



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

██████████
Docket No: 5152-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF ██████████ ██████████,
USMC, 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 Records (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

Encl: (1) DD Form 149 with attachments
(2) DD Form 214
(3) NAVMC 118(12), Offenses and Punishments
(4) NAVMC 118(13), Record of Conviction by Court-Martial, 30 July 1992
(5) NAVMC 118(13), Record of Conviction by Court-Martial, 9 June 1993
(6) NAVMC 118(12), Offenses and Punishments
(7) ██████████ Battalion, ██████████ Marines CO Memo 1910 17, subj: Notification of Administrative Separation Proceedings, 21 January 1994
(8) Petitioner's Memo 1910 17, subj: Acknowledgment of my Rights to be Exercised or Waived during Separation Proceedings, 27 January 1994
(9) ██████████ ██████████ CO Memo 1910 17, subj: Administrative Separation Proceedings by Reasons of Misconduct due to a Pattern of Misconduct and Commission of Serious Offenses in the case of [Petitioner], 27 January 1994
(10) ██████████ Memo 1910 17 (Second Endorsement of Enclosure (9)), subj: Administrative Separation Proceedings by Reasons of Misconduct due to a Pattern of Misconduct and Commission of Serious Offenses in the case of [Petitioner], 21 February 1994

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(11) NDRB Discharge Review Decisional Document, Docket No. [REDACTED]
10 April 2008

(12) BCNR Memo Docket No: NR20220005152, 20 September 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 to honorable.

2. The Board reviewed Petitioner's allegations of error or injustice on 9 November 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 included 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, 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 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 15 May 1990. See enclosure (2).

d. On 12 December 1990, Petitioner received nonjudicial punishment (NJP) for unauthorized absence (UA) in violation of Article 86, Uniform Code of Military Justice (UCMJ). He was required to forfeit \$189 pay per month of one month, to perform extra duty for 14 days, and was restricted to the limits of his unit for 14 days. See enclosure (3).

e. On 28 February 1992, Petitioner received his second NJP for being drunk on duty in violation of Article 134, UCMJ; two specification of assault upon fellow Marines in violation of Article 128, UCMJ;¹ and willful disobedience of a superior noncommissioned officer in violation of Article 91, UCMJ. He was reduced to E-2, required to forfeit \$440 per month for two month and perform extra duties for 45 days, and was restricted for 45 days. See enclosure (3).

f. On 11 May 1992, Petitioner received his third NJP for wrongfully using provoking speech in violation of Article 117, UCMJ;² and for breaking restriction in violation of Article 134, UCMJ.³ See enclosure (3).

¹ One of the specifications was drafted as assault upon a sentinel, as Petitioner kicked a fellow Marine who was performing fire watch duties. The other specification involved punching a fellow Marine in the face with his fist.

² Petitioner allegedly said, "I don't like you or any other white mother fuckers, and they all can kiss my ass," and "I'm going to kick your ass," or words to that effect, to a fellow Marine.

³ The restriction broken was that imposed by the NJP discussed in paragraph 3e.

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g. On 30 July 1992, Petitioner was convicted by a special court-martial (SPCM), pursuant to his pleas, of UA from on or about 31 May 1992 until on or about 23 June 1992, in violation of Article 86, UCMJ. The SPCM adjudged 36 days of confinement. The convening authority approved the sentence as adjudged and ordered it executed on 23 October 1992. See enclosure (4).

h. On 9 June 1993, Petitioner was convicted by a second SPCM of sodomy in violation of Article 125, UCMJ; and indecent acts and disorderly conduct in violation of Article 134, UCMJ.⁴ The SPCM adjudged 30 days of confinement, reduction to E-1, and a bad-conduct discharge (BCD).⁵ See enclosure (5).

i. On 9 December 1993, Petitioner received his fourth NJP for two specifications of disrespect to a superior commissioned officer in violation of Article 89, UCMJ, and using provoking words in violation of Article 117, UCMJ. He was required to forfeit \$407 pay per month for one month and perform extra duty for 30 days. See enclosure (6).

j. By memorandum dated 21 January 1994, Petitioner was notified that he was being recommended for discharge from the Marine Corps for misconduct due to a pattern of misconduct and commission of serious offenses. See enclosure (7).

k. By memorandum dated 27 January 1994, Petitioner waived his right to request an administrative separation board after consulting with counsel. See enclosure (8).

l. By memorandum dated 27 January 1994, Petitioner's commander recommended that Petitioner be discharged under other than honorable (OTH) conditions by reason of misconduct due to a pattern of misconduct and commission of serious offenses. See enclosure (9).

m. By memorandum dated 21 February 1994, the separation authority directed that Petitioner be discharged from the Marine Corps under OTH conditions for misconduct. The primary basis for this separation for reporting purposes a pattern of misconduct. See enclosure (10).

n. On 16 March 1994, Petitioner was discharged under OTH conditions for misconduct due to a pattern of misconduct. See enclosure (2).

o. On 10 April 2008, the Naval Discharge Review Board (NDRB) unanimously determined that Petitioner's discharge was proper as issued and that no change was warranted. Petitioner contended in his application to the NDRB that his problems were attributed to his youth and immaturity, and that post-service factors warranted equitable relief. See enclosure (11).

p. Petitioner contends that relief is warranted because his command did not explain the

⁴ Charges of violating a lawful order in violation of Article 92, UCMJ; rape in violation of Article 120, UCMJ; and a separate specification of indecent acts in violation of Article 134 were preferred to the SPCM, but were withdrawn before the SPCM announced its findings.

⁵ Although the SPCM adjudged a BCD, it was never executed. It is not clear from the record why the BCD was not executed.

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importance of an administrative separation board review. He claims that his chain of command discriminated against African American Marines, and that he requested to be discharged only to get away from this abuse. He also claims that his chain of command assured him that an OTH discharge would not affect his employment opportunities, but that it has prevented him from gaining his dream job as a police officer. Since his discharge, Petitioner claims to have been a model citizen and has been married for 28 years. He also asserts that he has proven his command to be wrong about him by earning a bachelor's degree in business despite their method to sabotage his life. Finally, Petitioner claimed that he was punched by two NCOs for coming back from leave late, which caused him to drink alcohol to ease the pain of his abuse. In addition to his own statement, Petitioner provided several letters of support attesting to his post-service professional accomplishments, character, family values, and service to his community. See enclosure (1).

q. Although he provided no evidence to support such claim, Petitioner indicated in block 13 of enclosure (1) that post-traumatic stress disorder (PTSD) was related to his request.⁶ Accordingly, his application and records were reviewed by a qualified mental health professional, who provided an advisory opinion (AO) for the Board's consideration. The AO found no evidence that Petitioner was diagnosed with a mental health condition during his military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. It also noted that no concerns of a mental health condition were raised throughout his multiple disciplinary proceedings. Finally, the AO commented that Petitioner's personal statement is not sufficiently detailed to establish any clinical symptoms or to provide a nexus with his misconduct. The AO concluded that there is insufficient evidence of a diagnosis of PTSD attributable to Petitioner's military service, or that his misconduct could be attributed to PTSD.⁷ See enclosure (12).

MAJORITY CONCLUSION:

Upon careful review and consideration of all the evidence of record, the Majority of the Board found that equitable partial relief is warranted in the interest of justice.

Because Petitioner indicated that his request for relief was related to PTSD, the Majority reviewed that portion of Petitioner's request pursuant to the guidance of references (b) – (d). Accordingly, the Majority applied liberal consideration to Petitioner's contention that PTSD was related to his claim, and any effect that this claimed condition may have had upon the misconduct for which he was discharged. Even applying liberal consideration, however, the Board found no evidence to support the contention that Petitioner suffered from PTSD during his military service or that PTSD contributed to the misconduct for which he was discharged. The only evidence of such a condition was the fact that Petitioner indicated as such in block 13 of enclosure (1). Even Petitioner's narrative argument for relief did not support this claim. Accordingly, the Majority did not consider PTSD among the factors which may warrant relief in Petitioner's case.

⁶ The Board made Petitioner aware of the absence of any evidence to support his claim of PTSD by letter dated 15 July 2022 and invited him to provide any documentation to support this claim, but Petitioner failed to respond.

⁷ Petitioner was invited to respond to the AO by letter dated 20 September 2022, but failed to do so.

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The Majority also found no error or injustice in Petitioner's discharge for misconduct at the time that it was administered. In this regard, the Majority found no evidence to support Petitioner's contention that his discharge was motivated by racism, or that his chain of command conspired to sabotage Petitioner's life as he claims. Petitioner's misconduct does not appear to be in doubt, and much of it was established beyond a reasonable doubt by two separate SPCMs at which Petitioner had the opportunity to confront the witnesses against him. The Majority also found no merit in Petitioner's contention that he was misled regarding the effect of his OTH discharge by his chain of command. The evidence reflects that Petitioner consulted with a field-grade Judge Advocate counsel prior to waiving his right to an administrative separation board, so even if his command was underselling the long-term impact of an OTH discharge he had independent counsel to counter such advice. More importantly, given the extent of Petitioner's misconduct and that a SPCM had already previously adjudged a BCD, an OTH characterization of service was likely inevitable regardless of whether Petitioner waived his right to an administrative separation board, so any bad advice received by his chain of command with regard to the exercise of his rights was irrelevant.

Although it found no error or injustice in Petitioner's discharge for misconduct at the time that it was administered, the Majority also 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 Majority considered, among other factors, Petitioner's post-service academic and professional accomplishments and substantial contributions to his community, which reflect his successful rehabilitation efforts; the letters of support attesting to Petitioner's work ethic, character, and volunteer work in the community; Petitioner's wartime service, which was reflected by his receipt of the Combat Action Ribbon; Petitioner's relative youth and immaturity at the time of his discharge; and the passage of time since Petitioner's discharge. Petitioner has demonstrated his successful rehabilitation from his substandard performance and indiscipline in the Marine Corps through his years of professional employment in positions demanding accountability and responsibility, which he achieved despite the stigma of his OTH discharge, and through his extensive volunteer efforts in his community. Based primarily upon this demonstrated rehabilitation, the Majority determined that partial equitable relief is warranted in the interest of justice. Specifically, the Majority found that an upgrade of Petitioner's characterization of service to general (under honorable conditions) is warranted. The Majority did not believe that an upgrade of Petitioner's characterization of service to fully honorable, as requested by the Petitioner, was warranted given the frequency and severity of Petitioner's misconduct while in the Marine Corps.

Although not specifically requested by Petitioner, the Majority also determined that a change to Petitioner's narrative reason for separation was warranted in the interest of justice. Specifically, the Majority determined that Petitioner's narrative reason for separation, and the associated entries on his DD Form 214, should be changed to reflect that Petitioner was discharged pursuant to "Secretarial Authority" in order to avoid future negative inferences from being drawn from Petitioner's service and to give effect to the other equitable relief recommended herein.

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MAJORITY RECOMMENDATION:

In view of the above, the Majority of the Board recommends that the following corrective action be taken on Petitioner's naval record in the interest 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 "Secretarial Authority"; that his separation code was "JFF1"; and that his separation authority was "MARCORPSEPMAN par. 6214."

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

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

MINORITY CONCLUSION:

Upon careful review and consideration of all 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 conclusions regarding Petitioner's claim of PTSD and the propriety of Petitioner's discharge at the time that it was administered.

The Minority also 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 Minority considered the same potentially mitigating factors as did the Majority. Unlike the Majority, however, the Minority did not believe that equitable relief was warranted given the totality of the circumstances. While the Minority acknowledged Petitioner's favorable post-service record and contributions to his community, it found Petitioner's misconduct while in the Marine Corps to far outweigh the factors favoring relief. Petitioner was convicted by two separate SPCMs for serious misconduct, including at least one charge of indecent acts, which warranted a BCD. He also received four NJPs for equally serious misconduct, which included physical assaults upon two separate Marines. Reference (e) specifically provides that equitable relief is generally more appropriate for nonviolent offenses than for violent offenses. The Minority also had doubts regarding Petitioner's rehabilitation given his failure to accept any responsibility for his misconduct, and his attempt to reassign blame for his adverse discharge to a chain of command which obviously provided him multiple opportunities to improve his conduct. Finally, the Minority noted that Petitioner somehow escaped the stigma of the punitive discharge which was adjudged and deserved based upon the misconduct for which he was convicted, but which was never executed. Accordingly, the Minority found that equitable relief was far from warranted given 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.

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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.

12/5/2022



ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

___ MAJORITY Recommendation Approved (Partial Relief – I concur with the Majority conclusion and direct the relief recommended by the Majority above.)

MINORITY Recommendation Approved (Deny Relief – I concur with the Minority conclusion and direct that no change be made to Petitioner's naval record.)

___ MAJORITY Recommendation Partially Approved (Partial Relief – I concur with the Majority conclusion that Petitioner's characterization of service should be upgraded in the interest of justice based upon his demonstrated post-service rehabilitation, but I do not agree that a change to Petitioner's narrative reason for separation is warranted. Petitioner was correctly discharged for a pattern of significant misconduct, and I find no basis to change this aspect of his naval record. Accordingly, I direct the relief recommended by the Majority above, except that Petitioner's narrative reason for separation, separation code, and separation authority is not to be changed.)

___ Petitioner's Request Approved (Full Relief – I concur with the Majority conclusion that equitable relief is warranted in the interest of justice, but do not believe that the relief recommended by the Majority goes far enough. Accordingly, I direct the relief recommended by the Petitioner above, except that Petitioner's service is to be characterized as "Honorable." Petitioner shall also be issued an Honorable Discharge certificate.)

12/27/2022

