



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

██████████
Docket No. 6281-23
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) 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) NAVMC 136, Examination of Applicant by Recruiting Officer, 23 April 1973
 - (3) DD Form 214MC
 - (4) Judgment and Commitment, in the case of The State of ██████████ vs. [Petitioner], in the General Court of Justice, Superior Court Division, State of ██████████ ██████████ February 1977
 - (5) MCBCL 1910/5B, Advice to Respondent for Administrative Discharge, 14 March 1977
 - (6) ██████████ Memo LLF:fsc 1610, subj: Notice of Proposed Discharge Action; case of [Petitioner and Another Named Marine], 21 March 1977
 - (7) ██████████ Memo MLB/mrn 1900, subj: Recommendation for Discharge for reason of misconduct due to civil conviction; case of [Petitioner], 28 March 1977
 - (8) ██████████ CO Memo 06/RNB/mt, First Endorsement on Enclosure (7), subj: Recommendation for Discharge for Misconduct due to Civil Convictions; case of [Petitioner], 4 April 1977
 - (9) Petition for Writ of Habeas Corps, in the case of [Petitioner] vs. [Prison Warden], in the General Court of Justice, Superior Court Division, State of ██████████, ██████████, 6 April 1977
 - (10) Order, in the case of [Petitioner] vs. State of ██████████, in the General Court of Justice, Superior Court Division, State of ██████████, ██████████, ██████████, 14 April 1977
 - (11) Administrative Separation Board Record of Proceedings, 28 April 1977
 - (12) ██████████ 17/CEK/dl 1900, subj: Recommendation for Administrative Discharge; case of [Petitioner], 24 May 1977
 - (13) NAVSO 1900/5C, NDRB Decisional Document, Docket No. MD-78-01564/780210
 - (14) BCNR Letter KLR Docket No: 7940-21, 15 February 2022

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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 to honorable¹ and his narrative reason for separation be changed.²³

2. A three-member panel of the Board, sitting in executive session, considered Petitioner's application on 1 September 2023. The names and votes of the panel members will be furnished upon request. Petitioner's allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of the Board. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval record, applicable statutes, regulations, and policies, to include reference (b).

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. On 30 April 1973, Petitioner was approved for a moral waiver permitting him to enlist in the Marine Corps despite his arrest and juvenile conviction for Breaking and Entering in March 1971. See enclosure (2).

d. Petitioner enlisted in the Marine Corps and began a period of active duty service on 2 July 1973. See enclosure (3).

e. On 23 February 1977, Petitioner pled guilty in civilian court to Common Law Robbery and Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury.⁴ He was sentenced to be imprisoned for not less than seven and not more than 10 years.⁵ See enclosure (4).

f. On 14 March 1977, Petitioner was notified that he was being processed for administrative discharge for misconduct due to conviction by civil authorities. See enclosure (5).

¹ In the alternative, Petitioner requested an upgrade of his characterization of service to general (under honorable conditions).

² Specifically, Petitioner requested that his narrative reason for separation be changed to "Secretarial Authority" or "Miscellaneous/General Reasons."

³ This application constitutes a request for reconsideration of the Board's previous denial of his request for relief in Docket No. 7940-21.

⁴ Petitioner originally entered a plea of not guilty upon arraignment on 31 January 1977, but withdrew that plea and entered a guilty plea at the conclusion of the State's evidence.

⁵ Petitioner received 74 days of pretrial confinement credit. His DD Form 214 (enclosure (2)) reflects time lost starting on 2 December 1976, indicating that he was arrested and placed into pretrial confinement by civilian authorities on that date.

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g. On 17 March 1977, Petitioner was presented with the notification discussed in paragraph 3f above, but refused to sign it without counsel. See enclosure (6).

h. By memorandum dated 28 March 1977, Petitioner's commander recommended that Petitioner be discharged from the Marine Corps for misconduct due to conviction by civil authorities.⁶ In making this recommendation, his commander noted that Petitioner had no office hours and had good proficiency and conduct marks, but that his conduct while on liberty was unbecoming a Marine. He also noted that it was a poor reflection on Petitioner than one of his victims was a fellow Marine. See enclosure (7).

i. By memorandum dated 4 April 1977, Petitioner's battalion commander endorsed and forwarded the recommendation referenced in paragraph 3h above, and recommending that Petitioner be discharged from the Marine Corps under other than honorable (OTH) conditions. In this endorsement, the battalion commander requested that Petitioner be assigned legal counsel to ensure he is afforded all of his rights. See enclosure (8).

j. On 6 April 1977, Petitioner petitioned for a writ of habeas corpus on the basis of illegal detention, claiming that he accepted the plea bargain offered only because of the jury composition and not because he committed any crime. He also claimed that each of the State's witnesses testified to different time periods for the alleged incident; that the arresting officer took money from him upon arrest to reimburse the alleged victim; that the arresting officer took a piece of pipe off of his vehicle as evidence which had nothing to do with the case but was nevertheless presented to the jury; that the victim claimed to have been leaving a bar at the time that the arresting officer testified he was robbed; and that the arresting officer did not testify to other information that was reportedly relayed to Petitioner at the time of arrest. See enclosure (9).

k. On 14 April 1977, Petitioner's petition for a writ of habeas corpus was denied. See enclosure (10).

l. On 28 April 1977, an administrative discharge board convened to hear Petitioner's case. Petitioner was represented by counsel during the proceedings.⁷ After considering all of the evidence, the administrative discharge board unanimously found that Petitioner was convicted by civil authorities and recommended that he be separated from the Marine Corps under OTH conditions. See enclosure (11).

m. By memorandum dated 24 May 1977, the separation authority's Staff Judge Advocate found that Petitioner's administrative discharge proceedings were sufficient in law and fact. See enclosure (12).

n. On 26 May 1977, Petitioner was discharged from the Marine Corps under OTH conditions for misconduct due to civil conviction. See enclosure (3).

⁶ This recommendation did not include a specific characterization of service.

⁷ Petitioner's appointed counsel objected to the hearing on the basis that Petitioner's conviction was not final and that no action could be taken until such point. This objection was overruled based upon evidence presented that a guilty plea could not be appealed in the State of [REDACTED].

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o. On 11 April 1977, the Naval Discharge Review Board (NDRB) determined by a majority vote that no change to Petitioner's discharge under OTH conditions for misconduct due to civil conviction was warranted.⁸ Petitioner had requested relief on the bases that he did not commit the crime for which he was convicted and that his discharge was inequitable based upon his overall service record. See enclosure (13).

p. On 31 January 2022, the Board denied Petitioner's previous request for relief in Docket No. 7940-21. He had claimed that he was the victim of racism and pled guilty to a crime that he did not commit. In denying his request for relief, the Board noted that Petitioner failed to provide any evidence of his post-service accomplishments or contributions to society. As such, the Board found insufficient evidence upon which to base any equitable relief. See enclosure (14).

q. Petitioner requests a *de novo* review of his discharge because its characterization is not consistent with his military service records. He alleges that he was wrongfully accused by a racist law enforcement officer who had targeted him, and that he was "strongly encouraged" to accept a plea bargain because his court-appointed public defender told him that an all-white jury simply would not believe an African-American man. Prior to this incident, he had been a model Marine, with high performance marks. Petitioner, through counsel, argues that equitable relief is warranted in this case based upon the guidance of reference (b).^{9,10} Petitioner provided evidence of his post-service conduct with his present application. He reportedly has been working as a mechanic for [REDACTED], a plywood mill, ever since his discharge from the Marine Corps. He is also reportedly married with four children,¹¹ and is well regarded by his employer and in the community. Petitioner provided four character references in support of his application for relief.¹² See enclosure (1).

MAJORITY CONCLUSION:

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

⁸ Two out of the five voting members of the NDRB believed that an upgrade to his characterization of service to general (under honorable conditions) was warranted on the basis that Petitioner served nearly all of his four-year enlistment as an exemplary Marine and was held in high esteem by his supervisors. They also noted that although Petitioner was sentenced to seven- to 10-years of confinement, he apparently served only approximately nine months, had been rehabilitated, and is a productive member of society. According to enclosure (1), Petitioner was released from confinement after only nine months for good conduct to an advancement center, where he remained for a year, worked in maintenance, and took machinery maintenance classes at night.

⁹ Petitioner's counsel cited specifically to paragraph 6a of the attachment to reference (b), which provides that "[i]t is consistent with military custom and practice to honor sacrifices and achievement, to punish only to the extent necessary, to rehabilitate to the greatest extent possible, and to favor second chances in situations in which individual have paid for their misdeeds." She also cited to the reference in paragraph 6b to character and rehabilitation, and in paragraph 6c to the fact that an honorable characterization of service does not require flawless service.

¹⁰ Petitioner's counsel also erroneously asserted that Petitioner's application must be reviewed with liberal consideration. There was, however, nothing about Petitioner's application which warranted liberal consideration.

¹¹ Two of his sons are reportedly field-grade officers in the U.S. Army.

¹² One of these letters references Petitioner's post-service work as a volunteer fire fighter.

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The Majority found no error or injustice in Petitioner's discharge at the time that it was administered. Although Petitioner maintains his innocence of the charge, he pled guilty in civilian court and that conviction was upheld despite his petition for a writ of habeus corpus. At the very least, there is no dispute that Petitioner was convicted of a felony charge by civil authorities, which was the actual basis for his discharge. It appears that all procedural requirements for Petitioner's discharge under OTH conditions were satisfied, as he was represented by counsel at the administrative discharge board. Finally, the severe sentence adjudged pursuant to Petitioner's guilty plea attests to the severity of the offense of which he was convicted. As such, a discharge under OTH conditions was warranted under the circumstances at the time.

In addition to reviewing the circumstances of Petitioner's discharge at the time that it was administered, the Majority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice in accordance with reference (b). In this regard, the Majority applied the guidance of reference (b), and considered, among other factors, Petitioner's continuing denial of his guilt; the entirety of Petitioner's naval record, which reflects high performance and conduct marks, rapid promotion, and no evidence of any other misconduct; the fact that multiple leaders testified to Petitioner's favorable character at his administrative discharge board, despite the nature of the offense for which he was convicted; that Petitioner ended up serving only nine months out of a seven- to 10-year adjudged prison sentence for good conduct; Petitioner's post-service record of continuing employment and contributions to his community, reflecting considerable rehabilitation; the character references provided with Petitioner's application; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. Based upon this review, the Majority found these potentially mitigating factors to sufficiently outweigh the severity of Petitioner's discharge such as to justify an equitable upgrade of his characterization of service to general (under honorable conditions).

Although the Majority found the mitigating circumstances to be of sufficient weight to justify an upgrade of Petitioner's characterization of service to general (under honorable conditions), it did not find those mitigating circumstance to so significantly outweigh the severity of his discharge to justify the extraordinary relief of an upgrade to fully honorable as he requests. Petitioner was, in fact, convicted pursuant to his plea of a very serious offense. It would require significantly more mitigation to justify such extraordinary relief. The Majority also did not believe that a change to Petitioner's narrative reason for separation was warranted, as the current narrative reason was accurate and the mitigating circumstances insufficient to warrant such relief.

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's DD Form 214 be amended to reflect that his service ending on 26 May 1977 was characterized as "Under Honorable Conditions" and that he was issued a General Discharge Certificate. No other changes are to be made on Petitioner's DD Form 214.

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

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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 that there was no error or injustice in Petitioner's discharge under OTH for misconduct due to civil conviction at the time that it was administered.

Like the Majority, 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 (b). In this regard, the Minority considered the same potentially mitigating circumstances as did the Majority, but reached a different conclusion. Specifically, the Minority found that Petitioner's misconduct was particularly egregious, as it warranted up to a 10-year prison sentence. While Petitioner provides a description to the events which resulted in his arrest which minimized the severity of his misconduct, the sentence adjudged by the court and other evidence in the record suggests that there was far more to the story than he reveals to the Board. Petitioner's lack of candor in this regard weighed heavily against any equitable relief for the Minority. The Minority also noted that, other than four brief character references and a legal brief written by his attorney, Petitioner provided nothing new of substance to justify reversing the Board's decision in Docket No. 7940-21. Those new matters were simply was not close to enough to justify overturning the Board's previous decision. Ultimately, the Minority found that the combined weight of the mitigating circumstances did not even approach the severity of the misconduct to which Petitioner pled guilty. Accordingly, the Minority did not find that any equitable relief was warranted in the interests of justice.

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.

10/27/2023

[REDACTED]

Executive Director

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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.

___ Petitioner’s Request Approved (Full Relief – I generally concur with the Majority’s conclusion that equitable relief is warranted in the interests of justice, but I do not believe that the Majority recommendation goes far enough to serve the interests of justice. Specifically, I believe that the mitigating circumstances so significantly outweighed the severity of Petitioner’s misconduct that his requested relief is warranted. Accordingly, I direct that Petitioner be issued a new DD Form 214 reflecting that his service ending on 26 May 1977 was characterized as “Honorable”; that the authority and reason for his discharge was “Convenience of the Government – When directed by the Secretary of the Navy” and “MARCORSEPMAN 300”; and that his reenlistment code was “RE-1.” Petitioner is also to be issued an Honorable Discharge Certificate.

11/6/2023

[REDACTED]

Assistant General Counsel (M&RA)

Signed by: [REDACTED]