



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

██████████
Docket No. 7439-22
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552
(b) SECDEF Memo, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering 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," 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 w/attachments
(2) DD Form 214
(3) NAVMC 118 (12), Offenses and Punishments
(4) NAVMC 118 (11), Administrative Remarks
(5) NAVMC 10132, Unit Punishment Book
(6) Petitioner's Memo, subj: Request for undesirable discharge for the good of the service, 7 October 1976
(7) Petitioner's Father's Letter, undated
(8) Force Troops ████████ Force Service Support Group OSJA Memo 17:JL:ctg, subj: Undesirable discharge; case of [Petitioner], 8 October 1976
(9) Headquarters, ████████ Marine Division Special Court-Martial Order Number 18-77, 24 February 1977
(10) Petitioner's Memo, subj: Request for deferment of confinement, 12 November 1976
(11) NAVMC 118(12), Offenses and Punishments
(12) DA Form 3975, Military Police Report, Report No. 0303-79 (0242), 24 April 1979
(13) DA Form 3975, Military Police Report, Report No. 0808-79 (0242), 14 May 1979
(14) NAVSO 5815/3, Waiver of Restoration, 22 May 1979
(15) Headquarters, ████████ Marine Division Supplementary Special Court-Martial Order

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] USMC

Number 55-70, 11 June 1979

(16) BCNR Letter [REDACTED] Docket No: 2222-01, 10 September 2001

(17) BCNR Letter [REDACTED] Docket No: 9315-18/2222-01, 27 December 2019

(18) [REDACTED] Health System Records (excerpt)

(19) BCNR Memo Docket No: NR20220007439, subj: Advisory Opinion ICO
[Petitioner], 13 December 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 punitive discharge be upgraded to “Honorable”; that his narrative reason for separation and separation code be changed to reflect “Secretarial Authority”; and that his reentry code be changed to “RE-3.”¹
2. A three-member panel of the Board, sitting in executive session, reviewed Petitioner’s allegations of error or injustice on 27 January 2023 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner’s naval record. The names and votes of the panel members will be furnished upon request. 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 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 began a period of active duty service on 3 March 1976. See enclosure (2).
 - d. On 22 June 1976, Petitioner received nonjudicial punishment (NJP) for failure to obey a lawful order by being out of bounds on a 48-hour liberty, in violation of Article 92, Uniform Code of Military Justice (UCMJ); and for unauthorized absence (UA) in violation of Article 86, UCMJ.² He was required to forfeit \$168 per month for three months, and was restricted to the limits of his unit for 14 days.³ See enclosure (3).
 - e. On 9 July 1976, while still restricted from his previous NJP, Petitioner received his second NJP for failure to sign restriction papers at the prescribed time, in violation of Article 92, UCMJ;

¹ This application constitutes a request for reconsideration of the Board’s previous denials of Petitioner’s request for relief in Docket Nos. 2222-01 and 9315-18, based upon submission of new mental health evidence.

² Petitioner was allegedly in a UA status for just over 27 hours between 21 June 1976 and 22 June 1976.

³ The forfeitures were suspended for a period of three months.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] USMC

and for UA in violation of Article 86, UCMJ.⁴ He was required to forfeit \$84 per month for three months and was restricted to the limits of his unit for 14 days.⁵ See enclosure (3).

f. Petitioner was in a UA status from 5 August 1976 to 13 August 1976; from 16 August 1976 to 30 August 1976; and from 7 September 1976 to 22 September 1976. See enclosure (2).

g. On 24 September 1976, Petitioner was administratively counseled and informed that further frequent involvement with military authorities or continued violation of the UCMJ may result in an administrative discharge. He was also notified that he was awaiting Battalion office hours, and that any UA prior to his office hours could result in his confinement. See enclosure (4).

h. On 1 October 1976, Petitioner was placed in pretrial confinement after being in an UA status from 30 September 1976 to 1 October 1976. See enclosure (5).

i. By memorandum dated 7 October 1976, Petitioner requested discharge for the good of the service to escape trial by court-martial. He elected not to make a statement regarding this request. See enclosure (6). Although Petitioner did not make a personal statement with regard to this request, he did provide a letter from his father which pleaded for a discharge which would provide Petitioner the option to rejoin the Marine Corps within 90 days. His father made this request so that he could try to teach Petitioner about the hardships of soldiering, which he claimed to have learned during World War II. His father also explained that Petitioner's attitude turned sour after he was passed over for a promotion that had been promised to him in favor of another Marine who he felt did not deserve it. See enclosure (7).

j. By memorandum dated 8 October 1976, both the convening authority and the separation authority's Staff Judge Advocate recommended that Petitioner's request for discharge to escape trial by court-martial be disapproved. See enclosure (8).

k. On 12 November 1976, Petitioner was convicted by a special court-martial (SPCM), pursuant to his pleas, of five specifications of UA in violation of Article 86, UCMJ; one specification of willfully disobeying the lawful command of a superior commissioned officer in violation of Article 90, UCMJ; four specifications of disobedience of superior noncommissioned officers (NCO) and four specifications of disrespect toward superior NCOs, both in violation of Article 91, UCMJ; and breaking restriction and communicating a threat, both in violation of Article 134, UCMJ. He was sentenced to five months of confinement at hard labor, forfeiture of \$240 pay per month for five months, and a bad conduct discharge (BCD). See enclosure (9).

l. On 12 November 1976, Petitioner requested and the convening authority approved the deferment of his sentence to confinement until initial action was taken on his case. See enclosure (10).

⁴ Petitioner was allegedly in a UA status 2 July 1976 to 9 July 1976.

⁵ The forfeitures were again suspended for a period of three months. The previous suspension of forfeitures was vacated and ordered executed.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] USMC

m. On 22 November 1976, while his adjudged sentence to confinement was deferred, Petitioner entered into yet another UA status. He remained in this status until he was arrested by civilian authorities in [REDACTED] on charges of assault in the first degree, criminal possession of a weapon, and burglary in the first degree on 17 April 1979.⁶ See enclosures (11) and (12).

n. On 27 January 1977, with Petitioner in a UA status, the convening authority approved the SPCM sentence as adjudged. See enclosure (9).

o. On 11 May 1979, Petitioner was returned to military control when the civilian charges against him were dismissed. See enclosures (11) and (13).

p. On 22 May 1979, Petitioner wrote to the Naval Clemency and Parole Board, requesting to be discharged as soon as possible because he had family problems at home, with two children and his father to support and one month's rent in arrears. See enclosure (14).

q. On 11 June 1979, with his SPCM sentence affirmed through the appellate process, his BCD was ordered executed. See enclosure (15).

r. On 12 June 1979, Petitioner was discharged from the Marine Corps under conditions other than honorable. The authority and reason for his discharge listed on his DD Form 214 was "JJC2," which was the code used to describe a discharge due to a court-martial conviction for desertion. See enclosure (2).

s. On 5 September 2001, the Board denied Petitioner's first request to upgrade his discharge in Docket No. 2222-01, finding insufficient evidence to establish the existence of probable material error or injustice. In this application, he claimed to have been unjustly treated and forced to lie because he was a black man and his superiors wanted to give him a bad discharge. He also claimed that his birth certificate was falsified, presumably to enlist him before he was eligible. These factors were not found to be sufficient to warrant recharacterization of his discharge because of the seriousness of his misconduct and frequent and lengthy periods of UA, and Petitioner had submitted no evidence to support his claims. See enclosure (16).

t. On 19 November 2019, the Board denied Petitioner's second request to upgrade his discharge in Docket No. 9315-18, again finding insufficient evidence to establish the existence of probable material error or injustice. In this application, Petitioner claimed that he went UA because he was treated with a lot of racist behavior, that he was attacked and assaulted by three white Marines, and that his command did nothing, but he again provided no evidence to support these contentions. See enclosure (17).

u. In October 2020, Petitioner was diagnosed with a trauma and stressor-related disorder by a mental health professional. See enclosure (18).

⁶ Petitioner and his brother were accused of forcibly entering the residence of another on 11 April 1979, at which time Petitioner allegedly aimed a weapon at the resident's midsection and fired one round before he and his brother fled the scene. These charges were later dismissed.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] USMC

v. Petitioner requested relief based upon the changes in policy regarding discrimination in the military which create substantial doubt that he would have been discharged less than honorably under current Department of Defense policies. He also claimed that the Board should determine that his conduct was related to a mental health condition, thus mitigating his discharge and warranting the relief requested pursuant to references (b) – (d), and that equitable relief is warranted pursuant to the guidance of reference (e). Specifically, Petitioner claimed that he was assaulted by three white Marines shortly after reporting to his unit at [REDACTED]. He claimed that they punched him in the face and shoved his head in the sand and beach water, and called him a racial slur and other racist terms. Despite his claim that he reported this assault to his chain of command, none of the three Marines were ever charged with a crime and nothing was done about it. After this incident, he claims that he continued to experience racist treatment, and began to fear for his life. Under these circumstances, he felt like he needed to flee to avoid something awful happening to him and developed the anger which caused him to lash out at his NCOs. See enclosure (1).

w. Because Petitioner based his claim for relief in whole or in part upon his contention that his misconduct was attributable to post-traumatic stress disorder (PTSD), his application and records were reviewed by a qualified mental health professional who provided an advisory opinion for the Board’s consideration. The AO found no evidence that Petitioner was diagnosed with a mental health condition while in the Marine Corps, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. There were also no concerns of any mental health conditions raised throughout his disciplinary processing which would have warranted a referral for evaluation. The AO describes Petitioner’s post-service PTSD diagnosis as “temporally remote and attributed to his military service,” but found that the “available records do not establish a nexus with all of his misconduct. While disrespect and short periods of UA could be attributed to avoidance and irritability associated with unrecognized symptoms of PTSD, it is difficult to attribute all of his disobedience and his extended UA to a mental health condition.” The AO also noted that, contrary to his current explanation for his UAs, the contemporary evidence indicated that his extended UA was related to personal stressors and disaffection with the Marine Corps when he failed to receive an anticipated promotion. The clinical opinion of the AO author was that there is post-service evidence of a diagnosis of PTSD that may be attributed to military service, but insufficient evidence that all of his misconduct could be attributed to PTSD.⁷ See enclosure (19).

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board found insufficient evidence of any error or injustice warranting the relief requested by Petitioner. The Board did, however, find an error in Petitioner’s record not previously identified which warrants corrective action.

Because Petitioner based his claim for relief in whole or in part upon his claimed PTSD condition, the Board reviewed his application in accordance with the guidance of references (b) –

⁷ A copy of this AO was sent to Petitioner for comment by letter dated 15 December 2022, but no response was subsequently received.

(d). Accordingly, the Board applied liberal consideration to Petitioner's claimed condition and its effect upon Petitioner's misconduct. In this regard, the Board did not question the legitimacy of Petitioner's claimed PTSD condition. Further, applying extremely liberal consideration, the Board also accepted that Petitioner's condition may have resulted from his experience with racism while in the Marine Corps, despite a notable lack of evidence to support this claim. Even applying liberal consideration, however, the Board did not find that this condition excused or mitigated Petitioner's misconduct, because there was no nexus between this condition and his misconduct. While the Board recognizes that acts of disrespect and UA can be attributed to symptoms of PTSD, it did not believe that they were so attributable in Petitioner's case. The Board did not find credible Petitioner's claim that it was fear arising from his racist treatment at the hands of his fellow Marines which motivated his UAs, because that claim is inconsistent with the contemporary evidence. First, if Petitioner's UAs were, in fact, an avoidance mechanism triggered by his experience and PTSD symptoms, or motivated by a fear of harm as he now claims, those for which he was actually court-martialed would not have been of such short duration. Per enclosure (9), none of Petitioner's first five UAs exceeded 15 days or were terminated by apprehension. The Board did not believe Petitioner's claim that he was going UA out of fear of harm or to avoid the racist environment of his unit because he kept coming back to that environment voluntarily. Petitioner's claim that his extended UA was motivated by these factors is even less credible considering the circumstances. Petitioner personally requested to defer his sentence to confinement after his SPCM, and he departed on his extended UA during this period of deferment. If Petitioner truly did fear the racist environment of his unit, he would not have requested to have his confinement deferred because that confinement would have removed him from the allegedly racist environment permanently since had received a BCD. Instead, he voluntarily requested to have his confinement deferred, thereby voluntarily remaining in this allegedly hostile and fearful environment for another 10 days before departing on his final extended UA. Petitioner did not depart on this extended UA out of fear of the racist environment that he was in; rather, he departed on this extended UA to avoid the confinement that had been adjudged. The Board also did not believe that Petitioner's misconduct was motivated by his racist traumatic experiences in the unit because his father explained the source of his misconduct at the time in enclosure (7). In begging Petitioner's commander to give him the opportunity to come back into the Marine Corps, Petitioner's father explained that his poor attitude was the result of being passed over for a promotion that went to another Marine he believed to be less deserving. The Board found it highly unlikely that Petitioner would have attributed the change in his attitude toward the Marine Corps to this perceived snub with his father if, in fact, his attitude was the result of his traumatic racist experiences at this unit. He would have had no reason to hide these experiences from his father, who was clearly looking out for his best interests. Finally, Petitioner himself explained the reason for his extended absence in enclosure (14). Specifically, he explained his need to be removed from the Marine Corps as quickly as possible because of his family issues at home. The Board recognizes that Petitioner was not likely to raise in complaints of racist treatment in this context, but Petitioner's contemporaneous words explain his motivation for going and remaining UA. Although the Board did not find Petitioner's racist experiences and/or PTSD condition to excuse or mitigate his misconduct, it did consider those factors among the totality of the circumstances to determine whether equitable relief is warranted in the interest of justice as discussed below.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] USMC

The Board found no merit in Petitioner's contention that the anti-discrimination policies currently in place would have produced a better outcome for him under similar circumstances today. Petitioner received many opportunities to correct his behavior before he was ultimately court-martialed. He received two NJPs before any action was taken to remove him from the Marine Corps, and in both cases the sentence of forfeitures was suspended to permit Petitioner the opportunity to improve his conduct without financial penalty. This corrective action did not work, as Petitioner continued to engage in misconduct and repeated UAs. Even after it was apparent that the NJPs did not have the desired effect upon Petitioner's conduct, he was counseled on 24 September 1976 and warned that further misconduct could result in an administrative discharge and that another UA before Battalion office hours could result in his confinement. This warning also did not deter him, as he went UA again less than a week later. Even after his SPCM conviction, Petitioner's command granted his request to defer his confinement until initial action by the convening authority, and did not pursue an additional conviction and/or confinement following his apprehension by civilian authorities. As a result, Petitioner ended up serving less than half of his adjudged five months of confinement, and was never punished for his nearly 29-month long post-conviction UA terminated by apprehension. Given the circumstances, no Marine in any era could reasonably hope for a better result than what Petitioner enjoyed. Further, as stated above, the Board did not believe that Petitioner's misconduct was motivated by his claimed racist experiences in his unit, so the current anti-discrimination policies in place would not have produced a different result.

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, among other factors, Petitioner's claimed experience with racism in his unit, to include the assault that he described at the hands of three white Marines; Petitioner's claim that no action was ever taken by his command when he reported such racist behavior; Petitioner's current diagnosis with a trauma-related disorder, and his claim to have continued to suffer mental health problems; Petitioner's claim that he began to fear for his life at his unit; that Petitioner has sought and received treatment for his mental health condition; the non-violent nature of Petitioner's misconduct; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. Even considering these potentially mitigating factors, however, the Board did not believe that equitable relief was warranted. The Board believed that the severity and frequency of Petitioner's misconduct far outweighed all of the potentially mitigating circumstances. The Board also believed that the consequences of Petitioner's misconduct were relatively minor given its nature and frequency. Accordingly, the Board found that equitable relief is not warranted given the totality of the circumstances.

Although the Board found insufficient evidence of any error or injustice warranting an upgrade to Petitioner's discharge, it did find an error in Petitioner's naval record warranting corrective action. Specifically, block 9c of Petitioner's DD Form 214 states "JJC2" as the "Authority and Reason" for Petitioner's discharge. This was the code used at the time to indicate that Petitioner's punitive discharge was due to an adjudged court-martial sentence for the specific offense of desertion. A punitive discharge for any other offense would have been identified with the code of "JJD2." While Petitioner could have been charged for desertion in violation of Article 85, UCMJ, based upon his extended post-conviction UA that was terminated by apprehension, that charge was not among those for which he was convicted or the reason for his

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] USMC

punitive discharge. Accordingly, the Board found that Petitioner's DD Form 214 incorrectly states the reason and authority for his discharge, and that this error warrants corrective action.

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 that his service, ending on 12 June 1979, was characterized as "Under Conditions Other than Honorable"; that his separation authority was "MARCORSEPMAN par. 6019"; that his separation code was "JJD2"; and that his narrative reason for separation was "Sentence of Special Court-Martial – other than desertion."

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.

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 out in SECNAVINST 5420.193 and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

2/27/2023

