



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

[REDACTED]
Docket No: 5615-21
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
[CURRENTLY KNOWN AS [REDACTED],¹ USMC, XXX-XX-[REDACTED]

Ref: (a) 10 U.S.C. § 1552
(b) SECDEF Memo of 13 Sep 14 (Hagel Memo)
(c) PDUSD Memo of 24 Feb 16 (Carson Memo)
(d) USD Memo of 25 Aug 17 (Kurta Memo)
(e) USECDEF Memo of 25 Jul 18 (Wilkie Memo)

Encl: (1) DD Form 149 w/attachments
(2) DD Form 214
(3) NAVMC 118(9), Combat History – Expeditions – Awards Record
(4) Naval Base [REDACTED] General Court-Martial Order No [REDACTED], dtd 14 May 1993
(5) NAVMC 118(12), Offenses and Punishments, dtd 12 Jun 1990
(6) Marine Corps Security Force Battalion [REDACTED] Memo 5730 Legal, subj:
Correspondence: Case of [Petitioner], 1 August 1991
(7) NAVMC 118(12), Offenses and Punishments, dtd 26 Oct 1990
(8) NAVMC 118(12), Offenses and Punishments, dtd 11 May 1992
(9) Memorandum of Pretrial Agreement, in the case of *United States v. [Petitioner]*,
General Court-Martial in the United States Navy [REDACTED] Judicial Circuit,
[REDACTED]
(10) Navy Appellate Leave Activity General Court-Martial Supplemental Order No. [REDACTED]
[REDACTED] 30 December 1994
(11) [REDACTED] Client Information Record, generated 9 March 2021
(12) BCNR Memo Docket No: NR20210005615, subj: Advisory Opinion ICO
[Petitioner], 27 December 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, hereinafter referred to as the Board, requesting an upgrade to his discharge characterization to general (under honorable conditions).

2. A three-member panel of the Board, sitting in executive session, considered Petitioner's application on 25 May 2022. The names and votes of the panel members will be furnished upon

¹ Petitioner changed his name on 10 March 2016. See enclosure (11).

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request. Petitioner 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 enclosures; relevant portions of Petitioner's naval record; and applicable statutes, regulations, and policies, to include references (b) through (e).

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.

b. Although enclosure (1) was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review Petitioner's application on its merits.

c. Petitioner enlisted in the Marine Corps and began a period of active duty service on 24 January 1989. See enclosure (2).

d. Between 20 December 1989 and 11 February 1990, Petitioner was deployed to [REDACTED] and participated in Operations Just Cause and Promote Liberty. On 30 April 1990, Petitioner received a combat ribbon based upon this deployment. See enclosure (3).

e. On or about 31 May 1990, Petitioner stole two federal income tax refund checks with a combined value of approximately \$2,195 addressed to fellow Marines from the command mail room. Petitioner was subsequently charged with dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ); larceny in violation of Article 121, UCMJ; and stealing mail in violation of Article 134, UCMJ. These charges were ultimately referred to a general court-martial (GCM).² See enclosure (4).

f. On 12 June 1990, Petitioner received non-judicial punishment (NJP) for aiding and abetting another Marine's unauthorized absence (UA), conspiring with the other Marine to conceal his UA, and failing to report the other Marine's UA in violation of Articles 81 and 92, UCMJ.³ See enclosure (5).

g. On 3 October 1990, Petitioner was counselled for a lack of integrity after telling his First Sergeant that he had sent a money order as a spousal support payment, and then cancelling the money order before it could be redeemed. See enclosure (6).

h. On 26 October 1990, Petitioner received his second NJP for knowingly failing to surrender his armed forces identification (AFID) card to proper military authority after reporting

² It is not clear from the record when the charges were ultimately preferred or referred. Based on enclosure (6), it appears that they were still under investigation by law enforcement as of 1 August 1991.

³ Petitioner was reduced in grade to E-2, and required to forfeit \$400 pay for one month. The forfeiture of pay was suspended for six months.

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it as lost, and for signing an official document reporting the AFID card as being lost with the intent to deceive, in violation of Articles 92 and 134, UCMJ, respectively.⁴ See enclosure (7).

i. On 11 May 1992, Petitioner received his third NJP for failing to be at his appointed place of duty, in violation of Article 86, UCMJ, and for making a false official statement regarding his whereabouts, in violation of Article 107, UCMJ.⁵ See enclosure (8).

j. On 29 June 1992, Petitioner entered into a pretrial agreement with the convening authority whereby he agreed to plead guilty to the charges discussed in paragraph 3e above, in exchange for the convening authority's agreement to approve no worse than a bad conduct discharge (BCD) and to suspend any period of confinement greater than 12 months for a period of 12 months. See enclosure (9).

k. On 2 July 1992, the GCM accepted Petitioner's pleas to the charges of larceny and stealing mail, in violation of Articles 121 and 134, UCMJ, respectively, and adjudged a sentence of nine months of confinement; forfeiture of \$500 per month for nine months, and a BCD.⁶ See enclosure (4).

l. On 14 May 1993, the convening authority approved the sentence as adjudged after considering the Petitioner's clemency submissions. See enclosure (4).

m. On or about 30 December 1994, the U.S. Navy-Marine Corps Court of Military Review affirmed Petitioner's conviction and BCD. See enclosure (10).

n. On 30 December 1994, Petitioner's BCD from the Marine Corps was executed. See enclosure (2).

o. Between 2016 and 2021, Petitioner received psychotherapy for depression symptoms and reported post-traumatic stress disorder (PTSD) related to his experiences in [REDACTED] and [REDACTED] through the [REDACTED] Vet Center. See enclosure (11).

p. Petitioner contends that he was diagnosed and treated for PTSD in the summer of 1990 as a result of his experience in [REDACTED]. Specifically, he reports that he witnessed a fellow Marine be disemboweled right in front of him when a door blew open from the inside of a building that he was about to breach, and that he was unable to help his friend because his unit came under fire. He asserts that this was a defining moment which influenced the next 35 years of his life, as the guilt that he experienced in being unable to assist his wounded friend caused him to self-medicate, which in turn caused him to make the bad decisions which ultimately resulted in his GCM conviction and downward spiral thereafter. See enclosure (1).

⁴ Petitioner received 30 days correctional custody, and was required to forfeit \$405 pay per month for two months. The forfeiture of pay was again suspended for six months.

⁵ Petitioner was reduced in grade to E-1, required to forfeit \$390 pay per month for one month, and restricted for 60 days. The forfeiture of pay was again suspended for six months.

⁶ The military judge dismissed the specification of dereliction of duty in violation of Article 92, UCMJ, after arraignment.

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q. Because Petitioner based his claim for relief in whole or in part upon combat-related PTSD and/or traumatic brain injury (TBI), Petitioner's application and records were reviewed by a qualified mental health professional who provided an advisory opinion (AO) for the Board's consideration. This AO noted that Petitioner's separation physical noted that he received PTSD treatment while he was in the Marine Corps. Although the AO acknowledged Petitioner's PTSD diagnosis and that he coped with his PTSD through drugs and alcohol, it found "no indication Petitioner's misconduct was alcohol or drug related." It further found "no evidence [Petitioner] suffered from psychosis or other mental health symptoms that impaired his ability to function." The AO concluded that "there is sufficient evidence Petitioner exhibited behaviors associated with PTSD during his military service; however, the preponderance of available objective evidence failed to establish his in-service misconduct could be mitigated by PTSD." See enclosure (12).

r. By memorandum dated 10 April 2022, a different mental health professional provided another AO for the Board's consideration after his review of Petitioner's application and records.⁷ Recounting essentially the same evidence which had been reviewed in the previous AO, this AO found that "there is sufficient evidence Petitioner was diagnosed and treated for PTSD attributable to his military service," but "[t]he available objective evidence does not support his contention he incurred a TBI attributable to his military service" or that "his in-service misconduct could be attributed to PTSD." See enclosure (13).

MAJORITY CONCLUSION

Upon careful review and consideration of all of the evidence of record, the Majority of the Board determined that Petitioner's application warrants relief in the interests of justice.

The Majority found no error or injustice in Petitioner's BCD. Petitioner plead guilty to significant criminal offenses for which a punitive discharge and significant confinement was warranted. No procedural defects in this execution of this discharge were evidenced or claimed by Petitioner.

Because Petitioner based his claim for relief in whole or in part upon his PTSD and/or TBI condition, the Board reviewed his application in accordance with the guidance of references (b) – (d). Accordingly, the Board applied liberal consideration to Petitioner's contention that he developed these conditions while in the Marine Corps and that they contributed to his misconduct. In this regard, the Board found sufficient evidence that Petitioner developed PTSD while in the Marine Corps. It did not, however, find sufficient evidence that Petitioner endured TBI during his service. Contrary to the findings of both AOs, the Majority found that Petitioner's PTSD condition likely did contribute to his misconduct. Specifically, the Majority noted that Petitioner endured the traumatic event which triggered his PTSD in January 1990, but did not begin to receive any treatment for this condition until September 1992, after he had already committed the misconduct in question. The Majority found believable Petitioner's claim

⁷ It appears from the Board's internal records that Petitioner's case was referred for another AO because the first AO did not specifically address TBI. Petitioner referred to TBI in block 12 and marked TBI in block 13 of his DD Form 149, but did not present any evidence related to such a condition.

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that he turned to alcohol to deal with the symptoms of this untreated condition, and recognized that alcohol does impair judgment. Although the Majority believed that Petitioner's self-medication contributed to the misconduct for which he was discharged, it also believed that Petitioner's misconduct far outweighed the mitigating effect of Petitioner's self-medication upon his conduct. The stealing of mail addressed to his fellow Marines which contained income tax returns is a very deliberate and willful act, which required planning and an ongoing criminal intent to steal money belonging to his fellow Marines. While alcohol can explain impaired judgment, it certainly does not excuse such willful and wanton criminal misconduct and does not, by itself, warrant relief from the rightful consequence of such misconduct. The Majority did, however, consider the mitigating effect of Petitioner's self-medication with alcohol among the totality of the circumstances to determine whether relief is warranted, as discussed below.

In addition to applying liberal consideration to Petitioner's PTSD condition and the effect that it may have had upon his misconduct in accordance with references (b) – (d), the Majority also 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 Majority considered, among other factors, the mitigating effect of Petitioner's self-medication with alcohol upon his misconduct, as discussed above; that Petitioner developed PTSD as a result of his service in combat, and that this condition went untreated for several years; that Petitioner has endured the symptoms of his service-connected PTSD condition for many years; Petitioner's service to the nation in combat; Petitioner's recent efforts to rehabilitate himself, and desire to become a more productive member of society; the letters of support provided for review which reflected positively upon Petitioner's work ethic and character; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. These mitigating circumstances were balanced against the severity and frequency of Petitioner's misconduct, as well as the evidence that Petitioner's post-service record is not absent continuing criminal conduct. Based upon these considerations, the Majority determined that equitable relief is warranted in the interests of justice. Specifically, the Majority recommended that Petitioner's BCD be upgraded to a general (under honorable conditions). The Majority did not believe that a higher upgrade was warranted given the aggravating factors discussed above. Although not specifically requested by Petitioner, the Majority also determined that Petitioner's narrative reason for separation (and associated entries on his DD Form 214) and his reentry code should be changed to minimize the likelihood of negative inferences being drawn from his naval service and continuing to impede his ability to become a productive member of society.

MAJORITY RECOMMENDATION

In view of the above, the Majority of the Board recommended that the following corrective action be taken on Petitioner's naval record in the interests of justice:

That Petitioner be issued a new DD Form 214 reflecting that his service was characterized as "General (under honorable conditions)"; that the narrative reason for his separation was "Determination of Service Secretary – Secretary of the Navy Plenary Authority"; that his separation authority was "MARCORSEPMAN Par. 6214"; that his separation code was "JFF1"; and that his reenlistment code was "RE-1A."

That no further corrective action be taken on Petitioner's naval record.

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That a copy of this record of proceedings be filed in Petitioner's naval record.

MINORITY CONCLUSION

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

The Minority concurred with the Majority's determination that there was no error or injustice in Petitioner's BCD under the circumstances.

The Minority also applied liberal consideration to Petitioner's claimed PTSD/TBI conditions, and the effect that they may have had upon his misconduct, in accordance with references (b) – (d). In this regard, the Minority agreed with the Majority that there was sufficient evidence that Petitioner developed PTSD during his service in the Marine Corps. It disagreed with the Majority conclusion, however, that Petitioner's misconduct was mitigated by this condition. The Minority concurred with the conclusion of both AOs that there was insufficient evidence that Petitioner's misconduct could be attributed to PTSD. First, Petitioner's misconduct was not of the type which is attributable to PTSD. Petitioner did not go UA to avoid triggering his symptoms; he aided and abetted another Marine to go UA, resulting in his first NJP. His other two NJPs involved integrity violations, and there is no evidence that PTSD adversely affects one's integrity. Finally, the conduct for which Petitioner was court-martialed and discharged was willful and premeditated criminal misconduct. Reference (d) specifically states that “[p]remeditated misconduct is not generally excused by mental health conditions, including PTSD.” The Minority found that Petitioner's misconduct was not the result of poor or impaired judgment; rather, it was wanton, premeditated misconduct intended to benefit himself at the expense of his fellow Marines. Accordingly, the Minority found that Petitioner's misconduct was neither mitigated nor excused by his PTSD condition, even applying the liberal consideration standard.

In addition to applying liberal consideration in accordance with references (b) – (d), the Minority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice in accordance with reference (e). In this regard, the Minority considered the same factors as did the Majority. However, having determined that Petitioner's misconduct was not mitigated by his PTSD condition, the Minority found that Petitioner's misconduct significantly outweighed all of the potentially mitigating circumstances and that Petitioner's BCD therefore remains appropriate under the totality of the circumstances.

MINORITY RECOMMENDATION

In view of the above, the Minority of the Board recommends that no corrective action be taken on Petitioner's naval record.

That a copy of this record 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 titled matter.

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

6/23/2022

[REDACTED]

Executive Director

From: Assistant General Counsel (Manpower and Reserve Affairs)

MAJORITY Recommendation Approved (Grant Relief – Correct Petitioner’s naval record in accordance with the recommendation of the Majority stated above.)

MINORITY Recommendation Approved (Deny Relief)

7/6/2022

[REDACTED]

Acting Assistant General Counsel (M&RA)

Signed by: [REDACTED]