



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

[REDACTED] Docket No: 10649-19

Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED] USMC,
XXX-XX [REDACTED]

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," of 3 September 2014
(c) PDUSD Memo, "Consideration of Discharge Upgrade Requests Pursuant to
Supplemental Guidance to Military Boards for Correction of Military/Naval Records
by Veterans Claiming PTSD or TBI," of 24 February 2016
(d) USD Memo, "Clarifying Guidance to Military Discharge Review Boards and 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," of 25 August 2017
(e) USD Memo, "Guidance to Military Discharge Review Boards and Boards for
Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency
Determinations," of 25 July 2018

Encl: (1) DD Form 149 w/attachments
(2) DD Form 214
(3) Sworn Statement of Q.J., 1 May 18
(4) Medical Record, 3 Mar 09
(5) Medical Record, 3 Dec 10
(6) NAVMC 118(11), Administrative Remarks, 3 Dec 10
(7) MCFCO 5355.1, Prohibited Substances, 27 Jan 10
(8) NAVMC 10132, Unit Punishment Book, 17 Mar 11
(9) Medical Record, 20 May 11
(10) [REDACTED] BN Cdr Memo, subj: Notification of Separation Proceedings in the
Case of [Petitioner], 17 Jun 11
(11) USMC [REDACTED] subj: Administrative Discharge Board
Report: Findings and Recommendations in the Case of [Petitioner], 9 Sep 11
(12) USMC Legal Services Support Section Memo, subj: Letter of Deficiency regarding
the Administrative Separation Board of [Petitioner], 14 Sep 11
(13) Department of Veterans Affairs Decision Review Officer Decision, 8 Jun 17
(14) Department of Veterans Affairs Letter, 19 Jun 17
(15) [REDACTED] VAMC Mental Health Outpatient Psychiatric Follow Up Note,
8Aug17

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(16) BCNR Memo, subj: Advisory Opinion ICO [Petitioner], 26 Jan 21

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 (Board), requesting that his naval record be corrected by upgrading his characterization of service to honorable, changing the narrative reason for his separation to “Secretarial Authority,” and his case be forwarded to the Integrated Disability Evaluation System (IDES) for evaluation.
2. The Board reviewed Petitioner's allegations of error or injustice on 5 March 2021 and, pursuant to its regulations, determined that the corrective action indicated below should be taken. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies, to include references (b) – (e).
3. The Board, having reviewed all of the facts of record pertaining to Petitioner's allegations of error or 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.
 - b. Although enclosure (1) was not filed in a timely manner, it is in the interests of justice to review Petitioner's application on its merits.
 - c. The Board determined that Petitioner's personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Accordingly, the Board determined that a personal appearance was not necessary and considered Petitioner's case based on the evidence of record.
 - d. Petitioner enlisted in the Marine Corps and began a period of active duty service on 5 November 2007. See enclosure (2).
 - e. In early March 2009, Petitioner was a passenger in a 7-ton truck that rolled over while returning from a training exercise. According to a statement from a fellow Marine, Petitioner was rendered unconscious and appeared to be confused, discombobulated, and delusional upon regaining consciousness. This fellow Marine also asserts that Petitioner's personality seemed to be changed after the incident, and he believed Petitioner to be in pain. See enclosure (3). When Petitioner was subsequently seen in the emergency room, however, the only ailment that he complained of from the accident was an ankle sprain. See enclosure (4).
 - f. On 3 December 2010, Petitioner reported to the [REDACTED] Naval Medical Center Neurology Clinic complaining of “chronic left leg pain/weakness/numbness not responsive to conventional therapy.” According to the medical records, this appointment was a referral for a condition that had been progressing since 2008. See enclosure (5).
 - g. On 6 December 2010, Petitioner was counseled for using “Spice,” a synthetic cannabinoid, on 30 November 2010, in violation of U.S. Marine Corps Forces Command Order (MCFCO) 5355.1. See enclosure (6). MCFCO 5355.1 was a punitive lawful general order

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promulgated on 27 January 2010 by U.S. Marine Corps Forces Command and Commander, U.S. Marine Corps Bases, Atlantic. The MCFCO expressly prohibited the possession, purchase, sale, use, introduction onto installations, and/or distribution of "Spice" and other psychotropic and psychoactive substances. See enclosures (7).

h. On 17 March 2011, Petitioner received non-judicial punishment (NJP) for this incident. Specifically, he was punished for violating a lawful order (MCFCO 5355.1) in violation of Article 92, Uniform Code of Military Justice (UCMJ). See enclosure (8).

i. On 20 May 2011, Petitioner reported to his unit aid station for a post-traumatic stress disorder (PTSD) screening, which was found to be negative, "as [Petitioner] has not been deployed or otherwise in a combat zone/life threatening situation per military order." See enclosure (9).

j. By memorandum dated 17 June 2011, the Petitioner was notified that he was being recommended for discharge from the Marine Corps due to drug abuse. This memorandum informed him that the recommendation was based upon "[NJP] dated 17 March 2011 for violation of Articles [sic] 92 of the UCMJ, specifically, [he] violated United States Marine Corps Forces Command Order 5355.1, of [SECNAVINST 5300.28d]." See enclosure (10).

k. On 9 September 2011, an administrative separation board unanimously found that the preponderance of the evidence proves the allegations made in Petitioner's notification memorandum, and recommended that he be separated from the Marine Corps under other than honorable (OTH) conditions. See enclosure (11).

l. By memorandum dated 14 September 2011, Petitioner's detailed defense counsel submitted a letter of deficiency regarding the administrative separation board proceedings for the separation authority's consideration. Specifically, the defense counsel asserted that the recorder for the board made improper arguments during the proceedings by referencing the prior service drug waiver that Petitioner received to enter the Marine Corps, and asserting that he had failed to learn that drug use is incompatible with the Marine Corps. He also asserted that the administrative separation board was deficient because the members failed to find their own independent basis for separation and that the evidence submitted by the government did not meet the burden necessary to support the board's conclusions. See enclosure (12).

m. On 4 November 2011, Petitioner was discharged from the Marine Corps under OTH conditions for misconduct. The separation authority, however, was "MARCORSEPMAN PAR 6210.5," which is attributed to "drug abuse." See enclosure (2).

n. On 8 June 2017, the Department of Veterans Affairs (VA) increased Petitioner's service-connected disability rating for asthma from 30 to 60 percent. See enclosure (13). This increased Petitioner's combined disability rating to 100 percent. See enclosure (14).

o. On 8 August 2017, a VA mental health provider diagnosed Petitioner with chronic post-traumatic stress disorder (PTSD). See enclosure (15).

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p. Petitioner makes the following assertions in enclosure (1):

(1) Petitioner's DD Form 214 lists the improper separation authority. As referenced in paragraph 3m above, Petitioner's DD Form 214 lists "MARCORSEPMAN Par 6210.5" as his separation authority. This is the separation authority for drug abuse, which Petitioner asserts to be improper because "Spice" was not a prohibited substance at the time of his discharge. Petitioner states that his administrative separation was based on his NJP, and that his NJP was based on a violation of an order not in effect at the time of his alleged misconduct.

(2) Petitioner asserts that he suffered a traumatic brain injury (TBI) as a result of the training accident referenced in paragraph 3e above, which was never treated and which resulted in other physical symptoms. He also contends that he developed anxiety and sleep disturbances as a result of this traumatic event, but was never properly screened for PTSD. Finally, Petitioner contents that his use of Spice was to self-medicate for the symptoms of his TBI and/or PTSD that went untreated.

(3) Petitioner asserts that he should have been evaluated under the IDES. Specifically, he asserts that a magnetic resonance imaging (MRI) of his brain following the above referenced TBI revealed an abnormality which may have indicated his TBI or multiple sclerosis, and that a diagnosis of multiple sclerosis would have called into question Petitioner's fitness for continued service.

q. Due to Petitioner's claim of PTSD and TBI, his application and records were reviewed by a qualified mental health professional who provided an advisory opinion (AO) for the Board's consideration. The AO noted that Petitioner's in-service medical records reflected no direct evidence of diagnosed PTSD or TBI, or psychological or behavioral changes that may have indicated PTSD or TBI. In fact, the only in-service injury related to the accident referenced above was a left ankle injury. The AO also noted that while Petitioner was diagnosed with PTSD in 2017, the VA has repeatedly denied his applications for compensation based upon PTSD. Additionally, the AO noted that while there is an entry in Petitioner's clinical notes stating "History of TBI," there is no evidence of a diagnostic evaluation or definitive diagnosis of TBI. Accordingly, the AO found that the preponderance of available objective evidence fails to establish that Petitioner was diagnosed with or suffered from PTSD or TBI during his military service, or that his misconduct could be attributed to PTSD or TBI. See enclosure (16).

r. By letter dated 2 February 2021, Petitioner's counsel provided a rebuttal to the above-referenced AO. The rebuttal asserts that the AO is "patently incorrect, egregiously misrepresent[s] the service history and medical treatment records of [Petitioner] and wholly fail[s] to consider and apply the guidance [of reference (d)]." The rebuttal further asserts that the AO ignores critical facts concerning Petitioner's symptoms shortly after the training accident, while simultaneously applying the incorrect standards and guidance applicable to PTSD diagnoses. Petitioner's counsel also reiterated its previous assertions regarding his wrongful separation. See enclosure (17).

MAJORITY CONCLUSION:

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

The Majority of the Board found Petitioner's contention that he was wrongfully separated for violation of an order that was not in effect at the time of his misconduct to be without merit. Petitioner received NJP for violating a lawful order in violation of Article 92, UCMJ. The order that he violated, clearly stated in enclosure (10), was MCFCO 5255.1. MCFCO 5255.1 was promulgated in January 2010, well before the date that Petitioner allegedly used Spice.

Following receipt of this NJP, Petitioner was clearly notified that he was being separated for a violation of Article 92, UCMJ, and the promulgated order that he violated was clearly cited. Petitioner's assertion that Spice was not yet on the Drug Enforcement Administration's list of controlled substances when he used it is irrelevant, because he was neither charged with nor separated for the wrongful use of a controlled substance. The Majority agrees that Petitioner's separation authority and separation code erroneously reflect "drug abuse" as the basis for his separation, but concluded this to be an administrative error since the source documents do not reflect this as the basis for his separation. However, the Majority determined this error to be moot given the relief recommended below.

The Majority also rejected Petitioner's contention that he should have been referred to the IDES based upon the results of his MRI. First, there was no evidence provided that Petitioner ever demonstrated any indication that he was unfit for duty. In fact, his overall active duty conduct trait average of 4.0 suggests otherwise. The Majority did not see anything in Petitioner's medical records that would reflect a service disqualifying condition, and noted that Petitioner did not contend that the possible indicator of multiple sclerosis has since manifested itself as such. Second, as discussed above, Petitioner was properly separated for misconduct. There was no "dual processing" mechanism in effect at the time, so the Majority found no error or injustice in the prioritization of a misconduct discharge over a medical discharge for which there was little to no basis.

Because Petitioner's claim for relief was based in whole or in part upon his contention of PTSD and TBI, his application was reviewed in accordance with the guidance of references (b) – (d). Accordingly, the Majority applied liberal consideration to Petitioner's contentions of PTSD and TBI, and the effect that they may have had upon Petitioner's conduct. In this regard, the Majority noted that Petitioner's post-service medical records do reflect a diagnosis for PTSD and a reference to a "History of TBI." The Majority also considered the statement from Petitioner's fellow Marine who was present during and after the training accident to observe Petitioner's behavior at the time and during the weeks that followed. The Majority also considered, however, that the VA has repeatedly denied Petitioner's applications for compensation due to PTSD. Based upon this review, the Majority agreed with the AO conclusion that there is insufficient objective evidence that Petitioner's misconduct was mitigated by either PTSD and/or TBI. However, applying very liberal consideration to Petitioner's claims, the Majority was not willing to rule out the possibility that Petitioner's PTSD and/or TBI were the result of the training accident. Given the very tenuous nexus that the Majority found between Petitioner's claimed PTSD/TBI and the misconduct for which he was separated, the Majority did not find that Petitioner's conditions outweighed the misconduct to warrant a service characterization upgrade solely on this basis, but it did consider this as a mitigating factor as discussed below.

In addition to applying liberal consideration to Petitioner's claim of PTSD and TBI in accordance with references (b) – (d), the Majority also considered the totality of the circumstances to determine whether relief is warranted in the interests of justice in accordance with reference (e). In this regard, the Majority considered, among other factors, that Petitioner served for four years in the Marine Corps and that the significant majority of his service was meritorious as reflected by his overall conduct trait average and his receipt of a Good Conduct Medal; that Petitioner was injured during a training accident which, as discussed above, may have resulted in PTSD and/or TBI; that, regardless of the source, Petitioner has been diagnosed with and suffers from the effects of PTSD and Major Depressive Disorder; the relatively minor nature of Petitioner's misconduct; the fact that "Spice" was a relatively new product at the time of Petitioner's misconduct, and that its illegality was not well known or apparent at the time as reflected by its ready commercial availability and the fact that it had not yet been designated as a controlled substance; and Petitioner's relative youth and immaturity at the time of his misconduct. Based upon this review, the Majority concluded that no useful purpose is served by continuing to characterize Petitioner's service as OTH. Accordingly, the Majority determined that the interests of justice warrant an upgrade of Petitioner's characterization of service to "general (under honorable conditions)." The Majority did consider whether an upgrade of Petitioner's characterization of service to fully honorable was warranted, but determined that it was not under the totality of the circumstances since Petitioner was properly discharged for misconduct. In addition to determining that an upgrade of Petitioner's characterization of service was warranted in the interests of justice, the Majority also determined that Petitioner's narrative reason for separation, separation authority, and separation code should be changed to "Secretarial Authority" to minimize potential future negative implications.

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 was characterized as "General (under honorable conditions)"; that the narrative reason for his separation was "Secretarial Authority"; that his separation authority was "MARCORSEPMAN par. 6214"; and that his separation code was "JFF1";

That no further corrections be made to 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 no error or injustice warranting relief.

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The Minority concurred with the Majority conclusions that Petitioner's contentions that he was wrongfully separated for violation of an order that was not in effect at the time and that he should have been referred to the IDES based upon the results of his MRI were without merit.

The Minority also applied liberal consideration to Petitioner's contentions of PTSD and TBI, and the effect that they may have had upon Petitioner's conduct in accordance with references (b) – (d). Even applying liberal consideration, however, the Minority concurred with the AO finding that there was insufficient evidence to establish that Petitioner was diagnosed with or suffered from PTSD or TBI during his military service, or that his misconduct could be attributed to PTSD or TBI. The Minority does not question Petitioner's diagnosed PTSD condition, but simply found insufficient evidence to connect this condition to Petitioner's military service or misconduct.

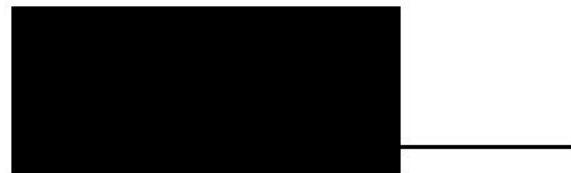
Like the Majority, the Minority also considered the totality of the circumstances to determine whether relief is warranted in the interests of justice in accordance with reference (e). The Minority considered all of the potentially mitigating circumstances considered by the Majority as discussed above. However, having found no nexus between Petitioner's PTSD or TBI conditions and the misconduct for which he was separated, the Minority found that an upgrade to Petitioner's characterization of service or change to his narrative reason for separation was not warranted under the totality of the circumstances.

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.

4/5/2021



Executive Director

ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

MAJORITY Recommendation Approved (Upgrade to General (under honorable conditions),
Change to Secretarial Authority; Deny IDES Referral)

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4/29/2021

Assistant General Counsel (M&RA)

Signed by: