



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

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Docket No. 9451-23

Ref: Signature Date

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER ■■■■■■■■■■,
USN, XXX-XX ■■■■■■■■■■

Ref: (a) 10 U.S.C. §1552
(b) 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
(c) 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) NAVPERS 1070/605, History of Assignments
(4) NAVPERS 1616/26, Evaluation Report & Counseling Record (E1-E6)
(20050315 – 20060315)
(5) NAVPERS 1616/26, Evaluation Report & Counseling Record (E1-E6)
(20060331 – 20060923)
(6) P601-7R, Court Memorandum, 27 February 2008
(7) Petitioner's Statement, Re: Statement of Military Dishonorable Discharge Events:
Mail Handler Assistant – ■■■■■■■■■■, 4 March 2019
(8) Department of Veterans Affairs, Disability Rating Website
(9) BCNR Memo Docket No: NR20230009451, subj: Advisory Opinion ICO [Petitioner],
17 April 2024
(10) Department of Veterans Affairs Rating Decision, 9 November 2022

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 dishonorable discharge (DD) be upgraded to an honorable discharge.

2. The Board considered Petitioner's allegations of error or injustice on 5 June 2024 and, pursuant to its governing policies and procedures, determined by a majority vote that the clemency 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) and (c).

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3. Having reviewed all 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 Navy and began a period of active duty service on 21 March 2001. See enclosure (2).

d. On 13 March 2005, Petitioner reported for duty at [REDACTED], where he served as a Physical Therapy (PT) Technician. See enclosures (3) and (4).

e. Petitioner deployed with Joint Task Force (JTF) – [REDACTED] from March to September 2006. He was the sole PT Technician assigned to the Detention Hospital during this period, where he provided care to a population of over 460 detainees. See enclosure (5).

f. On 4 December 2007, Petitioner was convicted by a general court-martial (GCM), pursuant to his plea, of a violation of Article 134, Uniform Code of Military Justice (UCMJ).¹ He was sentenced to confinement at hard labor for 18 months, reduction in grade to E-1, and a DD.² See enclosure (6).

g. On 27 February 2008, the convening authority approved the sentence as adjudged.³ See enclosure (6).

h. On 5 September 2008, Petitioner's DD was executed.⁴ See enclosure (2).

i. On 9 November 2022, the Department of Veterans Affairs (VA) awarded Petitioner service connection for, among other conditions, "other specified trauma and stressor related disorder with depressive disorder," with a 100 percent disability rating. See enclosure (8).

¹ The details of Petitioner's offense are not included in Petitioner's naval record. According to his own statement dated 4 March 2019, he was performing an ultrasound treatment on the inner thigh area of a female active duty patient on 8 May 2007 when he touched her genitals with his fingers while removing excess gel at the end of the treatment. See enclosure (7). This explanation, combined with the fact that Petitioner was convicted of violating Article 134, UCMJ, suggests that Petitioner was charged with and convicted for the offense of Indecent Assault.

² It appears from the record that the Petitioner pled guilty pursuant to a pretrial agreement which capped his period of confinement at one year. Based upon the information in enclosure (2), he served at most only 10 months of confinement despite the 18 month adjudged sentence.

³ The convening authority deferred Petitioner's adjudged reduction and waived automatic reduction and forfeitures for six months pursuant to Article 57a, UCMJ. It appears from Petitioner's statement at enclosure (7) that this action may have been part of his pretrial agreement with the convening authority.

⁴ The record does not include documentation of Petitioner's post-trial appellate process leading up to the execution of his DD. In the absence of evidence to the contrary, the Board applies the presumption of regularity to establish that all procedural requirements to execute the adjudged DD were satisfied.

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j. Petitioner contends that he was not himself at the time of his misconduct. He claims to have been going through some mental health issues that he did not seek help for at the time due to the perceived stigma which attached to such conditions. Petitioner's application is support by several character references attesting to his involvement in his church, reliability, and work ethic; and evidence of his post-service academic accomplishments and credentials.⁵ See enclosure (1).

k. Because Petitioner based his request for relief in whole or in part upon claimed mental health conditions, his application and records were reviewed by a licensed clinical psychologist who provided an advisory opinion (AO) for the Board's consideration. The licensed clinical psychologist found no evidence in the record that Petitioner was diagnosed with any mental health condition while in the Navy, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Petitioner did, however, submit evidence of a post-service diagnosis of Other Specified Trauma- and Stressor-Related Disorder with Depressive Disorder (see paragraph 3i above), but the etiology or rationale for this diagnosis was not provided for review. Finally, the licensed clinical psychologist noted that Petitioner's personal statement was not sufficiently detailed to establish clinical symptoms or to provide a nexus with his misconduct. Based on the available evidence, it was the clinical opinion of the licensed clinical psychologist that there was insufficient evidence of a mental health condition that may be attributed to Petitioner's military service or that Petitioner's misconduct could be attributed to a mental health condition.⁶ See enclosure (9).

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 partial relief in the interests of justice.

The Majority found no error or injustice in Petitioner's DD. Petitioner plead guilty to serious misconduct for which a punitive discharge and significant confinement was warranted, and his guilty plea and the sentence adjudged presumably survived the post-trial appellate process. There is no evidence of any procedural defects in Petitioner's court-martial proceedings, nor were any claimed by Petitioner. Finally, the Majority found that a DD was appropriate for the conduct that Petitioner described in enclosure (7).

Because he based his request for relief in whole or in part upon his claimed mental health condition, the Majority reviewed Petitioner's application in accordance with the guidance of reference (b). Accordingly, the Majority applied liberal consideration to Petitioner's claimed mental health condition and the effect that it may have had upon his conduct. Despite its skepticism arising from the fact that the VA examiner attributed Petitioner's service-connected trauma-related condition to his experiences during a deployment to Iraq which is not reflected in his record (or his statement to the Board), the Majority found sufficient evidence that Petitioner

⁵ Petitioner has since earned three academic degrees, culminating in a Master's Degree in Medical Sciences (Athletic Training) from the University of [REDACTED].

⁶ A copy of this AO was provided to Petitioner for comment by letter dated 7 November 2023. In response, Petitioner provided only the VA's formal rating decision, which revealed that Petitioner's diagnosis was based upon the VA examiner's medical opinion, which stated that Petitioner "is diagnosed with a depressive disorder due to the pain from injuries in service and a trauma disorder due to his experiences in Iraq, a combat zone."

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suffered from these conditions during his naval service through the very generous application of liberal consideration and special consideration of the VA's diagnosis. However, even applying liberal consideration the Majority found insufficient evidence of any nexus between Petitioner's misconduct and mental health conditions. Nothing about Petitioner's claimed mental health conditions would compel an individual to violate the body of a female patient by touching her genitals without consent. Accordingly, the Majority found that Petitioner's misconduct was not excused or mitigated by his claimed mental health conditions.

In addition to applying liberal consideration to Petitioner's claimed mental health conditions and their effect upon the misconduct for which Petitioner was discharged in accordance with reference (b), the Majority also considered the totality of the circumstances to determine whether clemency is warranted in the interests of justice in accordance with reference (c). In this regard, the Majority considered, among other factors, that Petitioner apparently developed mental health conditions during his naval service, and that he presumably continues to suffer their effects; the entirety of Petitioner's naval service, which appears to have been otherwise honorable and included his voluntary deployment as part of [REDACTED]; that Petitioner was reportedly going through a difficult time in his life at the time of his misconduct; that Petitioner accepted responsibility for his offense by pleading guilty at his GCM; the character references provided for review; Petitioner's post-service accomplishments, to include obtaining three academic degrees, despite the stigma associated with his DD; and the passage of time since Petitioner's discharge. Based upon these factors, the Majority determined that modest clemency is warranted in the interests of justice. Specifically, the Majority determined that Petitioner's DD should be upgraded to a bad-conduct discharge (BCD).

Although the Majority found the mitigating circumstances sufficient to justify the modest clemency recommended above, it did not find those mitigating circumstances to be nearly sufficient to justify the extraordinary relief that he requests. The Majority found that Petitioner's misconduct was far too severe to justify any equitable relief beyond the upgrade to BCD recommended above.

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 interest of justice:

That Petitioner be issued a new DD Form 214 with an updated characterization of service in block 24 reflecting that Petitioner received a BCD (vice a DD). All other entries on 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 the evidence of record, the Minority of the Board

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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 DD under the circumstances.

Like the Majority, the Minority also applied liberal consideration to Petitioner's claimed mental health conditions and their effect upon his conduct in accordance with reference (b) and reached the same conclusion as did the Majority in this regard.

Finally, the Minority also considered the totality of the circumstances to determine whether clemency is warranted in the interests of justice in accordance with reference (c). In this regard, the Minority considered the same potentially mitigating factors as did the Majority, but reached a different conclusion. Specifically, the Minority simply found that the mitigating circumstances were not nearly sufficient to justify any clemency given the severity of Petitioner's misconduct. In this regard, assigned greater weight to the severity of Petitioner's misconduct than did the Majority, noting that his offense was aggravated by the fact that it occurred while he was in a relative of trust as a medical provider and that he grossly abused that trust. The Minority also noted that Petitioner has already enjoyed significant clemency in the reduction of his term of confinement and the convening authority's waiver and deferral of his reduction and forfeitures for the benefit of his family.

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.

8/7/2024

[REDACTED]

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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.)
- 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.)
- ____ MAJORITY Recommendation Approved (with modification) (Partial Relief – I concur with the Majority conclusion that clemency is warranted under the circumstances, but do not believe that the Majority recommendation goes far enough to serve the interests of justice. Specifically, I find that the mitigating circumstances warranted an upgrade to Petitioner’s characterization of service to general (under honorable conditions). Accordingly, I direct the relief recommended by the Majority above, except that Petitioner’s characterization of service in his updated DD Form 214 is to reflect “General (under honorable conditions).”
- ____ Petitioner’s Request Approved (Full Relief – I concur with the Majority conclusion that clemency is warranted under the circumstances, but do not believe that the Majority recommendation goes far enough to serve the interests of justice. Specifically, I find that the mitigating circumstances warranted an upgrade to Petitioner’s characterization of service to fully honorable as he requested. Although not specifically requested, I also find that a change to Petitioner’s narrative reason for separation is warranted in the interests of justice to minimize the stigma of his discharge. Accordingly, I direct that Petitioner be issued a new DD Form 214 reflecting that his service ending on 5 September 2008 was characterized as “Honorable”; that his narrative reason for separation was “Secretarial Authority”; that his separation authority was “MILPERSMAN 1910-164”; that his separation code was “JFF”; and that his reentry code was “RE-1.” Petitioner shall also be issued an Honorable Discharge certificate.)

