



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

█
Docket No. 8371-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER █
█

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," 13 September 2014
(c) PDUSD (P&R) 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 (P&R) 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 (P&R) 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) NAVPERS 1070/613, Administrative Remarks, 13 February 1987
(4) NAVPERS 1070/613, Administrative Remarks, 21 March 1987
(5) NAVPERS 1070/613, Administrative Remarks, 6 August 1987 – 10 August 1987
(6) NAVPERS 1070/613, Administrative Remarks, 27 August 1987
(7) NAVPERS 1070/613, Administrative Remarks, 13 April 1988
(8) █ Msg, subj: [Petitioner]; Recommendation for Separation by Reasons of Misconduct due to a Pattern of Misconduct and Misconduct due to a Civilian Conviction, dtg 192300Z DEC 88
(9) NAVPERS 1070/607, Court Memorandum, 13 November 1988
(10) COMNAVMILPERSCOM Msg, subj: Misconduct Disch ICO [Petitioner], dtg 021908Z JAN 89
(11) Department of Veterans Affairs, Administrative Decision, 21 July 2014
(12) BCNR Memo Letter █ Docket No: 7519-15, 16 November 2016
(13) Department of Veterans Affairs, Rating Decision, 27 December 2021
(14) BCNR Memo Docket No: NR20220008371, subj: Advisory Opinion ICO

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
[REDACTED]

[Petitioner], 23 February 2023

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 his service be upgraded and his narrative reason for separation be changed.¹

2. The Board reviewed Petitioner's allegations of error or injustice on 5 April 2023 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, 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 interests of justice to waive the statute of limitations and consider Petitioner's application on its merits.

c. Petitioner enlisted in the Navy and began a period of active duty service on 24 February 1986.² See enclosure (2).

d. On 13 February 1987, Petitioner received non-judicial punishment (NJP) for insubordinate conduct toward a petty officer in violation of Article 91, Uniform Code of Military Justice (UCMJ), and failure to obey an order or regulation in violation of Article 92, UCMJ. He receive 20 days of restriction and extra duty, and was required to forfeit \$200 pay per month for one month.³ See enclosure (3).

e. On 21 March 1987, Petitioner received his second NJP for absence without leave in violation of Article 86, UCMJ, and offenses by a sentinel or lookout in violation of Article 134, UCMJ. He received 20 days of restriction and extra duty. See enclosure (4).

f. On 17 May 1987, an [REDACTED] aircraft fired two Exocet missiles at the [REDACTED] on which the Petitioner served. Thirty-seven (37) Sailors were killed in this incident, and another 27 were injured.

g. Petitioner was in an unauthorized absence (UA) status from the [REDACTED] for approximately a 24-hour period between 6 August 1987 and 7 August 1987, and for another 48-hour period between 8 August 1987 and 10 August 1987. See enclosure (5).

¹ This application constitutes a request for reconsideration of the Board's previous denial of his request for relief in Docket No. 7519-15. Reconsideration is mandated in this case per references (b) and (c).

² Petitioner enlisted pursuant to a waiver of pre-service drug abuse. See enclosure (3).

³ The forfeiture of pay was suspended for one month.

h. On 27 August 1987, Petitioner was counseled regarding misconduct and/or failure to follow Navy regulations. He was informed that he was being retained in the naval service, but warned that any further deficiencies in his performance and/or conduct would result in disciplinary action and in processing for administrative separation. See enclosure (6).

i. On 13 April 1988, Petitioner received his third NJP for absence without leave in violation of Article 86, UCMJ. He received 14 days of restriction and extra duty. See enclosure (7).

j. On 7 July 1998, Petitioner was convicted in a civilian court, contrary to his pleas, of carrying a concealed weapon and two counts of assault. See enclosure (8).

k. On 11 July 1988, Petitioner was notified that he was being processed for administrative discharge for misconduct due to both a pattern of misconduct and a civilian conviction. See enclosure (8).

l. On 12 November 1988, Petitioner received his fourth NJP for dereliction of duty in violation of Article 92, UCMJ, and for improper hazarding of a vessel in violation of Article 110, UCMJ. He received 15 days of extra duty and was reduced to the next inferior pay grade. See enclosure (9).

m. On 19 December 1988, Petitioner waived all of his rights with regard to his administrative discharge proceedings.⁴ See enclosure (8).

n. By message dated 19 December 1988, Petitioner's commander strongly recommended that Petitioner be administratively discharged from the Navy under other than honorable (OTH) conditions. In making this recommendation, Petitioner's commander stated that Petitioner "has demonstrated no ability to perform duties without direct supervision. Frequent counseling concerning his occasional lateness. Inability to pay just debts. Poor military bearing, and a constant habit of straying from assigned work area has resulted in no improvement. His dependence on others to do his work has had a detrimental affection morale within his division and throughout the command. [Petitioner] has no potential for further Naval service." See enclosure (8).

o. By message dated 2 January 1989, the separation authority directed that Petitioner be administratively discharged from the Navy under OTH conditions for misconduct due to a pattern of misconduct. See enclosure (10).

p. On 13 January 1989, Petitioner was discharged from the Navy under OTH conditions for misconduct due to a pattern of misconduct. See enclosure (2).

⁴ The reason for the delay between Petitioner's notification letter and his acknowledgement of his rights was due to operational commitments and difficulties experienced by Petitioner in consulting with counsel. Additionally, a hand-written note on enclosure (8) reflects that Petitioner originally elected to exercise his right to an administrative discharge board, but apparently elected to waive that right after his fourth NJP.

q. By letter dated 21 July 2014, the Department of Veterans Affairs (VA) informed Petitioner of its determination that the entirety of his naval service is considered honorable for VA purposes. In making this determination, the VA explained that Petitioner had no disciplinary issues prior to the attack on the [REDACTED].⁵ See enclosure (11).

r. On 15 June 2016, the Board denied Petitioner's previous request for relief in Docket No. 7519-15. Petitioner asserted in Docket No. 7519-15 that he received a copy of his DD Form 214 reflecting that his service was characterized as honorable, but the Board found that this assertion was not supported by any evidence provided or by his service record. Given the serious nature of Petitioner's repeated misconduct, which included a civilian conviction, the Board denied his request for relief. See enclosure (12).

r. On 27 December 2021, the VA awarded Petitioner a 70 percent disability rating for combat-related post-traumatic stress disorder (PTSD).⁶ See enclosure (13).

s. In support of his request for relief, Petitioner offered some explanation and context for his misconduct. With regard to his absence without leave, he claimed that his flight was postponed when he returned from leave after his mother's funeral.⁷ He stayed at [REDACTED] Naval Station until he was able to get back to the [REDACTED] and nothing was mentioned to him about his absence at the time. With regard to his insubordination charge, Petitioner claimed that he was suffering from undiagnosed PTSD due to racism from his fellow shipmates.⁸ This was difficult for him to understand and deal with, because they needed to count on each other. He also claims that his PTSD became worse after the events of 17 May 1987. Rather than bringing the crew together, he claims that his shipmates took out their frustrations on him even more. See enclosure (1).

t. Petitioner's application and records were reviewed by a qualified mental health professional, who provided an advisory opinion (AO) for the Board's consideration.⁹ This AO noted that Petitioner's misconduct both preceded and followed the attack on his ship, and the severity and pervasiveness of Petitioner's misconduct is not typical of one experiencing PTSD. It also noted that Petitioner's personal statement was not sufficiently detailed to establish clinical symptoms or to provide a nexus with his misconduct, and that additional information may result in a different opinion.¹⁰ Ultimately, the AO found evidence of a temporally-remote diagnosis of PTSD, but insufficient evidence that Petitioner's misconduct could be attributed to PTSD or another mental health condition. See enclosure (14).

MAJORITY CONCLUSION:

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

⁵ This statement was incorrect, as Petitioner had already received two NJPs prior to the events of 17 May 1987.

⁶ Petitioner's combined disability rating is 100 percent.

⁷ It is not clear from the record which period of UA Petitioner refers to.

⁸ Petitioner cites the racial slurs that he endured from fellow shipmates.

⁹ In accordance with reference (a), the author of the AO is a licensed clinical psychologist.

¹⁰ Petitioner was provided the opportunity to respond to this AO, but failed to do so.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
[REDACTED]

The Majority found no error or injustice in Petitioner's discharge under OTH conditions for misconduct due to a pattern of misconduct and a civilian conviction at the time that it was administered. It appears that the Navy complied with all procedural requirements pertaining to such discharges, and no evidence was provided to call the legitimacy of Petitioner's numerous acts of misconduct or his civilian conviction into question.

Because he based his claim for relief in whole or in part upon his claimed combat-related PTSD condition, the Majority reviewed Petitioner's application pursuant to the guidance of references (a) – (d). Accordingly, the Majority applied liberal consideration to Petitioner's claimed PTSD condition, and the effect that it may have had upon the misconduct for which he was discharged. In this regard, the Majority concurred with the AO conclusion that there was sufficient evidence, albeit temporally remote, that Petitioner developed a combat-related PTSD condition during his naval service. Applying liberal consideration, however, the Majority did not concur with the AO's conclusion that there was insufficient evidence that Petitioner's misconduct could be attributed to his PTSD condition. While acknowledging that the evidence of any nexus between Petitioner's mental health condition and misconduct was limited, the Majority believed it plausible, through the application of very liberal consideration, that at least some of the misconduct after the events of 17 May 1987 for which Petitioner was discharged may have been mitigated by his PTSD condition. Accordingly, the Majority found sufficient evidence to conclude that Petitioner's experience surrounding the attack upon his ship and the symptoms of his then-undiagnosed PTSD condition, combined to change his behavior and mitigated at least some of the misconduct for which he was discharged.

In addition to applying liberal consideration to Petitioner's claimed PTSD condition and the effect that it may have had upon his misconduct in accordance with references (a) - (d), 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, the mitigating effect of Petitioner's PTSD condition upon the misconduct for which he was discharged, as discussed above; that Petitioner's combat-related PTSD condition went undiagnosed and presumably untreated for many years after his discharge; Petitioner's service onboard the [REDACTED] at the time of the Iraqi missile attack; the racism that Petitioner reported experiencing while onboard the [REDACTED] the evidence in the record of Petitioner's participation in VA-sponsored vocational training or opportunities; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. Based upon these considerations, the Majority determined that equitable relief is warranted in the interests of justice. Specifically, the Majority found that the mitigating circumstances, particularly Petitioner's combat-related PTSD condition, outweighed the severity of his misconduct sufficiently to justify an upgrade of his characterization of service to general (under honorable conditions) and a change to his narrative reason for separation to mitigate the stigma associated with his discharge.

While the Majority found the totality of the mitigating circumstances to outweigh the severity of the misconduct for which Petitioner was discharged, it did not find those circumstances to so significantly outweigh the severity of his misconduct so as to justify the extraordinary relief of an upgrade to his characterization of service to fully honorable. In this regard, the Majority noted that much of Petitioner's misconduct predated the 17 May 1987 attack on the [REDACTED].

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
[REDACTED]

[REDACTED], and that only some of Petitioner's subsequent misconduct may have been mitigated by his undiagnosed PTSD condition. Further, the Majority noted that Petitioner was convicted by civilian authorities of two counts of assault, and that reference (e) provides that equitable relief is generally less appropriate for violent offenses.

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 "Secretary Plenary Authority"; that his separation authority was "MILPERSMAN 3630900"; and that his separation code was "JFF."

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 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 determination that there was no error or injustice in Petitioner's discharge under OTH conditions at the time that it was administered.

Like the Majority, the Minority also applied liberal consideration to Petitioner's claimed PTSD condition and the effect that it may have had upon the misconduct for which he was discharged in accordance with references (a) – (d). While the Minority concurred that there is sufficient evidence to conclude that Petitioner developed a PTSD condition during his naval service, even applying liberal consideration it found any mitigating effect of his condition upon the misconduct for which Petitioner was discharged to be negligible. Specifically, the Minority noted that much of Petitioner's misconduct predated the attack on the [REDACTED] which it, like the VA, considered to be the triggering event of Petitioner's PTSD condition, so it could not have been mitigated by Petitioner's PTSD condition.¹¹ It also did not find the offenses which were the subject of Petitioner's civilian conviction, which were the most serious committed by Petitioner, or those which were subject of his final NJP, to be of the type normally explained or mitigated by PTSD symptoms. The only misconduct which may conceivably have been mitigated by Petitioner's misconduct was the UA charged in his third NJP. However,

¹¹ The Minority member did not find merit in Petitioner's contention that his insubordination toward a petty officer was mitigated by PTSD arising from racial trauma. The Minority believed it possible, and even likely, that frustration arising from racist treatment could have contributed to such behavior, but did not find such conduct to be attributable to PTSD. In this regard, the VA records reflect that Petitioner's PTSD was combat-related, so the VA also did not attribute Petitioner's condition to racial trauma.

considering that this offense warranted only 14 days of restriction and extra duty, this act of misconduct likely contributed minimally to Petitioner's discharge. Accordingly, the Minority concurred with the AO that there was insufficient evidence to establish a nexus between Petitioner's PTSD condition and the misconduct for which he was discharged.¹²

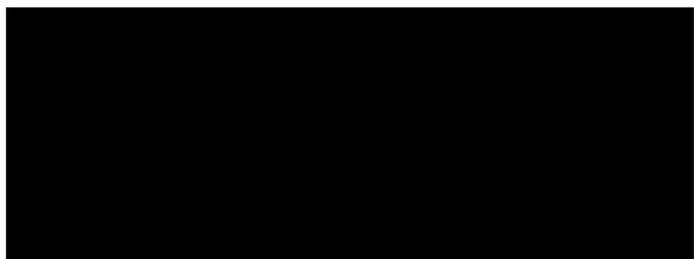
The Minority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice in accordance with reference (e). In this regard, the Minority considered the same potentially mitigating factors as did the Majority. However, having reached a different conclusion than did the Majority regarding the potentially mitigating effect of Petitioner's PTSD condition, the Minority assigned significantly less weight to the mitigating factors. As such, the Minority did not find those mitigating circumstances to outweigh the severity and frequency of Petitioner's misconduct to warrant any equitable relief. In reaching this conclusion, the Minority noted that Petitioner's civilian conviction included two counts of assault, and that reference (e) provides that equitable relief is generally more appropriate for nonviolent offenses than for violent offenses. The Minority further noted that Petitioner failed to provide the Board with any significant evidence of his post-service accomplishments or activities, or any character references, which might provide an alternative basis for relief.

MINORITY RECOMMENDATION:

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

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above titled matter.
5. The foregoing action of the Board is submitted for your review and action.

6/6/2023



¹² The Minority concurred with the AO conclusion that additional information or context regarding Petitioner's clinical PTSD symptoms may have produced a different outcome, but Petitioner failed to provide such additional information when offered the opportunity to do so.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED] USN,
XXX-XX [REDACTED]

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 therefore direct that no corrective action be taken on Petitioner’s naval record.)

____ MAJORITY Recommendation Approved (with modification) (Full Relief – I generally concur with the Majority conclusion above, but do not believe that the relief recommended goes far enough to serve the interests of justice. Specifically, I believe that the mitigating circumstances did so significantly outweigh the severity and frequency of Petitioner’s misconduct so as to justify the upgrade of his characterization of service to fully honorable. Accordingly, I direct the relief recommended the Majority above, except that Petitioner’s service is to be characterized as “Honorable.” Petitioner shall also be issued an Honorable Discharge Certificate.

7/19/2023

[REDACTED]

Assistant General Counsel (M&RA)

Signed by [REDACTED]