



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

██████████
Docket No. 2411-23
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER ██████████
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- 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 (P&R) 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 (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/enclosures
 - (2) DD Form 214
 - (3) NAVMC 118(9), Combat History – Expeditions – Awards Record
 - (4) NAVMC 118(3), Chronological Record
 - (5) ██████████ Court-Martial Order No. ██████████, ██████████
 - (6) United States v. [Petitioner], in the U.S. Navy-Marine Corps Court of Military Review, ██████████, decided ██████████
 - (7) Naval Clemency and Parole Board Memo Serial No. ██████████ ██████████
 - (8) Navy-Marine Corps Appellate Review Authority Memo 5800 40.32, subj: U.S. Court of Military Appeals Action in the case of [Petitioner], ██████████ ██████████
 - (9) BCNR Memo Docket No: NR20230002411, subj: Advisory Opinion ICO [Petitioner, 12 July 2023
 - (10) Petitioner's Attorney Letter, subj: AO Rebuttal for Docket No: NR20230002411 [Petitioner], 9 August 2023 (with enclosed supplementary evidence)
 - (11) BCNR Memo Docket No: NR20230002411, subj: Advisory Opinion Rebuttal Response ICO [Petitioner], 9 August 2023

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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 associated separation authority and separation code) be changed to “Secretarial Authority”; and that his reentry code be changed to “RE-1.”
2. The Board reviewed Petitioner’s allegations of error or injustice on 18 August 2023 and pursuant to its regulations, determined that clemency is warranted in the interests of justice. Documentary material considered by the Board included the enclosures; relevant portions of Petitioner’s naval records; and applicable statutes, regulations, and policies, to include references (b) – (e).
3. Having reviewed all of the evidence of record pertaining to Petitioner’s allegations of error or injustice, the Board found as follows:
 - a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy.
 - b. Although enclosure (1) was not filed in a timely manner, it is in the interests of justice to waive the statute of limitations and review Petitioner’s application on its merits.¹
 - c. Petitioner enlisted in the Marine Corps and began a period of active duty service on 28 June 1989. See enclosure (2).
 - d. Between 12 December 1990 and 4 May 1991, Petitioner was deployed to [REDACTED] in support of [REDACTED] and [REDACTED]. See enclosure (3).
 - e. In April 1992, Petitioner was reassigned [REDACTED] to the [REDACTED] in [REDACTED]. See enclosure (4).
 - f. In August 1992, Petitioner stole a Zenith Laptop Computer from a fellow Marine, in violation of Article 121, Uniform Code of Military Justice (UCMJ).² See enclosure (5).
 - g. In August 1992, Petitioner stole a Super Nintendo Entertainment System from the U.S. Government, in violation of Article 121, UCMJ.³ See enclosure (5).
 - h. In September or October 1992, Petitioner stole a Sony Stereo Receiver;⁴ a JVC Digital Audio Tape Player; and a pair of Infinity speakers from the Army and Air Force Exchange Service (AAFES), in violation of Article 121, UCMJ.⁵ See enclosure (5).

¹ References (c) and (d) also direct the waiver of the statute of limitation in this case.

² The estimated value of this item was \$2,000.00.

³ The estimated value of this item was \$139.00.

⁴ The estimated value of this item was \$710.00.

⁵ The combined estimated value of these items was \$1,348.97.

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i. In October 1992, Petitioner received a Citizen Television Monitor which he knew to have been stolen property, in violation of Article 134, UCMJ. See enclosure (5).

j. In January 1993, Petitioner stole a Panasonic Compact Disc Player and Compact Car Stereo from AAFES, in violation of Article 121, UCMJ. See enclosure (5).

k. On 29 September 1993, Petitioner was convicted by a general court-martial (GCM), pursuant to his pleas, of the offenses references in paragraphs 3(f) through 3(j) above.⁶⁷ He was sentenced to 20 months of confinement; forfeiture of all pay and allowances; reduction to the pay grade of E-1; and a dishonorable discharge (DD). See enclosure (5).

l. On 21 December 1993, the convening authority approved Petitioner's GCM sentence as adjudged, but suspended that portion of his sentence to confinement in excess of seven months.⁸ See enclosure (5).

m. On 25 May 1994, the U.S. Navy-Marine Corps Court of Military Review (NMCCMR) affirmed the GCM findings and the sentence as approved.⁹ See enclosure (6).

n. On 14 July 1994, the Naval Clemency and Parole Board (NCPB) mitigated Petitioner's DD to a bad-conduct discharge (BCD). See enclosure (7).

o. On 19 August 1994, the U.S. Court of Military Appeals denied Petitioner's petition for review. See enclosure (8).

p. On 27 October 1994, Petitioner's BCD was executed. See enclosure (2).

q. Petitioner, through counsel, contends that he was experiencing depression and anxiety during his service, and that he was diagnosed with post-traumatic stress disorder (PTSD) after his discharge. He asserts that his is entitled to clemency because he can demonstrate that there were extenuating circumstances surrounding his misconduct, and he has shown exemplary behavior since his discharge and has evidence of rehabilitation or character transformation. In his personal statement attached to his application, Petitioner stated that his assignment to [REDACTED] was ill-timed because he had just become engaged and his fiancé was pregnant. He further asserts that this assignment triggered his mental health symptoms for anxiety and depression, and that he was reluctant to seek help for fear of being labeled a "weak Marine."

⁶ The GCM acquitted Petitioner of two specifications of conspiracy to commit the offense of housebreaking during August or September 1992, in violation of Article 81, UCMJ; eight specifications of larceny between August 1992 and March 1993, in violation of Article 121, UCMJ; and three specifications of unlawfully entering an enlisted barracks with the intent to commit larceny in August or September 1992, in violation of Article 130, UCMJ

⁷ Petitioner's case was a companion case to the courts-martial of three other Marines tried separately.

⁸ The Board presumes that this action was pursuant to a pretrial agreement.

⁹ The NMCCMR rejected each of Petitioner's assignments of error. Specifically, Petitioner contended that his pleas to the offenses referenced in paragraphs 3g and 3j above were not provident; and that a DD was an inappropriately severe punishment based upon his previous service and rehabilitation potential. He also asserted that the involvement of the Assistant Judge Advocate General for Military Justice and the Judge Advocate General of the Navy in the preparation of the NMCCMR judges' fitness reports deprived the court of its independence and the appearance of independence.

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As a result, he claims that he began to isolate himself and find ways to heal his pain. Finally, he asserted that his misconduct was outside of his character. He fell in with a group of bad Marines, and did things that he should not have done, but he asserted that the activity “appealed” to him because “it applied a bandage to the pain that has been instilled after the events experienced after the war.” Petitioner provided his personal resume for review, which reflects post-service professional success and rehabilitation. See enclosure (1).

r. Because Petitioner based his claim for relief in whole or in part upon combat-related PTSD and other mental health conditions, his records were reviewed by a licensed clinical psychologist, who provided an advisory opinion (AO) for the Board’s consideration. The AO noted that there was no evidence in the record that Petitioner exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. It also noted that Petitioner provided no medical evidence to support his claim, and that his personal statement is not sufficiently detailed to establish clinical symptoms in service or to establish a nexus to his misconduct, as theft is not a typical symptom of a mental health condition. Accordingly, the AO found that there was insufficient evidence of a diagnosis for PTSD or another mental health condition that may be attributed to Petitioner’s military service, or to attribute his misconduct to PTSD or another mental health condition. See enclosure (9).

s. By letter dated 20 July 2023, Petitioner, through counsel, provided a rebuttal to the AO referenced in paragraph 3r above. This rebuttal was accompanied by medical evidence to support his claimed diagnoses which had not previously been provided to the Board, along with several letters of support from his fellow Marines attesting to his character and performance, as well as to the mental health symptoms experienced by Petitioner. See enclosure (10).

t. Based upon the new evidence provided by Petitioner with his rebuttal, the same licensed clinical psychologist who provided the AO referenced in paragraph 3r above reconsidered her opinion, and provided a supplemental AO for the Board’s consideration. The supplemental AO revealed that there was evidence in Petitioner’s medical records that Petitioner was referred for suicidal ideations in April 1992 and diagnosed with a “probable Adjustment Disorder with mixed emotional features.”¹⁰ In May 1992, Petitioner returned for a follow-up evaluation and reported that he was improving “at work and abilities to cope with his new environment.” The supplemental AO also revealed that Petitioner has current diagnoses of PTSD and Anxiety Disorder from June 2018. Based upon this new evidence, the supplemental AO found evidence of mental health symptoms during Petitioner’s military service, as well as a post-service diagnosis of PTSD which is attributed to his military service. It also found that it was possible that Petitioner’s in-service mental health symptoms evolved over time into PTSD. Despite these revised findings, the supplemental AO continued to find it difficult to attribute Petitioner’s misconduct to a mental health condition, as larceny is not an offense easily attributed to or resulting from the mental health conditions at issue. See enclosure (11).

¹⁰ This timeframe corresponded to Petitioner’s reassignment to ██████████.

MAJORITY CONCLUSION:

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

The Majority found no error or injustice in Petitioner's BCD at the time that it was executed. There does not appear to be any controversy regarding the legitimacy of the misconduct for which Petitioner was discharged. He does not dispute that he committed these offenses, and he plead guilty to those offenses under oath during his GCM. Further, his guilty pleas were subsequently affirmed by the NMCCMR. There also does not appear to be any procedural irregularities associated with Petitioner's discharge. Finally, a BCD was appropriate and reasonable given the severity of the misconduct for which Petitioner was convicted. Considering that both the GCM which heard Petitioner's case, and the NMCCMR which reviewed it, believed that Petitioner's misconduct warranted a DD, the BCD which was ultimately executed was reasonable under the circumstances.

Because Petitioner based his application for relief in whole or in part upon his combat-related PTSD and other mental health conditions, the Majority reviewed his application in accordance with the guidance of references (a) – (d).¹¹ Accordingly, the Majority applied liberal consideration to Petitioner's claim that he was suffering from PTSD and other mental health conditions during his service, and the effect that those conditions may have had upon his misconduct. Applying such liberal consideration, the Majority found sufficient evidence to conclude that Petitioner was suffering from mental health conditions during his military service, and that those conditions predated the misconduct for which he was ultimately discharged. He was certainly suffering from depression and anxiety at that time, and the symptoms of those conditions may very well have represented the early stages of the PTSD condition for which he was later diagnosed. However, even applying liberal consideration, the Majority found insufficient evidence to establish that Petitioner's mental health conditions excused, mitigated, or contributed to Petitioner's misconduct and resulting discharge. There simply is no logical nexus between offenses of the type for which Petitioner was court-martialed and discharged, and the mental health conditions that he was suffering. Neither PTSD, nor depression, nor anxiety compels an individual to steal property, and such activity cannot be credibly characterized as a type of "self-medication" for these conditions. In enclosure (1), Petitioner explained that he turned to drugs to cope with the pain of his conditions. Such misconduct would certainly have been mitigated by his mental health conditions, but such misconduct was not the basis of his discharge. Although the Majority found that Petitioner's mental health conditions did not excuse or mitigate the misconduct for which he was discharged, it did consider the existence of these conditions among the totality of the circumstances to determine whether clemency is warranted in the interests of justice, as discussed below.

In addition to applying liberal consideration to Petitioner's claimed mental health conditions and the effect that they may have had upon his conduct in accordance with references (a) – (d), the Majority also considered the totality of the circumstances to determine whether clemency is warranted in the interests of justice in accordance with reference (e). In this regard, the Majority

¹¹ The Majority reviewed Petitioner's application in accordance with the guidance of subparagraph (h)(2) of reference (a), as well as the guidance of references (b) – (d).

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considered, among other factors, the totality of Petitioner's service in the Marine Corps, which included a combat deployment; that Petitioner developed mental health conditions, to include depression, anxiety, and PTSD, during his service, and perhaps due at least in part to his experiences in combat, and has presumably continued to suffer the effects of these conditions since his discharge; the unfortunate circumstances and timing of Petitioner's assignment to ██████████, which may have contributed to his mental distress; that Petitioner's record includes no evidence of misconduct or disciplinary actions prior to his assignment to ██████████; the letters of support provided by Petitioner's fellow Marines attesting to his favorable performance and character; the non-violent nature of the misconduct for which Petitioner was discharged; Petitioner's apparent post-service professional success in spite of his punitive discharge, which reflects considerable rehabilitation and resiliency; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. Based upon these factors, the Majority found the mitigating circumstances to outweigh the severity of Petitioner's misconduct, and that some clemency is therefore warranted in the interests of justice. Specifically, the Majority determined that Petitioner's service characterization should be equitably upgraded to "General (under honorable conditions)"; and that his narrative reason for separation should be changed to mitigate the stigma associated with his court-martial conviction.

Although the Majority determined that the mitigating circumstances sufficiently outweighed the severity of Petitioner's misconduct to justify the clemency discussed above, it did not find that those mitigating circumstances so significantly outweighed the severity of Petitioner's misconduct to justify the extraordinary relief of an upgrade to his characterization of service to fully honorable, as he requested. In this regard, the Majority noted that Petitioner's misconduct was of such severity to warrant a DD. Accordingly, his misconduct was of such severity that further clemency beyond that recommended herein is simply not warranted.

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 interests of justice:

That Petitioner be issued a new DD Form 214 reflecting that his service ending on 27 October 1994 was characterized as "General (under honorable conditions); that the narrative reason for his separation was "Determination of Service Secretary – Secretary of the Navy Plenary Authority"; that his separation authority was "MARCORSEPMAN par 6214"; and that his separation code was "JFF1." All other entries reflected on Petitioner's current DD Form 214 are to remain unchanged.

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

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

MINORITY CONCLUSION:

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

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The Minority concurred with the Majority conclusion above that there was no error or injustice in Petitioner's BCD at the time that it was administered. The Minority also concurred with the Majority determination that, although there is sufficient evidence that Petitioner was suffering from mental health conditions during his military service, those conditions did not excuse or mitigate the misconduct for which he was discharged.

Like the Majority, the Minority considered the totality of the circumstances to determine whether clemency 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, but reached a different conclusion in this regard. The Minority believed that the severity of Petitioner's misconduct far outweighed the potentially mitigating circumstances, and that clemency is therefore not warranted. The Minority recognized Petitioner's post-service accomplishments and demonstrated rehabilitation, but did not find those factors combined with the other mitigating factors to be nearly sufficient to overcome the severity of the misconduct for which he was convicted and discharged. The Minority also noted that Petitioner has already been the beneficiary of significant clemency in this case. Despite the NMCCMR's determination that a DD was appropriate in Petitioner's case in May 1994, the NCPB mitigated his DD down to a BCD in July 1994. In enclosure (1), Petitioner claimed to have traveled to [REDACTED] to personally make his case for such clemency before the NCPB. As such, the Minority found it likely that at least some of the factors contributing to the clemency recommended by the Majority herein were already factored into the generous clemency he received from the NCPB in 1994. This tended to offset the weight afforded by the Minority to those mitigating factors.

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.

10/6/2023

[REDACTED]

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ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

___ MAJORITY Recommendation Approved (Partial Relief – I concur with the Majority conclusion and therefore 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.)

10/27/2023

