evidence that the DON violated any regulations in discharging Petitioner for misconduct. The Board found no evidence Petitioner was treated disparately in any way that violated his due process rights based on a finding that facts and circumstances of misconduct cases are often different requiring military leadership to apply their judgment and discretion in applying discipline. In addition, the fact that Petitioner's case was reviewed by multiple levels of leadership up through the ASN (M&RA) also convinced the Board that the preponderance of the evidence did not support a finding that an error was made in discharging him for misconduct. Regarding his claim for a disability discharge, the Board determined that Petitioner did not qualify for disability processing based on his misconduct processing, noting that Petitioner's PEB status was reviewed by his chain of command up through the ASN (M&RA). See enclosure (7).

t. On 23 November 2020, Petitioner requested reconsideration of the Board's denial of his application in Docket No. 1989-18. As part of his reconsideration request to have his narrative reason for separation changed to disability and to be issued severance pay, he submitted congressional testimony and reports suggesting that African-American service members were more likely to face investigatory and disciplinary action than other racial groups in the military. Relying upon these reports and his narrative of another similarly situated officer who was allowed to continue her career, Petitioner requested reconsideration based on the argument that he was treated disparately for his misconduct based on race. See enclosure (8).

u. On 21 January 2021, the Board reconsidered its previous decision in Docket No. 1989-18 pursuant to Petitioner's request and again found insufficient evidence of any error or injustice to warrant relief in Docket No. 8765-20. This decision was approved by the Acting ASN (M&RA) on 10 February 2021. See enclosure (8).

v. Petitioner again requests reconsideration of the Board's denial of his requests in Docket Nos. 1989-18 and 8765-20. With this application, he provided an explanative narrative from the Superior Court of [REDACTED] which he asserts supports his contention that the enlisted female with whom he fraternized was divorced as of the date of judgment by the court. Petitioner also questions the advice provided by the Staff Judge Advocate to the officer administering Petitioner's NJP regarding interpretation of the court order at enclosure (4), and insinuates ill

intent in the failure to disclose his written advice to Petitioner. Finally, Petitioner questions the validity of the presumption of regularity, suggesting that such a presumption disproportionately impacts black service members. Petitioner also contends, contrary to the findings of Docket No. 1989-18 and 8765-20, that Petitioner's case meets the elements of a prima facie claim of discrimination as outlined by the American Bar Association. See enclosure (1).

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.

The Board found Petitioner's continuing argument that he did not commit adultery because his partner was no longer married at the time to be entirely without merit. The evidence that Petitioner provided with his current application from the court which adjudicated the enlisted member's divorce does not support his argument in this regard. Enclosure (4) is unequivocal in stating that the marriage in question did not terminate until 18 April 2014, after the date which Petitioner admitted to having engaged in sexual relations with her. The court entered judgment directing the dissolution of the marriage on 7 February 2014, but unequivocally stated on the same document that the marriage would not be terminated until 18 April 2014. The excerpt provided by Petitioner does not support his contention that the marriage was dissolved earlier than the date unequivocally stated on the court order. Accordingly, there was no error in the NJP administered to Petitioner, or in the basis for Petitioner's separation from the Marine Corps. There is also no merit in Petitioner's contention that the SJA's advice was flawed in this regard.

The Board continues to find insufficient evidence to support Petitioner's contention that he was racially discriminated against in the disposition of his case. The Board does not question that racial bias, either implicit or explicit, is a possible explanation for the disparity he asserts in the disposition of his case relative to the disposition of the other cases he cited. However, it is only one of thousands of potential explanations for these disparities. In Docket No. 8765-20, Petitioner cited the case of a Caucasian female lieutenant who engaged in what he described as more favorable treatment for similar misconduct. Comparing the minimal knowledge that the Board has of this case to Petitioner's case, the Board noted several obvious differences which could offer potential explanations for the disparate treatment that Petitioner claims, including but not limited to the accountability of each of the parties for their respective misconduct,⁴ the difference in culpability,⁵ and Petitioner's superior experience relative to the junior officer described in the case he described.⁶ The Board does not cite these differences to justify or explain the disparate treatment that Petitioner claims, but rather to highlight the fact that there are countless potential explanations for the disparate treatment claimed by Petitioner other than the

⁴ Petitioner continues to deny responsibility for his adultery charge despite the clear evidence that his partner remained married at the time of his offense. This is certainly his right, but it is a possible explanation for why his command would view his contrition and accountability differently than that reportedly demonstrated by the other officer.

⁵ Petitioner erroneously equated his case to another fraternization case in which adultery was not at issue.

⁶ Petitioner compared his misconduct to that of a first lieutenant. With 16 years of service, Petitioner had far more experience than would the lieutenant, and should presumably have understood better the wrongfulness of his conduct.

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racial bias that he assumes. This Board is not an investigative body. The burden of proof is on the Petitioner to establish the existence of an error or injustice, and providing a limited number hand-picked examples of apparent disparate treatment without context does not come close to meeting that burden. The Board cannot assume that these other individuals were similarly situated to the Petitioner, as every case is different. The Board noted the evidence that Petitioner provided of racial bias within the military justice system. Again, the Board does not question this evidence, it simply finds insufficient evidence to establish the existence of such bias within his own case. As discussed above, the Board found no error in the NJP administered to Petitioner or in the basis for Petitioner's separation from the Marine Corps. The evidence unequivocally established that Petitioner committed adultery with a married enlisted member, and he admitted to fraternizing with the same enlisted member. Such conduct is inherently prejudicial to good order and discipline, and Petitioner knew his conduct to be wrong. This misconduct was objectively sufficient to justify his separation from the Marine Corps, regardless of his race.

The Board found no merit in Petitioner's contention that his previous claims met the standard for a prima facie claim of discrimination as outlined by the American Bar Association. Even if Petitioner has raised a valid claim of discrimination, he has not provided sufficient evidence to prove that other similarly situated individuals were treated more favorably or not subjected to the same or similar adverse treatment. The citation to several hand-picked cases without any context is not sufficient to establish this element. To establish this would require a more holistic evaluation of the command's treatment of similar cases, taking into account all of the nuances of each case. Accordingly, Petitioner has failed to meet his burden in this regard.

Having found no error or injustice in Petitioner's NJP or separation from the Marine Corps for misconduct, the Board validated its previous finding that Petitioner was not eligible for a disability discharge or severance pay.

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 entitled matter.

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

9/22/2021

[REDACTED]

Executive Director

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ACTING ASSISTANT SECRETARY OF THE NAVY FOR MANPOWER AND RESERVE
AFFAIRS DECISION:

Board Recommendation Approved (Deny Relief)

SEP 28 2021

Petitioner's Request Approved (Grant Relief – Remove NJP and all reference to Petitioner's adultery charge, show cause procedures, and misconduct separation from Petitioner's record; Change Petitioner's reason for separation to reflect a medical discharge with all resulting benefits.)

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