



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

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Docket No. 2762-23  
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 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  
(f) MCO 1900.16 Change 1, subj: Separation and Retirement Manual (Short Title: MARCORSEPMAN), 7 August 2015  
(g) SECNAVINST 1850.4E, Department of the Navy (DON) Disability Evaluation Manual, 30 April 2002  
(h) MARADMIN 135/19, subj: Marine Corps Temporary Early Retirement Authority (TERA) Program, dtg 042225Z MAR 19

Encl: (1) DD Form 149 with attachments  
(2) DD Form 214  
(3) NAVMC 118(12), Offenses and Punishments, 6 December 1999  
(4) MCTFS Database Entry, Individual Separation Information, 2 January 2016  
(5) Notarized Letter from Petitioner's Former Spouse, 14 October 2022  
(6) Petitioner's Medical Records (Excerpt)  
(7) NAVMC 118(11), Administrative Remarks, 31 May 2014  
(8) █ Memo 1910 1ITB, subj: Notification of Administrative Separation Proceedings, 21 August 2015  
(9) NAVMC 10132, Unit Punishment Book, 20 August 2015  
(10) Memorandum of Pretrial Agreement, in the case of *United States v. [Petitioner]*, 22 July 2015  
(11) NAVMC 118(11), Administrative Remarks, 20 August 2015

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- (12) Petitioner's Memo 1910 1ITB, subj: Acknowledgment of my Rights to be Exercised or Waived during Separation Proceedings, 21 August 2015
- (13) Standard Form 600, Medical Record – Chronological Record of Medical Care, 21 August 2015
- (14) [REDACTED] Memo 1910 [REDACTED], subj: Recommendation for Administrative Separation in the case of [Petitioner], 2 September 2015
- (15) [REDACTED] Memo 1910 [REDACTED], First Endorsement on Enclosure (14), subj: Recommendation for Administrative Separation in the case of [Petitioner], 7 September 2015
- (16) HQMC Memo 1910 MMSR-2E, subj: Cancellation of Transfer to the FMCR, [Petitioner], 5 October 2015
- (17) [REDACTED] CG Memo 1910 C 472, subj: Recommendation for Administrative Separation in the case of [Petitioner], 8 October 2015
- (18) NDRB Discharge Review Decisional Document, Docket No. MD16-01053, 14 March 2018
- (19) BCNR Memo Docket No: NR20230002762, subj: Advisory Opinion ICO [Petitioner], 10 July 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 several corrections to his naval record.<sup>1</sup>

2. The Board considered Petitioner's allegations of error or injustice on 21 September 2023 and, pursuant to its governing policies and procedures, determined that the equitable relief indicated below is warranted in the interests of justice. 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. 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 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 limitation and consider Petitioner's application on its merits.

c. Petitioner enlisted in the Marine Corps and began a period of active duty service on

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<sup>1</sup> Specifically, Petitioner requested the following relief:

- Upgrade of his characterization of service from general (under honorable conditions) to honorable;
- Restoration of his rank of Staff Sergeant (SSGT)/E-6;
- Change to his narrative reason for separation to "Voluntary Release due to Personal Reasons"; "Secretarial Authority"; or some similar, neutral reason for discharge (with corresponding changes to Petitioner's separation authority and separation code);
- Upgrade to his reentry code;
- Grant retirement pursuant to the Temporary Early Retirement Authority (TERA) effective 1 May 2015 or, alternatively, referral to the Disability Evaluation System (DES) for post-traumatic stress disorder (PTSD).

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23 February 1999. See enclosure (2).

d. On 29 November 1999, Petitioner received non-judicial punishment (NJP) for attempting to switch a bottle of his own urine with a different bottle during a urinalysis test, in violation of Article 134, UCMJ. He was reduced to E-1; required to forfeit \$479 pay per month for two months and to perform extra duty for 45 days; and restricted for 45 days. See enclosure (3).

e. Petitioner deployed to Iraq in support of Operation Iraqi Freedom from 1 February 2003 to 27 May 2003. See enclosure (4).

f. Petitioner redeployed to Iraq on 24 October 2004 and remained in theater until on or about 4 February 2005.<sup>2</sup> See enclosure (4). Petitioner reports learning during this deployment that his first wife was having an affair with a fellow service member.

g. Petitioner deployed to Afghanistan in support of Operation Enduring Freedom from 11 January 2006 to 7 May 2006, and again from 23 May 2011 to 30 November 2011. See enclosure (4). Petitioner reports learning during the latter deployment of his second wife's infidelity.<sup>3</sup>

h. In August 2012, Petitioner and his then-spouse filed a formal separation agreement. See enclosure (5).

i. On 31 May 2014, Petitioner was formally counseled for signing for and transporting serialized communication equipment and other unit equipment valued in excess of \$4,800 via his privately-owned vehicle to his off-base residence, in violation of a published Standard Operating Procedures, which resulted in the theft of this equipment from his vehicle. Petitioner elected not to make a statement in rebuttal to this counseling. See enclosure (7).

j. In September 2014, Petitioner was approved for early retirement pursuant to the TERA, with an effective date of 1 May 2015. See enclosure (1).

k. On 4 February 2015, Petitioner reportedly stated his belief that he had PTSD after a reportedly sudden increase in anxiety symptoms, based upon a conversation he had with a relative which led him to believe that his symptoms had been dormant.<sup>4</sup> His increased anxiety reportedly resulted in him "almost moving out of the house" and feelings of anger toward his family "for nothing" despite improvement in his marriage. Petitioner subsequently engaged in several psychotherapy sessions for PTSD, the records of which do not detail the traumatic event(s) which may have triggered his PTSD condition, but did reference survival guilt and "details of his traumatic deployment." He also reported discord in his marriage. See enclosure (6).

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<sup>2</sup> Petitioner participated in combat operations in ██████████ during much of this deployment in support of Operation Phantom Fury.

<sup>3</sup> Petitioner remarried in January 2007. He discussed his second wife's infidelity with his mental health provider in 2014, and she admitted to her infidelity in a letter to the Board. See enclosures (5) and (6).

<sup>4</sup> Petitioner had previously denied PTSD symptoms, endorsing mostly depressive symptoms.

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l. On 29 April 2015, Petitioner's estranged spouse accused him of spousal abuse and adultery. As a result, he was removed from his position as [REDACTED], and transferred to the [REDACTED], pending investigation of the allegations. His early retirement pursuant to the TERA was also delayed. See enclosures (5) and (15)

m. On 30 April 2015, Petitioner was command referred for a mental health evaluation based upon concerns for his welfare, as he had recently been informed that he was under investigation for adultery, and had two Military Protective Orders (MPO) in place.<sup>5</sup> Additionally, Petitioner's early retirement pursuant to the TERA had been delayed pending the investigation.<sup>6</sup> Petitioner reported suicidal ideations and expressed paranoid thoughts during this evaluation. Petitioner was diagnosed with PTSD by a Licensed Clinical Social Worker after this evaluation, and was admitted for in-patient mental health treatment.<sup>7</sup> See enclosure (6).

n. On 29 May 2015, Petitioner was placed into pretrial confinement.<sup>8</sup> See enclosure (6). During the medical examination preceding his placement into pretrial confinement, Petitioner became agitated and tearful, and expressed suicidal ideations. He was referred to the Naval Hospital [REDACTED] emergency room for further evaluation. See enclosure (6).

o. Petitioner was subsequently charged with adultery in violation of Article 134, Uniform Code of Military Justice (UCMJ); three specifications of false official statement in violation of Article 107, UCMJ;<sup>9</sup> and willful disobedience of a superior commissioned officer in violation of Article 90, UCMJ. See enclosures (9) and (10).

p. On 19 August 2015, Petitioner entered into a pretrial agreement (PTA) with the convening authority, whereby he agreed to enter pleas of guilty to the offenses referenced in paragraph 3o above, and to waive his right to any administrative separation board which may follow, in exchange for disposition of the charges at NJP.<sup>10</sup> As part of this agreement, Petitioner asserted that he was, in fact, guilty of the offenses charged; that he was entering into the agreement freely and voluntarily; and that his defense counsel had advised him of the possibility that he may be processed for administrative discharge for the misconduct which was the basis of the agreement

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<sup>5</sup> Petitioner claims to have met the woman with whom he was accused of committing adultery, who was herself a military spouse in an unhappy marriage, on Craigslist. She was the spouse of a Marine Corps Captain. According to enclosure (5), Petitioner's estranged spouse reported the affair to his chain of command. One of these MPOs prohibited Petitioner from contacting his wife or daughter, while the other prohibited Petitioner from contacting the family the woman with whom he was having a consensual extramarital relationship.

<sup>6</sup> This information was recorded as being provided by Petitioner's Executive Officer.

<sup>7</sup> The mental health provider who provided this diagnosis ruled out a diagnosis for Major Depressive Disorder (MDD), and also noted Petitioner's marital problems and "prominent cluster B traits."

<sup>8</sup> Petitioner reports that he violated one of his MPOs by speaking with his daughter about her dance recital. The evidence in the record, however, suggests that the misconduct for which he was placed into pretrial confinement was much more severe than he claimed.

<sup>9</sup> According to enclosure (11), Petitioner made false statements to a Marine Corps Captain that he never had sex with the woman with whom he was having an affair; that he had not made contact with that woman electronically; and that he had never had a certain e-mail account which was presumably used to make unauthorized communications.

<sup>10</sup> The convening authority also agreed to credit Petitioner with two days of restriction and/or extra duties against any such punishments adjudged for each day spent in pretrial confinement.

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and that such discharge may be characterized as other than honorable (OTH). See enclosure (10).

q. On 20 August 2015, Petitioner received NJP pursuant to the PTA referenced in paragraph 3p above. He was sentenced to forfeit \$1,836 pay per month for two months, and to be restricted for 60 days. See enclosure (9).

r. By memorandum dated 21 August 2015, Petitioner was notified of his command's intent to recommend his involuntary discharge from the Marine Corps under OTH conditions for misconduct due to commission of a serious offense. The stated basis for this recommendation was his "multiple violations of the Military Protective Order prohibiting contact with [the named spouse] of another Marine"; his several false official statements during the course of the investigation; and his admission to engaging in adultery. See enclosure (8).

s. By memorandum also dated 21 August 2015, Petitioner, after consulting with counsel, acknowledged receipt of the notice referenced in paragraph 3r above and elected to waive his right to request a hearing before an administrative separation board in accordance with the terms of his PTA. He also acknowledged his understanding that he was to be administratively reduced to pay grade E-3 upon separation if administratively separated under OTH conditions.<sup>11</sup> See enclosure (12).

t. Petitioner's separation physical noted Petitioner's PTSD condition, but found that he did not have a medical condition that may have a material impact on his behavior. See enclosure (13).

u. By memorandum dated 2 September 2015, Petitioner's commander recommended to the Deputy Commandant (Manpower and Reserve Affairs) that Petitioner be administratively discharged from the Marine Corps for misconduct due to commission of a serious offense. In doing so, he certified that Petitioner had been deployed and diagnosed with PTSD.<sup>12</sup> See enclosure (14).

v. By memorandum dated 7 September 2015, the next higher commander in Petitioner's chain of command forwarded the administrative separation package pertaining to Petitioner, and also recommended that Petitioner be discharged from the Marine Corps under OTH conditions by reason of misconduct due to commission of a serious offense. He further recommended that Petitioner's previously approved early retirement pursuant to the TERA be rescinded. See enclosure (15).

w. By memorandum dated 5 October 2015, Petitioner's previously approved early retirement pursuant to the TERA was formally canceled in accordance with reference (f). See enclosure (16).

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<sup>11</sup> Per paragraph 8311.8 of reference (f), "[w]hen a Marine serving in pay grade E-4 or above is administratively separated with an other than honorable characterization of service, the Marine shall be administratively reduced to pay grade E-3 with such reduction to become effective upon separation."

<sup>12</sup> Petitioner's commander also certified that Petitioner was not diagnosed with traumatic brain injury (TBI).

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x. By memorandum dated 8 October 2015, the separation authority directed that Petitioner be separated from the Marine Corps under OTH conditions for misconduct due to commission of a serious offense.<sup>1314</sup> In making this decision, the separation authority acknowledged that Petitioner had combat service and has been diagnosed with PTSD, but affirmatively found that PTSD did not contribute to or otherwise mitigate the seriousness of Petitioner's misconduct. See enclosure (17).

y. On 14 October 2015, Petitioner was discharged from the Marine Corps under OTH conditions for misconduct due to commission of a serious offense in the grade of Lance Corporal/E-3. See enclosure (2).

z. On 14 March 2018, the Naval Discharge Review Board (NDRB), by a vote of 4-1, found that Petitioner's discharge from the Marine Corps under OTH conditions for misconduct due to commission of a serious offense was "proper but not equitable."<sup>15</sup> Accordingly, the NDRB upgraded Petitioner's characterization of service to general (under honorable conditions), but specifically left Petitioner's narrative reason for separation and reentry code unchanged.<sup>16</sup> In support of his request for relief from the NDRB, Petitioner asserted that his misconduct arose as a result of his alcohol dependence which he used to cope with PTSD, two failed marriages, and his father's death; that his discharge was inequitable given his otherwise honorable service; and that his post-service contributions to society should be considered.<sup>17</sup> See enclosure (18).

aa. Petitioner, through counsel, asserts that relief is warranted for the following reasons:

(1) His punishment was excessive for his misconduct. Specifically, Petitioner notes that he was confined for almost three months, reduced in rank from SSGT to Lance Corporal, was discharged under OTH conditions, and lost his retirement, for conduct which is no longer even punishable under the UCMJ.<sup>18</sup>

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<sup>13</sup> The separation authority was the Commanding General, [REDACTED].

<sup>14</sup> Enclosure (17) includes a certification from the separation authority's Staff Judge Advocate that the administrative separation proceedings were legally reviewed and found sufficient in law and fact.

<sup>15</sup> The NDRB found that Petitioner's PTSD condition was a mitigating factor associated with Petitioner's misconduct. It also found that Petitioner's meritorious service in combat warranted additional consideration in the determination of Petitioner's overall characterization of service.

<sup>16</sup> The NDRB also noted an administrative error in Petitioner's original DD Form 214 in that Block 18 did not include the statement: "CONTINUOUS HONORABLE ACTIVE SERVICE FROM 990223 UNTIL 110315." Per reference (f), this statement shall appear as the first entry in Block 18 of the DD Form 214 of Marines who have previously reenlisted without being issued a DD Form 214 and who are separated with any discharge characterization less than fully honorable.

<sup>17</sup> Petitioner provided several character reference letters from his family, a letter from his employer, and a letter from his church. He also offered testimony during the hearing about his owner/operator trucking business, continuing connections with his Marine Corps associates around the country, and an instance in which he assisted his cousin with heroin detoxification.

<sup>18</sup> Petitioner asserts that he would have benefitted from the 2019 amendment to the UCMJ, which added the offense of "extramarital sexual conduct" with an mistake of fact defense related to his belief regarding the other's marital status.

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(2) Relief is warranted pursuant to the guidance of reference (e). Specifically, Petitioner requests that the Board consider his post-service conduct along with other mitigating factors, to include his extensive combat service. He cited 10 specific factors listed in reference (e) for consideration.

(3) Petitioner asserts an error in the failure to refer him to a Medical Evaluation Board (MEB) in violation of reference (g). Specifically, he claims that the symptoms of his mental health conditions were present during his military service, and were of sufficient severity to render him unfit for military service. As such, he should have been promptly referred to a MEB after experiencing years of insomnia, flashbacks, and nightmares.

(4) His mental health conditions contributed to his misconduct, and liberal consideration is warranted in accordance with references (b) and (d). Specifically, Petitioner asserts that his discovery of his second wife's infidelity upon returning from a combat deployment to Afghanistan "triggered [his] PTSD and TBI."<sup>19</sup> As a result, he claims that he began drinking to numb the feelings of pain caused by his combat deployments, and sought to treat his loneliness by dating the other woman, whom he believed to be legally separated. He further asserts that the development of his PTSD symptoms, dating back to 2012, evidences his deteriorating mental health, indicating that his judgment was impaired.

See enclosure (1).

bb. Because Petitioner based his claim for relief in whole or in part upon a combat-related PTSD condition, his application and records were reviewed by a licensed clinical psychologist who provided an advisory opinion (AO) for the Board's consideration. The AO noted that the medical records provided by Petitioner indicated an acute psychiatric crisis coinciding with the cancellation of Petitioner's early retirement pursuant to the TERA. It also noted that Petitioner was medically "cleared for any and all disciplinary actions deemed appropriate by his command" The AO found evidence of an in-service PTSD diagnosis, and that it was probable that alcohol use may have worsened Petitioner's PTSD symptoms. The AO also found it plausible that Petitioner's marital situation may have worsened due to his PTSD symptoms and combat deployment. However, the AO author found it "difficult to attribute violation of an MPO and making false statements to PTSD." Accordingly, while the licensed clinical psychologist who authored the AO found sufficient evidence of PTSD which may be attributed to Petitioner's military service, she found insufficient evidence to attribute all of Petitioner's misconduct to PTSD.<sup>20</sup> See enclosure (19).

#### CONCLUSION:

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

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<sup>19</sup> Petitioner confuses TBI with PTSD with this argument. TBI is caused by trauma to the head; it does not get "triggered" by an external emotional event.

<sup>20</sup> A copy of this AO was sent to Petitioner's counsel at the address provided on his DD Form 149 for comment by letter dated 10 July 2023, but no response or rebuttal was received within the 30 days provided.

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The Board found no error or injustice in Petitioner's involuntary discharge from the Marine Corps under OTH conditions at the time that it was administered. In this regard, the Board concurred with the NDRB's determination that Petitioner's discharge was "proper." There does not appear to be any controversy regarding the legitimacy of the misconduct for which Petitioner was discharged, as he pled guilty to the charges at NJP after consulting with counsel. Petitioner's argument that he would not have been so punished today due to changes in the UCMJ is without merit, as the change he cited to applied only to the charge of adultery in violation of Article 134, UCMJ. That was by far the least severe of the charges against Petitioner, and was not a significant contributing factor to the adverse consequences suffered by Petitioner. Petitioner's multiple false official statements and violations of the MPOs was the gravamen of his misconduct, and the primary reasons for the severity of the consequences suffered by Petitioner. These consequences were not at all excessive given this misconduct. In this regard, the Board did not consider Petitioner's pretrial confinement to be "punishment," per se. He was in pretrial confinement because his command determined that that was the only way to ensure that he stopped engaging in misconduct after he was found to have violated the MPOs in place, and perhaps because he was reasonably deemed to be a threat to his spouse if not so confined. Although his former spouse provided a statement indicating that she had fabricated the allegations of spousal abuse, Petitioner's medical records reflect that he understood and agreed with the reason for the MPO restricting access to his family and that he had previously stated that he would "blow [his] wife's brains out," so violation of such orders was serious misconduct and the command's fear for his spouse's safety was reasonable. His command also fairly offset his NJP with his pretrial confinement time in the PTA by granting two days of restrictions and/or extra military duty credit for each day that Petitioner spent in pretrial confinement. As a result, the adjudged forfeiture was the only "punishment" actually suffered by Petitioner for his serious misconduct. His reduction in rank was also not a punishment, but rather the administrative consequence of an OTH discharge per reference (f). This administrative consequence had no substantive impact upon Petitioner, since the reduction became effective only upon his discharge and therefore did not affect his compensation. Finally, it appears that all procedural requirements regarding Petitioner's discharge under OTH conditions were complied with. Petitioner was properly notified of his proposed separation, and waived his right to an administrative separation board after consulting with counsel. Further, Petitioner received a separation physical prior to action upon his discharge, which identified his PTSD condition but found that this condition did not have a material impact on his behavior, and the separation authority, after considering this medical advice, made the determination that Petitioner's PTSD condition did not affect his judgment and did not contribute to or otherwise mitigate the seriousness of Petitioner's misconduct in accordance with reference (f).

Because Petitioner based his claim for relief in whole or in part upon his combat-related PTSD condition, the Board reviewed that portion of Petitioner's application in accordance with the guidance of references (a) – (d).<sup>21</sup> Accordingly, the Board applied liberal consideration to

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<sup>21</sup> Although Petitioner's counsel also asserted that Petitioner suffered from TBI, it seemed apparent that he was conflating TBI with PTSD. As discussed in footnote 19 above, TBI is a head injury. It is not a mental health condition which is "triggered" by external events. There was no evidence in the record of any TBI occurrence, and Petitioner offered no explanation for when and where such a TBI may have occurred. Accordingly, even applying liberal consideration, the Board found insufficient evidence to support his claim of a TBI. As the Board did find



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 Board need not have applied liberal consideration to find sufficient evidence that Petitioner suffered from PTSD during his service in the Marine Corps. This condition was diagnosed while he remained in the service, and was explicitly recognized and considered by the separation authority. Even applying liberal consideration, however, the Board did not find that Petitioner's PTSD condition excused or mitigated the misconduct for which he was discharged. There simply is no reasonable nexus between PTSD and the misconduct in question. PTSD does not make one more likely to lie or to disobey orders, which was the gravamen of Petitioner's misconduct. The Board also reviewed Petitioner's application with liberal consideration that PTSD potentially contributed to the circumstances resulting in Petitioner's discharge in accordance with reference (a). However, any such contribution was so attenuated as to have virtually no mitigating effect upon the relevant misconduct. A case could be made that Petitioner's PTSD condition contributed tangentially to his ultimate decision to engage in an extramarital affair, but as stated above the consensual adultery was not the gravamen of Petitioner's misconduct or a substantial reason for his discharge. Although the Board found that Petitioner's PTSD condition did not excuse or mitigate the misconduct for which he was discharged, it did consider the existence and circumstances of this condition among the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice, as discussed further below.

Petitioner's claim that he should have been referred to the DES is without merit. Although the evidence supports his claim to have suffered PTSD symptoms, the mere existence of a mental health condition or presentation of PTSD symptoms is not sufficient to warrant referral to the DES. Per reference (g), "[c]ommanding officers of [military treatment facilities] and individual medical and dental officers are to identify promptly for referral to the DES those members presenting for medical care would Fitness for active duty is questionable."<sup>22</sup> There is no evidence in the record that Petitioner's medical fitness for active duty was ever questionable. The fact that he was never so referred, despite numerous encounters with Navy medical professionals, suggests that his condition did not rise to the level of calling his fitness into question. Other than his dishonesty and disobedience, there is no evidence in the record that Petitioner's performance was ever impaired in any way. He was removed from his regular duties, which were clearly consist with those of his office, grade, rank, and rating, only when he came under criminal investigation, and not because he demonstrated any inability to perform those duties. Although Petitioner's counsel claims that he was "described as not fit for deployment," this is not reflected in the evidence provided and was unlikely to be formally assessed since he was assigned to a training unit and not pending or ordinarily subject to deployment. Finally, it was only after Petitioner's early retirement pursuant to TERA was delayed pending investigation of the allegations against him that his mental health symptoms manifested in a manner requiring in-patient treatment.

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sufficient evidence of PTSD, however, the analysis pertaining to it is the same as would have been applied to a hypothetical TBI condition.

<sup>22</sup> Per reference (g), fitness for active duty is a reference to the individual's ability perform the duties of his office, grade, rank, or rating.

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Petitioner's contention that he should have been referred into the DES and received a medical retirement is also undermined by the circumstances. According to his own statement, Petitioner was approved for early retirement pursuant to the TERA in September 2014. Per reference (g), there is a presumption of fitness for Service members who are pending retirement at the time they are referred for physical disability.<sup>23</sup> Reference (g) also provides that cases shall not be submitted to the Physical Evaluation Board for a member who is currently being processed for misconduct which could result in a punitive discharge as a result of court-martial or for a member who is pending an administrative discharge due to misconduct.<sup>24</sup> Petitioner was pending retirement pursuant to the TERA from September 2014 until his TERA retirement was formally cancelled on 5 October 2015, and he provided no evidence to overcome the presumption of fitness. He was also being processed for misconduct which could have resulted in a punitive discharge as a result of court-martial, or administrative separation proceedings for misconduct, from 29 May 2015 forward. As his mental health symptoms had not manifested in any manner which would remotely justify his referral to the DES prior either of these events, the circumstances never warranted Petitioner's referral to the DES.

There was no error or injustice in the cancellation of Petitioner's early retirement pursuant to the TERA. Per reference (h), a Marine "[m]ust not be pending legal action, legal proceedings, administrative separation, or disability evaluation" to qualify for early retirement pursuant to the TERA. As such, Petitioner became disqualified for early retirement pursuant to the TERA as soon as court-martial charges were preferred against him, and remained so disqualified while administrative separation proceedings were pending against him.

Finally, the Board 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, the totality of Petitioner's career in the Marine Corps, which appears with minor exceptions to have been generally honorable and meritorious until the misconduct which resulted in his discharge;<sup>25</sup> Petitioner's numerous deployment and extensive combat experience, and the sacrifices that such service entailed; that Petitioner developed PTSD as a result of his military service, and presumably continues to suffer its effects; the difficult marital circumstances faced by Petitioner during the period in question, and the likelihood that Petitioner's military service exacerbated his marital difficulties; that Petitioner might not have been punished for his adultery offense under current standards; that Petitioner spent almost three months in pretrial confinement; Petitioner's post-service contributions to society, as evidenced by the character references provided and his record of employment; the non-violent nature of Petitioner's misconduct; each of the factors cited from reference (e) by Petitioner's counsel; Petitioner's humble expression of remorse and acknowledgment of the wrongfulness of his actions; and the passage of time since Petitioner's discharge. Based upon these mitigating factors, the Board concurred with the equitable relief already granted to Petitioner by the NDRB. Specifically, the Board agreed that an equitable upgrade to Petitioner's characterization of service to general (under honorable conditions) was warranted based upon the mitigating circumstances. The Board did not, however, believe that further equitable relief as it pertained to

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<sup>23</sup> Paragraph 3305.

<sup>24</sup> Paragraph 3403.

<sup>25</sup> Petitioner received five Marine Corps Good Conduct Medals over the course of his career, along with other merit-based awards.

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Petitioner's characterization of service, beyond that already granted by the NDRB, was warranted given the totality of the circumstances. The combined weight of the mitigating circumstances did not so substantially outweigh the severity of Petitioner's misconduct to justify the extraordinary relief requested of an upgrade to his characterization of service to fully honorable.

For the same reasons that the Board agreed with the NDRB determination that an equitable upgrade to Petitioner's service characterization was warranted in the interests of justice, the Board also believed an equitable restoration of his rank was warranted. In this regard, the Board noted that the only reason that Petitioner was administratively reduced in rank to Lance Corporal/E-3 upon his discharge was the fact that he received an OTH characterization of service. That characterization, however, has since been equitably upgraded. Accordingly, the Board found that the circumstances which justified Petitioner's administrative reduction have been removed, and that further equitable relief in this regard is warranted.

Finally, although the Board found that equitable relief regarding Petitioner's service characterization and administrative reduction in rank were warranted in the interests of justice, the Board did not find that such relief was warranted with regard to Petitioner's narrative reason for separation and reentry code under the circumstances. Specifically, the Board agreed with the NDRB determination that Petitioner's discharge for misconduct was "proper." Accordingly, Petitioner's narrative reason for separation, and reentry code limiting his ability to reenlist in the Armed Forces, remains appropriate under the circumstances.

#### RECOMMENDATION:

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

That Petitioner's naval record be corrected to reflect that he was not reduced in grade to Lance Corporal/E-3 upon his discharge from the Marine Corps. Specifically, blocks 4a (Grade, Rate or Rank) and 4b (Pay Grade) of Petitioner's DD Form 214 should reflect "SSGT" and "E-6" respectively.<sup>26</sup>

That Petitioner's DD Form 214 be further corrected to include the following comment in Block 18 (Remarks): "CONTINUOUS HONORABLE ACTIVE SERVICE FROM 990203 UNTIL 110315."<sup>27</sup>

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.

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<sup>26</sup> This correction may be made either through the issuance of a new DD Form 214, or the original issuance of a DD Form 215, at the discretion of Navy Personnel Command.

<sup>27</sup> Although the NDRB identified this requirement in enclosure (18) and directed that Petitioner's DD Form 214 be corrected to include this statement, it does not appear from the record that this correction was ever administered.

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[REDACTED] XXX XX [REDACTED] USMC

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. In accordance with Section 6(e)(2)(c), the foregoing action of the Board is submitted for your review and action.

12/26/2023

[REDACTED]

Executive Director

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED]

[REDACTED] XXX XX [REDACTED] USMC

ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION

\_\_\_ Board Recommendation Approved (Partial Relief – I concur with the Board’s conclusion and therefore direct the relief recommended by the Board above.)

\_\_\_ Petitioner’s Request Partially Approved (Partial Relief – I generally concur with the Board’s conclusion, but do not believe that the relief recommended goes far enough to serve the interests of justice. Specifically, I find that the mitigating circumstances did so significantly outweigh the severity of the misconduct for which Petitioner was discharged to justify an upgrade of his characterization of service to fully honorable and changes to his narrative reason for separation. Accordingly, in addition to the relief recommended by the Board above, I further direct that Petitioner’s naval record be corrected to reflect that his service was characterized as “Honorable”;<sup>28</sup> that the narrative reason for his separation was “Secretarial Authority”; that his separation authority was “MARCORSEPMAN 6214”; that his separation code was “JFF1”; and that his reentry code was “RE-1.” Petitioner shall also be issued an Honorable Discharge Certificate. Despite this equitable relief, Petitioner remains disqualified for an early retirement pursuant to the TERA or a medical retirement pursuant to reference (g).)

**X** Board Recommendation Disapproved (Deny Relief – I do not concur with the Board’s conclusion that equitable relief is warranted with regard to Petitioner’s reduction in rank. Petitioner’s reduction in rank was an administrative consequence of his discharge under OTH conditions, and required under the circumstances by reference (f). When the NDRB granted Petitioner’s equitable relief, it specifically found that Petitioner’s discharge under OTH conditions was “proper.” Likewise, the Board found that there was no error in Petitioner’s discharge, and recommended this relief pursuant to its equitable authority to “remove injustices” from the naval record. As there was no error in Petitioner’s administrative discharge from the Marine Corps under OTH conditions, however, I find the Board’s recommended equitable relief to be contrary to and to undermine the provisions of reference (f). I also find the restoration of rank to be an improper type of “equitable” relief under the circumstances. Accordingly, I disapprove the Board’s recommendation that Petitioner’s naval record be corrected to reflect that he was separated in the rank and pay grade of Staff Sergeant/E-6. Only that portion of the Board’s recommendation to correct Petitioner’s DD Form 214 to include the following statement in block 18 is to be executed: “CONTINUOUS HONORABLE ACTIVE SERVICE FROM 990203 UNTIL 110315.”)

1/5/2024

[REDACTED]

Assistant General Counsel (M&RA)

Signed by: [REDACTED]

<sup>28</sup> With this correction, the addition of the statement regarding Petitioner’s honorable service from 3 February 1999 until 15 March 2011 is not necessary.