



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

█
Docket No. 3952-23
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER █
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," 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) NAVMC 10132, Unit Punishment Book, 21 January 2003
(4) NAVMC 118(11), Administrative Remarks, 23 January 2003
(5) █ CO Memo 1900 LEGAL, subj: Notification of Separation Proceedings, 28 January 2003
(6) Petitioner's Memo 1900 LEGAL, subj: Acknowledgment of my Rights to be Exercised or Waived during Separation Proceedings, 28 January 2003
(7) █ SJA Memo 1900 SJALOA/ahl, subj: Recommendation for Administrative Separation in the case of [Petitioner], 3 February 2003 (including Second Endorsement on Enclosure (5) by the █ Commanding General, dated 5 February 2003)
(8) Naval Discharge Review Board, Discharge Review Decisional Document, Docket No. MD04-00448
(9) Naval Discharge Review Board, Discharge Review Decisional Document, Docket No. MD08-00783

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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 characterization of service be upgraded and that his reentry code be changed.¹

2. The Board reviewed Petitioner's allegations of error or injustice on 31 July 2023 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on his 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. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board 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 consider Petitioner's application on its merits.²

c. Petitioner enlisted in U.S. Marine Corps and began a period of active duty service on 20 August 2002. See enclosure (2).

d. On 21 January 2003, Petitioner received non-judicial punishment (NJP) for the wrongful use of marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ). He was required to forfeit \$575 pay per month for two months, and was restricted and required to perform extra duties for 45 days. See enclosure (3).

e. On 22 January 2003, Petitioner was seen by a substance abuse counselor and refused treatment. See enclosure (4).

f. By memorandum dated 28 January 2003, Petitioner was notified of his command's intent to recommend his discharge from the Marine Corps by reason of misconduct due to drug abuse. See enclosure (5).

g. Petitioner waived his right to counsel and to a hearing before an administrative separation board on the same day as he was notified of his command's intent to recommend his discharge for misconduct. See enclosure (6).

h. By memorandum dated 3 February 2002, the separation authority's Staff Judge Advocate reported that he had reviewed the administrative separation proceedings and determined them to be sufficient in law and fact to support Petitioner's administrative discharge action. See enclosure (7).

¹ Petitioner specifically requested that his characterization of service be upgraded to either honorable or general (under honorable conditions).

² Waiver of the statute of limitations is also directed by reference (c).

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i. On 5 February 2003, the separation authority approved Petitioner's administrative separation from the Marine Corps under other than honorable (OTH) conditions by reason of misconduct due to drug abuse. See enclosure (7).

j. On 14 February 2003, Petitioner was discharged from the Marine Corps under OTH conditions for misconduct due to drug abuse. See enclosure (2).

k. On 17 August 2004, the Naval Discharge Review Board (NDRB) conducted a documentary review of Petitioner's discharge and unanimously determined that his characterization of service and narrative reason for separation should remain unchanged. See enclosure (8).

l. On 1 December 2008, the NDRB conducted a personal appearance hearing with regard to Petitioner's request to upgrade his discharge, and again unanimously determined that relief was not warranted. Petitioner had requested relief on the bases of his post-service conduct and that his discharge was too harsh given the short length of his service and the isolated nature of his misconduct,³ but the NDRB determined that Petitioner's OTH characterization of service was appropriate for his misconduct and that the evidence provided of his post-service accomplishments was not sufficiently encompassing.⁴ See enclosure (9)

m. Petitioner contends that he made one bad decision while on leave in December 2002 which cost him his military career. He further asserts that this bad decision may have been influenced by an undiagnosed mental health condition,⁵ but it did not define him as a person. Finally, he claims to have been a good, law-abiding citizen since his discharge, and that he currently works for the State of [REDACTED] as a peace officer.⁶ See enclosure (1).

MAJORITY CONCLUSION:

After 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.

The Majority found no error in Petitioner's discharge under OTH conditions for misconduct at the time that it was administered. The occurrence of Petitioner's misconduct does not appear to be in question, as it was adjudicated through NJP at the time and Petitioner impliedly admitted to it in his application by referring to the "mistake" that he made while on leave. Further, a violation of Article 112a, UCMJ, may warrant a punitive discharge, so his misconduct was of sufficient severity to justify a discharge under OTH conditions. Finally, there does not appear to be any question regarding compliance with the procedural requirements necessary to administer

³ Petitioner requested that the NDRB change his discharge to either an uncharacterized entry-level separation, or upgrade his characterization of service to general (under honorable conditions).

⁴ The NDRB indicated that it would have liked to have seen evidence such as a verifiable employment record, college transcripts, and/or documentation of community service.

⁵ Although Petitioner provided no documentation to support this contention, he asserts that his therapist diagnosed him with some form of post-traumatic stress disorder (PTSD) in 2019.

⁶ Petitioner provided documentary evidence of his completion of the Basic Correctional Officer Academy in May 2018; a favorable report of his performance as a correctional officer issued in 2020; and an identification card reflecting his status as a peace officer (correctional officer) for the State of [REDACTED].

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a discharge under OTH conditions. Petitioner was properly notified that he was being processed for discharge from the Marine Corps for misconduct due to drug abuse, and that the least favorable characterization of service that he may receive was under OTH conditions. Despite this notice, Petitioner waived his right to a hearing before an administrative separation board. Petitioner has presented no evidence to suggest that this waiver was involuntary or ineffective. Accordingly, there was no error in Petitioner's discharge from the Marine Corps under OTH conditions for misconduct due to drug abuse.

Because he based his claim for relief in part upon the possibility that his misconduct was the product of his undiagnosed PTSD condition, the Majority reviewed Petitioner's application in accordance with the guidance of references (b) – (d). Accordingly, the Majority applied liberal consideration to Petitioner's contention that his misconduct may have been influenced by an undiagnosed mental health condition. Even applying liberal consideration, however, the Majority found insufficient evidence to conclude that Petitioner was suffering from any mental health condition during his military service, or that his misconduct was influenced by any such condition. Petitioner provided no clinical evidence to support his claim that his therapist diagnosed him with "some form of PTSD" in 2019. While the Majority acknowledges that no such clinical evidence is required and that the Petitioner's testimony alone may establish the existence of a condition per reference (d), Petitioner provided no context whatsoever to this diagnosis upon which the Board could draw any conclusions. Specifically, he provided the Board with no information regarding the nature or onset of his symptoms, the traumatic experience which may have triggered such a condition, or any explanation for how or why his misconduct may have been influenced by this condition. In fact, Petitioner himself was uncertain that his misconduct was influenced by any such condition. Accordingly, the Majority found insufficient evidence to establish that Petitioner developed any mental health condition during his military service, or that his misconduct may have been influenced by such a condition.

In addition to applying liberal consideration to Petitioner's suggestion that his misconduct may have been influenced by an undiagnosed mental health condition in accordance with references (b) – (d), the Majority also considered the totality of the circumstances to determine whether equitable relief may be warranted in the interests of justice in accordance with reference (e). In this regard, the Majority considered, among other factors, the relatively minor and non-violent nature of Petitioner's misconduct; that Petitioner would not reasonably expect to suffer such adverse consequences under similar circumstances today; Petitioner's post-service record of employment and service to his community, as reflected by his successful service as a corrections officer in the State of [REDACTED] despite the stigma of his OTH characterization of service, which demonstrates his rehabilitation and resiliency; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. The Majority found that these mitigating factors far outweighed the very minor nature of Petitioner's isolated act of misconduct. Accordingly, the Majority determined that Petitioner's characterization of service should be upgraded to fully honorable. Although not specifically requested by Petitioner, the Majority also determined that his narrative reason for separation should be changed to mitigate the future potential stigma arising from his discharge.

As the relief recommended by the Majority above was purely equitable in nature, and the potential stigmatizing effect of an adverse reentry code absent the explanatory adverse

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characterization of service and/or narrative reason for separation is minimal, the Majority found insufficient basis to change Petitioner's reentry code as he requested.

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:

That Petitioner be issued a new DD Form 214 reflecting that his service ending on 14 February 2003 was characterized as "Honorable"; that the narrative reason for his separation was "Secretarial Authority"; that his separation code was "JFF1"; and that his separation authority was "MARCORSEPMAN par 6214." All other entries currently reflected on his DD Form 214 are to remain unchanged.

That Petitioner be issued an Honorable Discharge Certificate.

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 conclusion above that there was no error in Petitioner's discharge from the Marine Corps under OTH conditions for misconduct due to drug abuse at the time that it was administered. It also concurred with the Majority conclusion that there was insufficient evidence to support Petitioner's contention that his misconduct may have been influenced by an undiagnosed mental health condition, even upon the application of liberal consideration in accordance with references (b) – (d).

Like the Majority, the Minority also considered the totality of the circumstances to determine whether equitable relief may be warranted in the interests of justice in accordance with reference (e). In this regard, the Minority considered the same potentially mitigating circumstances as did the Majority, but reached a different conclusion. While the Minority recognized Petitioner's post-service record of employment and accomplishments, it did not believe the mitigating circumstances to be sufficient to justify an upgrade of Petitioner's discharge. In this regard, the Minority noted that Petitioner served less than six months on active duty and that this short duration of service was characterized by his misconduct. Given that he accomplished little else during his service, it is difficult to characterize his Marine Corps service as anything but how it was characterized at the time of his discharge. Additionally, Petitioner was discharged more than 20 years ago, but he provided evidence only of his employment activity for only the last five years to justify his request for an upgrade of his discharge. He did not provide the Board with any character references, evidence of his other contributions to society and/or his community, or evidence of what he was doing for the 15 years prior to his current employment as a peace officer. The Minority needed more than evidence that Petitioner has been employed for the last

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five years to justify characterizing Petitioner's short service in the Marine Corps differently than it actually was.

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.

8/30/2023

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Executive Director

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ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

- ___ MAJORITY Recommendation Approved (Full 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.)
- MAJORITY Recommendation Approved (with modification) (Grant Alternative Relief – I concur with the Majority conclusion that equitable relief is warranted in the interests of justice, but do not believe the relief recommended by the Majority to be appropriate under the circumstances. Petitioner served a total of 178 days on active duty in the Marine Corps. Apart from his initial entry training, almost all of that service was characterized by his drug use and the consequences arising from it. While I agree with the Majority that equitable relief is warranted given the totality of the circumstances, I do not believe that Petitioner should receive credit for and the benefits accruing from military service that he did not actually perform. Accordingly, I direct that Petitioner be issued a new DD Form 214 reflecting that he received an uncharacterized entry level separation from the Marine Corps on 14 February 2003, with the appropriate separation codes and authorities reflecting such a discharge at the time.)

9/8/2023

[REDACTED]

Assistant General Counsel (M&RA)

Signed by: [REDACTED]