



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

[REDACTED]
Docket No: 6640-16/
6352-06/7072-05
DEC 04 2017 4273-82

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

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

Ref: (a) 10 U.S.C. §1552
(b) SECDEF Memo of 3 Sep 14 "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD"
(c) PDUSD Memo of 24 Feb 16 "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or TBI"

Encl: (1) DD Form 149
(2) BUMED ltr 5740 Ser M34/17UM34192 undated
(3) Subject's naval record (excerpt)

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Marine Corps filed enclosure (1) with this Board requesting reconsideration that his other than honorable characterization of service be upgraded in light of current guidelines as reflected in references (b) and (c). His case was reconsidered in accordance with Board for Correction of Naval Records procedures that conform to *Lipsman v. Secretary of Army*, 335 F. Supp. 2d 48 (D.D.C. 2004).

2. The Board, consisting of [REDACTED] reviewed Petitioner's allegations of error and injustice on 21 August 2017, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of the naval records, applicable statutes, regulations, policies, and an advisory opinion (AO) provided by the Chief, Bureau of Medicine and Surgery. Enclosures (1) through (3) apply.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice 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.

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b. Petitioner enlisted in the Marine Corps and began a period of active service on 6 December 1966. On 13 August 1967, he received nonjudicial punishment (NJP) for unauthorized absence (UA). During the period from 9 October 1967 to 14 June 1968, he served in Vietnam. While in Vietnam, he had a psychiatric evaluation due to increased nervousness, but no psychiatric abnormality was found. On 18 October 1968 he received NJP for failure to comply with a lawful regulation. On 6 May 1969 and 22 July 1970, he was convicted by summary court-martial of a total of five specifications of UA. On 13 April 1970, he received another psychiatric evaluation and was diagnosed with Paranoid Personality Disorder with explosive features, and was recommended for an administrative discharge. On 19 August 1970, he began a period of UA that terminated when he was apprehended by civil authorities. He was charged with several offenses, but was only convicted of petty larceny and carrying a deadly weapon. He was returned to military authorities on 7 April 1971, but entered another period of UA on 13 April 1971 that terminated when he was apprehended by civil authorities and charged with armed robbery. While awaiting the disposition of charges, his Commanding Officer recommended that he be separated with a General (under honorable conditions) characterization of service. He also received another psychiatric evaluation by civilian personnel. This evaluation found him legally responsible for his behavior and that he had the capacity to refrain from the behavior that led to his arrest. He was diagnosed with latent schizophrenia with sufficient reason in purely psychological terms for an insanity plea. On 3 May 1972, he was convicted in civil court of robbery and possession of an unlicensed firearm, and sentenced to an indeterminate term under the Federal Youth Corrections Act. In view of the foregoing, administrative separation proceedings by reason of misconduct was initiated. The Petitioner was advised of his rights, but refused to sign the document acknowledging this advisement. On 28 June 1973, his Commanding Officer (CO) recommended an Undesirable discharge by reason of misconduct. His CO stated that Petitioner's refusal to sign acknowledgement of his rights constituted a waiver to an administrative discharge board (ADB). However, under regulations then in effect, an individual not under military control could not waive the right to an ADB. The discharge authority approved the CO's recommendation and on 26 July 1973, Petitioner received an Undesirable discharge by reason of misconduct (civil conviction). On 13 January 1982, the Naval Discharge Review Board concluded that Petitioner's request for an upgraded discharge was without merit and determined that his discharge should not be changed.

c. Petitioner contended that post-traumatic stress disorder (PTSD) is a mitigating factor for the misconduct that led to his other than honorable characterization of service. He contended that his post-conviction behavior is exemplary and weighs in favor of a clemency upgrade. Further, under current military procedures, he would likely have been medically discharged, and as a result, would not have committed misconduct that led to his unfavorable discharge. He also provided verification of PTSD diagnoses directly related to his service in Vietnam.

d. The Advisory Opinion opined that based on the preponderance of the evidence, there is sufficient evidence to support that Petitioner suffered from a mental health condition at the time of service that interfered with his judgement and led to an Undesirable discharge.

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CONCLUSION

Upon review and consideration of all the evidence of record, and especially in light of enclosures (1) and (2), the Board concluded that Petitioner's request warrants relief. Additionally, the Board reviewed his application under the guidance provided in references (b) through (c). Specifically, the Board considered whether his application was the type that was intended to be covered by these policies.

The purpose of the Secretary of Defense memorandum is to ease the process for veterans seeking redress and assist the Boards in reaching fair and consistent results in "these difficult cases." The memorandum describes the difficulty veterans face on "upgrading their discharges based on claims of previously unrecognized" PTSD. The memorandum further explains that since PTSD was not previously recognized as a diagnosis at the time of service for many veterans, and diagnoses were often not made until after service was completed, veterans were constrained in their arguments that PTSD should be considered in mitigation for misconduct committed or were unable to establish a nexus between PTSD and the misconduct underlying their discharge.

The Board notes Petitioner's misconduct and does not condone his actions. However, the Board's decision is based on Petitioner's evidence, to include his in- and post-service diagnoses and the AO provided at enclosure (2). The Board was able to reasonably conclude that the PTSD condition existed at the time of his misconduct, and subsequently resulted in his other than honorable discharge. After carefully considering all the evidence, the Board felt that Petitioner's assertion of PTSD should mitigate the misconduct he committed while on active duty since this condition outweighed the severity of the misconduct. The Board concluded that no useful purpose is served by continuing to characterize the Petitioner's service as having been other than honorable, and recharacterization to a General (under honorable conditions).

RECOMMENDATION

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

Petitioner's naval record be corrected to show that he was discharged with a General (under honorable conditions) characterization of service on 26 July 1973, vice the Undesirable discharge actually issued on that day.

Petitioner be issued a new DD Form 214.

A copy of this Report of Proceedings be filed in Petitioner's naval record.

Upon request, the Department of Veterans Affairs be informed that Petitioner's application was received by the Board on 27 July 2016.

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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 entitled matter.

[REDACTED]
Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

[REDACTED]
Executive director