



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

█
Docket No: 1505-22
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552
(b) 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
(c) PDUSD Memo, "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Record (BCMRs/BCNR) by Veterans Claiming Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI)," 24 February 2016
(d) USD 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
(e) USD Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations," 25 July 2018
(f) 10 U.S.C. § 1176

Encl: (1) DD Form 149 with enclosures
(2) DD Form 214
(3) NAVPERS 1070/609, Enlisted Performance Record
(4) NAVPERS 1616/26, Evaluation Report & Counseling Record (E1-E6)
(20031116-20041115)
(5) NAVPERS 1616/26, Evaluation Report & Counseling Record (E1-E6)
(20041116-20050305)
(6) NAVDRUGLAB █ Msg, subj: Report of Positive Urine Sample Tests,
dtg 241326Z Jun 05
(7) DD Form 458, Charge Sheet, 16 March 2006
(8) NAVPERS 1070/613, Administrative Remarks, 9 June 2006
(9) █ Memo R00/008, subj: Report of Results of Trial [Petitioner],
9 August 2006
(10) Administrative Separation Processing Notice – Administrative Board Procedures,
9 August 2006
(11) Petitioner's Memo, subj: Request for Waiver of Administrative Separation Processing
in order to be Eligible to Request Transfer to Fleet Reserve/Retired List,

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- 4 September 2006
- (12) Navy Operational Support Center, [REDACTED] CO Memo 1910 Ser N00/460, subj: Appointment of an Administrative Board ICO [Petitioner] who is being Processed for Administrative Separation by Reason of Misconduct due to Drug Abuse and Commission of a Serious Offense, 15 September 2006
 - (13) Memo 1910 Ser 00/, subj: Record of Proceedings of an Administrative Board in case of [Petitioner], undated
 - (14) Navy Operational Support Center, [REDACTED] CO Memo 1910 Ser N00/474, subj: [Petitioner]; Recommendation for Administrative Separation, 24 September 2006
 - (15) Petitioner's Counsel Memo, subj: Letter of Deficiency ICO Petitioner, 26 September 2006
 - (16) Navy Operational Support Center, NAS [REDACTED] CO Memo 5800 Ser N00/, subj: Response to Letter of Deficiency ICO [Petitioner], First Endorsement on Enclosure (15), 27 September 2006
 - (17) CNP Message, subj: Admin Discharge ICO [Petitioner], dtg 042225Z Oct 06
 - (18) VISTA Electronic Medical Documentation, 19 January 2022@ 10:57:01
 - (19) Department of Veterans Affairs Rating Decision, 29 March 2022
 - (20) BCNR Memo Docket No: NR20220001505, subj: Advisory Opinion ICO [Petitioner], 26 April 2022
 - (21) Petitioner's Letter, rcvd 16 May 2022

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 that his characterization of service be upgraded and that his active service dates be adjusted to reflect 20 years of active service. Petitioner further requested to be reinstated into the Fleet Reserve and to receive retirement benefits.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error or injustice on 11 July 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner's naval record. 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) – (e).

3. The Board, having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, found 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 interest of justice to waive the statute of limitations and review Petitioner's application on its merits.

c. Petitioner enlisted in the Navy and began a period of active duty service on 8 October 1986. See enclosure (2).

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d. From the time of his entry into the Navy until 31 March 2004, Petitioner's personal behavior traits and overall evaluation were consistently rated as 4.0/4.0. See enclosure (3).

e. On 4 December 2004, Petitioner received a fitness report (FITREP) for the period 16 November 2003 to 15 November 2004 with an individual trait average of 2.71. His Reporting Senior (RS) described him as "a highly qualified specialist in his field," but stated that he "is constantly preoccupied with a myriad of personal interests outside of the workcenter which has frequently impaired his soundness of judgement [sic] and his ability to complete assigned tasks." The RS further stated that Petitioner "has avoided, to the maximum extent possible, any task or responsibility associated with his duties. His mismanagement of subordinates and his deliberate absence from his workcenter reduced his effectiveness, produced less than desirable performance and resulted in his removal from [a temporary duty] assignment 2 months early." See enclosure (4).

f. On 28 February 2005, Petitioner received nonjudicial punishment (NJP) for obtaining services under false pretenses in violation of Article 134, Uniform Code of Military Justice (UCMJ), and unauthorized absence (UA) in violation of Article 86, UCMJ. See enclosure (5).

g. On 20 June 2005, a urine sample submitted by Petitioner tested positive for the presence of cocaine. See enclosure (6). Petitioner subsequently refused NJP for this offense. See enclosure (16).

h. On 15 March 2006, Petitioner was charged with two specifications of UA in violation of Article 86, UCMJ;¹ one specification of wrongfully using cocaine in violation of Article 112a, UCMJ;² one specification of obstruction of justice in violation of Article 134, UCMJ;³ and one specification of making a false official statement in violation of Article 107, UCMJ.⁴ These charges were referred to a special court-martial (SPCM) the day after they were preferred. See enclosure (7).

i. Petitioner was UA again from 8 May 2006 to 3 June 2006. See enclosure (8).

j. On 13 June 2006, Petitioner was placed into pretrial confinement. See enclosure (7).

k. On 9 August 2006, Petitioner was convicted by the SPCM, pursuant to his pleas, of the charged violations of Article 112a, 134, and 107, respectively.⁵ He was sentenced to be confined

¹ Petitioner was charged with a UA from 3 October 2005 to 4 October 2005, and from 17 October 2005 to 20 October 2005.

² This was for the cocaine use discussed in paragraph 3g above.

³ Petitioner was alleged to have attempted to influence the testimony of his spouse by threatening her with the loss of financial or medical support for herself and her children if she did not sign a false statement to the effect that she placed illegal drugs into his food.

⁴ The allegedly false statement made by Petitioner was a statement during the investigation of his alleged drug use when he stated that his spouse admitted to him that she put cocaine into his food and drink while he was visiting her.

⁵ The two specifications alleging violations of Article 86, UCMJ, were dismissed by the government without prejudice.

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for 120 days, to be reduced to pay grade E-3, and to forfeit \$1,000 per month for a period of two months. See enclosure (9).

l. On 9 August 2006, Petitioner was notified that he was being processed for administrative separation for misconduct by reasons of commission of a serious offense and drug abuse. See enclosure (10).

m. By memorandum dated 4 September 2006, Petitioner requested that his administrative separation processing be waived so that he could become eligible to request transfer to the Fleet Reserve upon the completion of 20 years of active service. See enclosure (11).

n. By memorandum dated 15 September 2006, Petitioner's command appointed an administrative separation board to review Petitioner's case on 19 September 2006. See enclosure (12).

o. On 19 September 2006, the administrative separation board unanimously found that the preponderance of the evidence supported the stated bases for separation, and recommended that Petitioner be involuntarily separated under honorable conditions with a general discharge.⁶ See enclosure (13).

p. By memorandum dated 24 September 2006, Petitioner's commander concurred with the findings of the administrative separation board. See enclosure (14).

q. By memorandum dated 26 September 2006, Petitioner, through counsel, submitted a letter of deficiency regarding the administrative separation board, requesting either a new board or, alternatively, either disapproval or suspension of the board's recommendation to separate Petitioner. The errors asserted by Petitioner's counsel were as follows:

(1) The board president announced during a recess that the board had already begun deliberations during the informal breaks and evidence review periods, prior to the close of evidence.

(2) Petitioner was prejudiced by the fact that the board was convened in the brig at Marine Corps Base (MCB) [REDACTED]⁷ because the prison environment painted Petitioner in a bad light and was not conducive the conduct of a professional board.⁸

⁶ Petitioner admitted to the offenses alleged against him during the administrative separation board hearing, but requested mercy for himself and his family. The record of proceedings reflects that Petitioner was estranged from his spouse, who was an alcohol and drug abuser and suffered a relapse in her rehabilitation over the year prior to the separation board. It also reflects that their daughter had been diagnosed with Lupus in 2005, and that she had a severe adverse reaction to the medication provided which resulted in an extended hospitalization and forced her to withdraw from college. Finally, the record reflects that the recorder elicited testimony to establish adulterous behavior on Petitioner's part, despite the fact that adultery was not among the misconduct alleged, and that the board members seemed to fixate on that conduct.

⁷ The board convened at MCB [REDACTED] because that was the location of Petitioner's confinement.

⁸ Petitioner's counsel noted that a delay of two days would have alleviated this issue, as Petitioner was scheduled to be released from confinement on 21 September 2006.

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(3) Faulty recording and audio equipment plagued the hearing and prejudiced Petitioner. Specifically, Petitioner's counsel claims that there were several occasions during which the recording equipment failed and that the Board could barely hear the critical testimony of Petitioner's daughter.

(4) Petitioner's counsel accused the convening authority of rushing the administrative separation board to have a third attempt to separate Petitioner, and of taking questionable actions to "reset the clock" with regard to Petitioner's SPCM charges.

(5) The rushed nature of the administrative separation board denied counsel the opportunity to prepare, and his witnesses the opportunity to make arrangements to participate.

(6) Petitioner's counsel claimed that the junior board member was biased by a previous experience as a board member in a case with a similar fact pattern which resulted in retention, in that she appeared determined not to permit a similar result.⁹

(7) The Recorder presented a copy of the charge sheet which included the charges which had been dismissed at the SPCM, therefore exposing board members to unsubstantiated misconduct for which Petitioner was not put on notice.¹⁰

(8) Petitioner's counsel asserted that the Recorder encouraged the administrative separation board to speculate on what other misconduct may be "hiding in the proverbial bushes."

(9) The board members neglected to consider the overwhelming favorable evidence of Petitioner's potential for further service in reaching its conclusion.

(10) Petitioner had already been sufficiently punished for his offenses through the SPCM. Petitioner's counsel also noted that the military judge, after hearing all of the evidence, did not believe that a punitive discharge was warranted.

See enclosure (15).

r. By memorandum dated 27 September 2006, Petitioner's commander responded to the letter of deficiency discussed in paragraph 3q above. In this response, Petitioner's commander established a timeline of relevant events to assert that Petitioner had adequate time to prepare for the board, and accused Petitioner's counsel of unnecessary attempts to delay the proceedings; denied that Petitioner was prejudiced by the conduct of the board in the MCB [REDACTED] brig; that the administrative separation board members received a read-ahead version of the case file before the Board convened, and that there was no evidence of fraud or collusion on their part related to the opportunity to review these materials in advance; that the Government granted a

⁹ Petitioner's counsel noted that this was discovered only after voir dire, as the member failed to disclose this information when asked, which denied Petitioner the opportunity to challenge this member.

¹⁰ Petitioner's counsel states that the Recorder agreed to remove these items, but only after the Board had convened and the members had been exposed to the information.

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defense witness request made on Friday afternoon, just 1.5 working days before the Board convened, and offered to provide transportation for these witnesses;¹¹ that the court-martial charges were withdrawn and re-preferred in order to add charges discovered during the investigation, and not to “reset the clock” as alleged by Petitioner’s counsel; that the court-martial proceedings were delayed in part due to Petitioner’s 26-day UA prior to the trial date; that Petitioner’s counsel had adequate opportunity to question and challenge the board member that he objected to in the letter of deficiencies; and that there was no prejudice in the failure to redact the dismissed charges from the charge sheet because the board members were informed that these charges were dismissed and not the basis for the separation board. See enclosure (16).

s. On 4 October 2006, the separation authority directed that Petitioner be involuntarily separated from the Navy under honorable conditions with a general discharge for misconduct due to drug abuse.¹² See enclosure (17).

t. On 5 October 2006, Petitioner was discharged from the Navy for misconduct due to drug abuse. At the time of his discharge, Petitioner had 19 years, 11 months, and 28 days of active service creditable for retirement.¹³ See enclosure (2).

u. On 19 January 2022, a mental health professional with the Department of Veterans Affairs (VA) diagnosed Petitioner with Major Depressive Disorder (MDD) and post-traumatic stress disorder (PTSD). See enclosure (18).

v. On 29 March 2022, the VA granted Petitioner service connection for PTSD, and increased his disability rating for PTSD with MDD (and polysubstance abuse) to 70 percent. See enclosure (19).

w. Petitioner contends that it was an injustice that he was discharged just two days shy of the 20 years of active service necessary for retirement due to PTSD and mental health conditions incurred due to his service, as verified by the VA. He accepted responsibility and expressed regret for his decision to use cocaine, but described the difficult family and mental health circumstances that he was dealing with at the time. He stated that he sought assistance for his mental health concerns, but his requests were not taken seriously and that he turned to drugs to self-medicate. Having been denied assistance for his condition, he went UA to seek inpatient crisis care for his mental health and substance abuse, and was then placed in pretrial confinement upon his return. See enclosure (1).

x. Because Petitioner’s claim for relief was based in whole or in part upon his claimed mental health condition, his application and records were reviewed by a qualified mental health

¹¹ Petitioner’s commander assigned blame for any witness production and inadequate communication technology to the lack of timely notice provided by Petitioner’s counsel.

¹² This order specifically directed that Petitioner was to be offered appropriate treatment prior to separation if he is drug or alcohol dependent. However, Petitioner was officially separated on the day after the publication of this order.

¹³ Petitioner was not credited with active service from 8 May 2006 to 3 June 2006, and from 13 June 2006 to 21 September 2006.

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professional who provided an advisory opinion (AO) for the Board's consideration. The AO noted the evidence of combat service in Petitioner's record, as well as an apparent decline in his performance in 2004. Although the recommendation for administrative discharge stated that a psychiatric/medical evaluation was conducted on 9 August 2006, there was no evidence of this evaluation in the record. Petitioner's post-service records reflect that Petitioner reported brief therapy during his military service for stress-related problems and interpersonal difficulties, as well as prescriptions for Lexapro and Ativan after a suicide attempt while in pretrial confinement. A Compensation and Pension examination conducted by the VA in July 2015 found that Petitioner's military service exacerbated his preexisting mental health condition(s), and several other post service records noted in-service events which contributed to Petitioner's mental health condition(s). Finally, the AO noted that while Petitioner attributes his cocaine use to a mental health condition, the documentation that he provided and his sworn statement at his administrative separation board suggests poor coping skills rather than a mental health condition. The AO concluded that Petitioner's mental health condition may be attributed to his military service, but that his misconduct cannot. See enclosure (20).

y. By letter received on 16 May 2022, Petitioner provided a rebuttal to the above referenced AO. He specifically accepted responsibility for his actions, but contended that he was suffering from mental health issues that he incurred while on active duty at the time. He further suggested that his confinement, forfeitures, and reduction in grade at court martial was sufficient punishment for his offenses. In describing the circumstances of his mental health issues at the time, Petitioner claimed that he sought assistance without success before ever being charged with anything, and that he ended up making poor decisions from which he could not recover. He also claimed that he entered a crisis center for mental health and drug abuse treatment when his requests for assistance went unanswered, and that this was the reason for the UA which resulted in his pretrial confinement. He claims that the command knew of his whereabouts during this UA, but they placed him into confinement upon his voluntary return. See enclosure (21).

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board determined that partial relief is warranted in the interest of justice, as described below.

The Board first considered Petitioner's request for constructive service credit to qualify for retirement.¹⁴ The Board considered the totality of the circumstances to determine whether equitable relief is warranted in the interest of justice in accordance with reference (e). In this regard, the Board considered, among other factors, that Petitioner was discharged only two days short of reaching the 20 years of active service required to qualify for transfer to the Fleet Reserve; the questionable nature of Petitioner's discharge two days before qualifying for transfer to reaching eligibility for transfer to the Fleet Reserve given the provisions of reference (f); the likelihood that the guidance in Enclosure (17) that Petitioner be offered appropriate treatment *prior to separation* if he was drug or alcohol dependent was ignored given that Petitioner was discharged

¹⁴ The Board reviewed Petitioner's request for constructive service credit separately from his request for a discharge upgrade because he was entitled to liberal consideration of his request for the latter. References (b)-(d) do not, however, apply to the former.

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within 24 hours of this issuance of this order; that the vast majority of Petitioner's service was meritorious until a notable decline in his performance and conduct over the final two years; that Petitioner was dealing with difficult family circumstances at the time of his misconduct, to include his spouse's substance abuse issues and his daughter's tragic medical situation; Petitioner's contention that he sought assistance for his mental health condition but was ignored; that the administrative separation board appears to have inappropriately fixated upon alleged misconduct (i.e., adultery) which was not among the bases for separation for which Petitioner was notified; that Petitioner developed PTSD during and as a result of his military service, and that this condition may have mitigated at least some of his misconduct; and the relatively minor nature of Petitioner's misconduct. Based upon the totality of the circumstances, the Board found a clear injustice in that Petitioner was deprived of the lifetime retirement benefits that would have accrued to him if his discharge had not been rushed to deprive him of those benefits. Accordingly, the Board determined that Petitioner should be granted the constructive service credit necessary to make him eligible for those benefits in the interest of justice.

Because Petitioner based his request for an upgrade to his characterization of service in whole or in part upon his PTSD condition, the Board reviewed this portion of his application in accordance with the guidance of references (b) – (d). Accordingly, the Board applied liberal consideration to Petitioner's claim that he suffered from PTSD during his military service and the effect of this condition upon the misconduct for which he was discharged. In this regard, the Board found sufficient evidence that Petitioner did indeed develop PTSD during his military service. Applying liberal consideration, the Board also found sufficient evidence that this condition contributed to at least some of the misconduct for which Petitioner was discharged. Specifically, the Board found Petitioner's post-service medical documentation, along with the evidence which reflected a notable decline in Petitioner's performance in 2004 after 18 years of otherwise meritorious service, to be persuasive in this regard. Accordingly, the Board found it more likely than not that this decline, after so many years of meritorious service, was at least in part attributable to the onset of his PTSD symptoms. Despite finding that Petitioner's PTSD condition likely contributed to at least some of Petitioner's misconduct, the Board did not find the mitigating effect of this condition to outweigh the severity of his misconduct. In reaching this conclusion, the Board found that not all of Petitioner's misconduct was attributable to his mental health condition. Specifically, the Board did not find offenses such as obtaining services under false pretenses, obstructing justice, and making false statements, to be attributable to PTSD symptoms, so the Board did not find Petitioner's mental health condition to mitigate these offenses.

In addition to applying liberal consideration to Petitioner's claimed PTSD condition and the effect that it may have had upon the misconduct for which he was discharged to his request for an upgrade to his characterization of service in accordance with references (b) – (d), the Board 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 Board considered the same factors as it considered in evaluating Petitioner's request for constructive service credit to qualify for retirement, as discussed above. Despite finding constructive service credit to be warranted in the interests of justice, the Board did not reach the same conclusion with regard to Petitioner's characterization of service. While the Board likely would have found equitable relief to be warranted if Petitioner was discharged under other than honorable

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conditions, it did not find the mitigating circumstances to so significantly outweigh Petitioner's misconduct to warrant an upgrade of his characterization of service to fully honorable. Given the Board's finding that some of Petitioner's significant misconduct was not mitigated by his mental health condition, the Board found that Petitioner's general (under honorable conditions) characterization of service was, and remains, appropriate under the totality of the circumstances.

RECOMMENDATION:

In view of the above, the Board recommends that the following corrective action be taken on Petitioner's naval record:

That Petitioner be issued a new DD Form 214 indicating the following changes:

- Block 4a (Grade, rate or rank): "PS1(SW)" vice "PSSN(SW)";
- Block 4b (Pay grade): "E-6" vice "E-3";
- Block 12b (Separation date this period): "31 October 2006" vice "5 October 2006";
- Block 12c (Net active service this period): "20 years, 00 months, and 23 days" vice "19 years, 11 months, and 28 days";
- Block 12h (Effective date of pay grade): "31 October 2006" vice "23 August 2006";
- Block 18 (Remarks): Add the following statement: "Continuous honorable service from the date he entered active duty to the day before his last reenlistment." [Note: All other remarks are to remain the same];
- Block 23 (Type of separation): "Transfer to Fleet Reserve" vice "Discharge";
- Block 25 (Separation authority): "MILPERSMAN 1810-10" vice "MILPERSMAN 1910-146";
- Block 26 (Separation code): "RBD" vice "GKK";
- Block 27 (Reentry code): "RE-2" vice "RE-4";
- Block 28 (Narrative reason for separation): "Sufficient service for retirement" vice "Misconduct (Drug Abuse)";

That the Defense Finance and Accounting Service conduct an audit of Petitioner's finance records to determine what pay and allowances Petitioner may be entitled to pursuant to the corrections to his naval record reflected herein, and make payments to him as appropriate.

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

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That no further corrective action should be taken.

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. Pursuant to the delegation of authority set forth in SECNAVINST 5420.193, and having assured compliance with its provisions, it is hereby announced that the recommended corrective action reflected above, made under the authority of reference (a), has been approved on behalf of the Secretary of the Navy.

9/13/2022

[REDACTED]

Executive Director

Signed by: [REDACTED]