



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

Docket No. 8335-23
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
XXX XX [REDACTED] 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

Encl: (1) DD Form 149 w/attachments
(2) DD Form 214
(3) NAVMC 118(12), Offenses and Punishment, 7 February 1980
(4) NAVMC 118(12), Offenses and Punishment, 13 May 1980
(5) NAVMC 118(11), Administrative Remarks, 29 May 1980
(6) NAVMC 118(12), Offenses and Punishment, 13 June 1980
(7) NAVMC 118(13), Record of Conviction by Court-Martial, 29 May 1981
(8) NAVMC 118(12), Offenses and Punishment, 5 October 1981
(9) NAVMC 118(13), Record of Conviction by Court-Martial, 9 March 1982
(10) Per [REDACTED] Decision, in the case of [Petitioner], in the U.S. Navy-Marine Corps Court of Military Review, Case No. [REDACTED] decided [REDACTED]
(11) [REDACTED] Supplementary Special Court-Martial Order No. [REDACTED]
(12) NDRB Discharge Review Decisional Document, Docket No. [REDACTED]
(13) BCNR Letter [REDACTED] Docket No: 10697-09, 26 July 2010
(14) BCNR Letter [REDACTED] Docket No: 1972-22, 27 June 2022
(15) BCNR Memo Docket No: NR20230008335, subj: Advisory Opinion ICO

[Petitioner], 28 February 24

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 general (under honorable conditions).¹
2. The Board considered Petitioner's allegations of error or injustice on 24 April 2024 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 9 April 1979.² See enclosure (2).
 - d. On 7 February 1980, Petitioner received non-judicial punishment (NJP) for wrongfully consuming alcoholic beverages in a Bachelor Enlisted Quarters (BEQ) area and for consuming alcoholic beverages in an area not designated as an authorized area for the consumption of alcohol, both in violation of Article 92, Uniform Code of Military Justice (UCMJ). His punishment consisted of the forfeiture of \$100 pay per month of one month and restriction for 14 days.³ Petitioner did not appeal this NJP. See enclosure (3).
 - e. On 13 May 1980, Petitioner received his second NJP for three specifications of failure to go or leaving his appointed place of duty in violation of Article 86, UCMJ; disobeying a lawful order from a noncommissioned officer in violation of Article 91, UCMJ; and for being incapacitated due to prior consumption of alcohol for the proper performance of duties as firewatch in violation of Article 134, UCMJ. His punishment consisted of the forfeiture of \$180 pay per month for one month and 30 days of correctional custody.⁴ With receipt of this NJP, the suspended portion of Petitioner's previous NJP (see footnote 3) was vacated. See enclosure (4).

¹ This constitutes a request for reconsideration of the Board's previous denial of relief in Docket No. 1972-22. In support of this request, Petitioner provided a letter from his treating psychiatrist not previously considered by the Board.

² Petitioner endorsed three pre-service arrests for underage drinking, vandalism, and trespassing during his enlistment process.

³ That part of Petitioner's adjudged forfeitures in excess of \$50 pay per month, as well as his adjudged restriction, was suspended for six months.

⁴ The 30 days of correctional custody was suspended for six months.

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f. On 29 May 1980, Petitioner was formally counseled concerning his "declining conduct and recurring incidents of alcohol abuse." See enclosure (5).

g. On 13 June 1980, Petitioner received his third NJP for sleeping on watch in violation of Article 113, UCMJ. His punishment consisted of the forfeiture of \$100 pay per month for one month. See enclosure (6).

h. On or about 20 November 1980, Petitioner stole a van belonging to a Gunnery Sergeant. See enclosure (7).

i. On 29 May 1981, Petitioner was convicted by a special court-martial (SPCM) of wrongful appropriation in violation of Article 121, UCMJ, for the incident referenced in paragraph 3h above;⁵ and for two specifications of going from his appointed place of duty in violation of Article 86, UCMJ. He was sentenced to be confined at hard labor for 45 days; to forfeit \$60 pay per month for six months; and to be reduced to pay grade E-1. See enclosure (7).

j. On 17 July 1981, the convening authority approved the SPCM sentence referenced in paragraph 3i as adjudged. See enclosure (7).

k. On 22 September 1981, Petitioner received his fourth NJP for failure to go to his appointed place of duty in violation of Article 86, UCMJ. His punishment consisted of the forfeiture of \$100 pay per month for one month and 14 days of extra duty and restriction.⁶ See enclosure (8).

l. On 9 March 1982, Petitioner was convicted by another SPCM of two specifications of failure to go to his appointed place of duty in violation of Article 86, UCMJ; and the wrongful possession, transfer, and sale of marijuana, in violation of Article 112a, UCMJ.⁷ He was sentenced to confinement at hard labor for four months; forfeiture of \$367 pay per month for six months; and a bad-conduct discharge (BCD). See enclosure (9).

m. On 13 May 1982, the convening authority approved the SPCM sentence referenced in paragraph 3l above as adjudged. See enclosure (9).

n. On 20 December 1982, the U.S. Navy-Marine Corps Court of Military Review (NMCCMR) affirmed the approved findings and sentence from the SPCM referenced in paragraph 3l above. See enclosure (10).

o. On 28 April 1983, Petitioner's BCD was ordered executed. See enclosure (11).

⁵ Petitioner was originally charged with larceny in violation of Article 121, UCMJ, but was ultimately convicted of the lesser included offense of wrongful appropriation.

⁶ That part of the adjudged forfeitures in excess of \$50 pay per month for one month was suspended for three months.

⁷ Petitioner was charged and convicted of possessing 84.5 grams of marijuana.

p. On 10 May 1983, Petitioner's BCD was executed.⁸ See enclosure (2).

q. In June 1987, Petitioner requested that the Naval Discharge Review Board (NDRB) upgrade his discharge characterization to honorable. This request was based upon Petitioner's claim that his BCD was inequitable because he maintained his innocence of the SPCM charges and due to his favorable post-service record.⁹ On 28 March 1988, the NDRB found no inequities or improprieties in Petitioner's BCD. See enclosure (12).

r. On 21 July 2010, the Board denied Petitioner's first request for relief in Docket No. 10697-09. He did not raise any mental health conditions in this application, relying instead on factors such as his youth and overall record of service. The Board found that these mitigating factors were insufficient to warrant recharacterization of his service given the nature and quantity of his misconduct. See enclosure (13).

s. On 3 June 2022, the Board denied Petitioner's second application for discharge relief in Docket No. 1972-22. Petitioner claimed in this application that had been diagnosed with PTSD and Bipolar Disorder and since realized that the actions resulting in his discharge were due to his mental state at the time. He also claimed that his bipolar disorder was drug and alcohol induced, and that he was never exposed to drugs until he was transferred to [REDACTED]. Finally, he asserted that the racism he experienced in the Marine Corps exacerbated the mental health conditions he incurred as a child. The advisory opinion (AO) obtained for this review found insufficient evidence of a diagnosis of PTSD or another mental health condition that may be attributed to military service or that his misconduct could be attributed to a mental health condition. The Board again determined that the mitigating factors were insufficient to warrant a discharge upgrade given the nature and quantity of Petitioner's misconduct. See enclosure (14).

t. Petitioner has reiterated his claim that PTSD and bipolar disorder contributed to his misconduct, and supplemented his application with additional supporting documentation not previously considered by the Board. Specifically, Petitioner provided a letter from his treating psychiatrist, dated 17 July 2023, attesting that Petitioner had been his patient for over a year and has been maintained on a medical regimen to treat bipolar disorder. He also attested that Petitioner has endorsed multiple childhood trauma related to domestic abuse and his biracial identity, as well as continued abuse in the Marine Corps which contributed to his abuse of alcohol and drugs. See enclosure (1).

u. Because Petitioner's request for relief was based in whole or in part upon his claimed mental health conditions, the Board sought an AO from a licensed clinical psychologist. After reviewing Petitioner's application and records, the licensed clinical psychologist determined that the available records are not sufficiently detailed to provide a nexus with Petitioner's misconduct, particularly given that his pre-service behavior appears to have carried over to his in-service behavior. She ultimately opined that there is post-service evidence of diagnoses for PTSD and another mental health condition that may have been exacerbated during Petitioner's naval service, but insufficient evidence to attribute Petitioner's misconduct to PTSD or another mental health condition. See enclosure (15).

⁸ After his release from confinement, Petitioner was in an appellate leave status from 16 July 1982 to 10 May 1983.

⁹ Petitioner claimed that a witness lied at his court-martial.

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MAJORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Majority of the Board determined that Petitioner's application warrants clemency in the interests of justice.

The Majority found no error or injustice in Petitioner's BCD when it was executed. Petitioner was convicted of serious drug offenses, to include selling marijuana, by proof beyond a reasonable doubt at his second SPCM. This conviction was subsequently reviewed and affirmed by the NMCCMR. The mental health conditions now claimed by Petitioner are not of the type which would be expected to impair his mental competency, and Petitioner has not suggested that he was not mentally responsible for his offenses. Given the serious nature of this misconduct, along with Petitioner's extensive record of misconduct predating this SPCM, the adjudged BCD was clearly warranted under the circumstances.

Because he based his request for relief in whole or in part upon his claimed PTSD and/or bipolar disorder conditions, the Majority reviewed Petitioner's application in accordance with the guidance of references (b) – (d). Accordingly, the Majority applied liberal consideration to Petitioner's claimed mental health conditions and the effect that they may have had upon his misconduct. Applying such liberal consideration, the Board found sufficient evidence to conclude that Petitioner may have been suffering from PTSD and/or bipolar disorder during his military service. This conclusion was supported by the documentation provided which suggests that he developed these conditions as a result of childhood trauma predating his service, along with very liberal consideration that his exposure to alcohol and drugs in the Marine Corps may have exacerbated his conditions. Contrary to the AO, the Majority also found that at least some of Petitioner's misconduct may have been mitigated by his mental health conditions. Specifically, much of Petitioner's extensive record of misconduct appears to have been influenced by alcohol and drug abuse, which could reasonably be attributed to his efforts to self-medicate for the symptoms of his then-undiagnosed conditions. While the Majority did not find that the most serious of Petitioner's offenses (i.e., selling marijuana in violation of Article 112a, UCMJ) was reasonably attributable to his mental health conditions, it did find that much of his other misconduct could be so attributed. This did not excuse any of his misconduct, but it mitigated some of it.

In addition to applying liberal consideration to Petitioner's claimed mental health conditions and the effect they may have had upon his misconduct in accordance with references (b) – (d), the Majority also considered the totality of the circumstances to determine whether clemency is warranted in the interests of justice in accordance with reference (e). In this regard, the Majority considered, among other factors, the mitigating effect of Petitioner's mental health conditions upon at least some of his misconduct, as discussed above; that Petitioner's mental health conditions went undiagnosed and may have been exacerbated by his service in the Marine Corps, and that he has continued to suffer from these conditions since his discharge; the non-violent nature of Petitioner's misconduct; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. The Majority found these mitigating factors to sufficiently outweigh the severity of Petitioner's misconduct to justify modest clemency in the form of an upgrade to his characterization of service to general (under honorable conditions).

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Although not specifically requested, the Majority did not believe that an upgrade of Petitioner's characterization of service to fully honorable, or any other clemency, was warranted in the interests of justice. While the Majority found that the mitigating circumstances sufficiently outweighed the severity of Petitioner's misconduct to justify the relief identified above, it did not find those mitigating circumstances to so significantly outweigh the severity of Petitioner's misconduct to justify such extraordinary relief. In this regard, the Majority noted that Petitioner's most serious offense was not mitigated by his mental health conditions, and that that offense alone was sufficient to characterize Petitioner's service as less than fully honorable.

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 be issued a new DD Form 214 reflecting that his service ending on 10 May 1983 was characterized as general (under honorable conditions). All other entries reflected in Petitioner's current DD Form 214 are to remain unchanged.

That a copy of this report 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's determination that there was no error or injustice in Petitioner's BCD when it was executed.

Like the Majority, the Minority also applied liberal consideration to Petitioner's claimed mental health conditions and the effect that they may have had upon his misconduct in accordance with references (b) – (d). Even applying liberal consideration, however, the Minority found insufficient evidence to establish a nexus between Petitioner's mental health conditions and the misconduct for which he was discharged. The Minority did not question that Petitioner suffered from his claimed mental health conditions, but simply agreed with the AO conclusion that there is insufficient information regarding the nature and manifestations of his conditions upon which to draw any reasonable conclusions. The Minority also noted that Petitioner's most serious misconduct (i.e., selling marijuana in violation of Article 112a, UMCJ) was willful and premeditated criminal misconduct. Reference (d) specifically provides that "[p]remeditated misconduct is not generally excused by mental health conditions, including PTSD." As the Minority believed that Petitioner's punitive discharge was justified by this offense alone, it concluded that Petitioner's mental health conditions did not excuse or mitigate the misconduct for which he was so discharged even if it did mitigate some of his extraneous misconduct.

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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 (e). In this regard, the Minority considered the same potentially mitigating factors as did the Majority. However, having reached a different conclusion than the Majority with regard to the mitigating effect of Petitioner's mental health conditions upon the misconduct for which he was discharged, as discussed above, the Minority reached a different conclusion. Specifically, absent the mitigating effect of Petitioner's mental health conditions relied upon by the Majority, the Minority found the mitigating circumstances to carry significantly lesser weight than did the Majority. As such, the Minority found that the severity of Petitioner's misconduct far outweighed those mitigating circumstances. In considering the totality of the circumstances, the Minority also noted that Petitioner submitted matters with his previous application in Docket No. 1972-22 suggesting that he has been incarcerated relatively recently. Specifically, he provided evidence that he completed group therapy at the [REDACTED] in May 2018, which suggests that Petitioner's behavioral issues, which predated his service in the Marine Corps, have continued through the many years since his discharge. This would weigh heavily against granting any equitable relief. Finally, the Board notes that Petitioner failed to provide the Board with any evidence of his post-service accomplishments or contributions to society since his discharge in 1983 which might otherwise justify clemency. While he is certainly not obligated to do so, the absence of such matters deprived the Board of a potential basis for equitable relief.

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.

7/22/2024

[REDACTED]

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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.)

X 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.)

