



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. 2027-24  
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 █ USMCR

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) 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  
(d) 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  
(e) MCO P1900.16, Marine Corps Separation Manual  
(f) SECNAVINST 5420.193, Board for Correction of Naval Records, 19 November 1997

Encl: (1) Order for Remand, in the case of *[Petitioner] v. U.S. Department of the Navy, et al.*, in the United States District Court for █, Civil Action █, filed 5 February 2024  
(2) DD Form 4, Enlistment/Reenlistment Document, Armed Forces of the United States, 17 June 1992  
(3) DD Form 214 (19930113 – 19930708)  
(4) NAVMC 118(3), Chronological Record  
(5) █ Message, subj: Positive Report of Urine Sample Tests (MCO P5300.12), dtg █  
(6) NAVMC 118(12), Offenses and Punishments  
(7) NAVMC 118(11), Administrative Remarks (1070), 4 August 1997  
(8) █ CO Memo 1900 █, subj: Notification of Discharge Proceedings, 9 August 1997  
(9) Petitioner's Memo 1900 █, subj: Acknowledgment of my Rights to be Exercised or Waived during Separation Proceedings, 9 August 1997  
(10) █ CO Memo 1900 █, subj: Recommendation for Administrative Discharge by Reason of Misconduct in the Selected Reserve in the case of [Petitioner], 3 September 1997  
(11) █ CO Memo 1900 SJA, Fourth Endorsement on Enclosure (10), subj: Administrative Discharge in the case of [Petitioner], 11 March 1998

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- (12) MCTFS Record of Service, 24 September 1997
- (13) DD Form 149 (with attachments) (for Docket No. 3732-22)
- (14) BCNR Memo Docket No: NR20220003732, subj: Advisory Opinion ICO [Petitioner], 9 August 2022
- (15) BCNR Letter Docket No: NR20220003732, 9 August 2022
- (16) Complaint, in the case of [Petitioner] v. U.S. Department of the Navy, et al., in the United States District Court for [REDACTED], Civil Action No. [REDACTED], filed 11 September 2023
- (17) BCNR Letter Docket No. NR20220003732, 26 September 2022
- (18) BCNR Letter BRB Docket No: 3732-22, 17 October 2022
- (19) DD Form 149 (with attachments)
- (20) BCNR Memo Docket No: NR20240002027, subj: Advisory Opinion ICO [Petitioner], 20 March 2024
- (21) Petitioner's Counsel's Letter, Re: Advisory Opinion ICO [Petitioner], 16 April 2024

1. By Order dated 5 February 2024, the U.S. District Court for [REDACTED] remanded the case filed by the Subject [hereinafter referred to as the Petitioner] to the Board for Correction of Naval Records, [hereinafter referred to as the Board] to reconsider its previous denial of Petitioner's request for relief in Docket No. 3732-22.<sup>1</sup> Specifically, [REDACTED] directed the Board to reconsider Petitioner's previous application along with any new matters that he may submit; apply liberal consideration to Petitioner's request and address relevant Department of Defense guidance, including but not limited to references (b) – (d); and issue a decision explaining whether Petitioner is entitled to the relief that he seeks, including but not limited to any corrections to his military record.<sup>2</sup> See enclosure (1).

2. A three-member panel of the Board, meeting in executive session, reconsidered Petitioner's allegations of error and/or injustice in accordance with its governing regulations and the Order of [REDACTED] on 10 May 2024, and reached the conclusions discussed in paragraph 5 below. This was a *de novo* review, with no deference assigned to the Board's previous decision in Docket No. 3732-22. The names of the panel members will be provided on request. Documentary materials considered by the Board included the enclosures; relevant portions of Petitioner's naval record; and relevant statutes, regulations, and policies, to include references (b) – (d).

3. Factual Background. The relevant factual background of Petitioner's case, based upon his naval records and other matters provided, is as follows:

a. Petitioner enlisted in the U.S. Marine Corps Reserve (USMCR) for a period of eight years on 17 June 1992, and successfully completed his initial active duty for training (IADT) from 13 January 1993 to 8 July 1993. See enclosures (2) and (3).

b. Upon completion of his IADT, Petitioner was affiliated with [REDACTED]. See enclosure (4).

<sup>1</sup> In Docket No. 3732-22, the Board denied Petitioner's request to upgrade his other than honorable (OTH) characterization of service and to change his narrative reason for separation to "Secretarial Authority."

<sup>2</sup> Correction of Petitioner's naval record is the only relief that this Board is empowered to grant pursuant to reference (a).

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c. In July 1997, Petitioner submitted a urine sample pursuant to a unit urinalysis which tested positive for the presence of tetrahydrocannabinol (THC) metabolites at a level above the threshold required for a positive result for the use of marijuana. This result was communicated by the Navy Drug Laboratory in [REDACTED] to Petitioner's command via message dated 30 July 1997. See enclosure (5).

d. On 1 August 1997, Petitioner received nonjudicial punishment (NJP) for wrongfully using THC in violation of Article 112a, Uniform Code of Military Justice (UCMJ). He was reduced to the next inferior pay grade.<sup>3</sup> Petitioner did not appeal this NJP. See enclosure (6).

e. On 4 August 1997, Petitioner was formally counseled regarding his use of illegal drugs. Specifically, he was informed that processing for administrative separation was mandatory under the circumstances in accordance with reference (e). Petitioner indicated his intention to make a statement in response to this counseling, but no such statement was ever received.<sup>4</sup> See enclosure (7).

f. By memorandum dated 9 August 1997, Petitioner was formally notified in writing of his commander's intent to recommend that he be separated from the USMCR under OTH conditions for misconduct due to drug abuse. See enclosure (8).

g. By memorandum also dated 9 August 1997, Petitioner acknowledged receipt of the notification referenced in paragraph 3f above, and elected to waive his right to an administrative separation board after consulting with counsel. He also indicated that a statement was provided, but as evidenced by the commander's comments elsewhere in the record this was not accurate. See enclosure (9).

h. By memorandum dated 3 September 1997, Petitioner's commander recommended to the separation authority that Petitioner be discharged from the USMCR under OTH conditions for misconduct due to drug abuse. See enclosure (10).

i. By memorandum dated 11 March 1998, the separation authority directed that the Petitioner be administratively discharged from the USMCR under OTH conditions for misconduct due to drug abuse.<sup>5</sup> See enclosure (11).

j. On 25 March 1998, Petitioner was discharged from the USMCR. See enclosure (4). His final conduct rating average was 4.3 throughout his USMCR career. See enclosure (12).

#### 4. Procedural Background.

a. Petitioner first applied to the Board for relief in May 2022. Specifically, he asserted that the requested relief was warranted because he developed post-traumatic stress disorder (PTSD)

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<sup>3</sup> Petitioner was reduced in grade from E-4 to E-3.

<sup>4</sup> Enclosure (10) reflects that the command provided him 20 days to submit matters (four times the requirement), but that he failed to do so.

<sup>5</sup> Enclosure (11) reflects that Petitioner's administrative separation was reviewed by a Judge Advocate and found to be sufficient in law and fact.

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following the death of his brother, and that he turned to marijuana to self-medicate for his symptoms. He also asserted that equitable relief was warranted pursuant to reference (d). See enclosure (13).

b. Because Petitioner based his request for relief in part upon his claimed PTSD condition, the Petitioner's application and records were reviewed by a licensed clinical psychologist who provided an advisory opinion (AO) in accordance with reference (a). The licensed clinical psychologist found no evidence that Petitioner was diagnosed with a mental health condition during his military service or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition, and that he provided no medical evidence to support his claim in this regard. As such, she found insufficient evidence to establish clinical symptoms or a nexus between his misconduct and claimed PTSD condition. Ultimately, it was her clinical opinion that there was insufficient evidence of a PTSD diagnosis or another mental health condition that may be attributed to military service, or that Petitioner's misconduct could be attributed to PTSD or another mental health condition. See enclosure (14).

c. A copy of this AO was forwarded to Petitioner's counsel for comment at the address provided on the DD Form 149 at enclosure (13) by cover letter dated 9 August 2022. See enclosure (15). However, Petitioner asserts that he never received a copy of this AO. See enclosure (16).

d. By letter dated 26 September 2022, the Board informed Petitioner's counsel that some of the supporting documentation referenced in enclosure (13) was not included in Petitioner's application, and requested that these items be submitted for consideration by the Board. See enclosure (17). The Board's internal records reflect that these missing documents were received from Petitioner's counsel on 6 October 2022, but it does not appear that these matters were submitted to the licensed clinical psychologist who provided the AO referenced in paragraph 4b above for reconsideration of her opinion.<sup>6</sup>

e. On 14 October 2022, the Board met in executive session to review Petitioner's application and voted to deny relief in Docket No. 3732-22. Specifically, the Board found that the potentially mitigating factors, to include Petitioner's claimed PTSD condition, were insufficient to warrant relief, even upon the application of liberal consideration. The Board simply found no convincing evidence of any nexus between Petitioner's claimed mental health conditions and/or related symptoms and his misconduct, and that there was insufficient evidence that any such mental health conditions mitigated Petitioner's misconduct. It also found that the severity of Petitioner's misconduct outweighed any mitigation offered by Petitioner's claimed mental health condition even if there were such a nexus. See enclosure (18).

f. On 11 September 2023, Petitioner filed a complaint with [REDACTED] asserting the following bases for relief:

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<sup>6</sup> Although the Board identified these documents as missing after the AO was complete and did not submit another request for an AO once the reportedly missing documents were received, the AO at enclosure (14) includes reference to assertions made by Petitioner in those reportedly missing documents.

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(1) The Board's decision in Docket No. 3732-22 was arbitrary and capricious, unsupported by substantial evidence, and contrary to law in violation of the Administrative Procedure Act by failing to adequately explain its decision and for failing to follow the guidance of references (b) –(d).

(2) The Board's decision in Docket No. 3732-22 was decided without proper compliance with required procedures by failing to provide the AO at enclosure (14) to Petitioner for comment, and relied upon that AO which was not fully informed by all of the evidence.

Accordingly, Petitioner requested that [REDACTED] vacate the Board's decision in Docket No. 3732-22 as arbitrary, capricious, unsupported by substantial evidence contrary to law, and without observance of procedures required by law; and upgrade Petitioner's discharge characterization to either honorable or general (under honorable conditions). Alternatively, he requested that [REDACTED] remand the decision for further proceedings. See enclosure (16).

g. On 6 February 2024, the [REDACTED] remanded the Petitioner's case to the Board for reconsideration pursuant to a motion by the Government, with the instructions referenced in paragraph 1 above.

h. On 5 March 2024, Petitioner submitted additional matters to the Board for consideration in accordance with the [REDACTED]. Remand Order. These matters generally mirrored those previously submitted by Petitioner in support of Docket No. 3732-22.<sup>7</sup> See enclosure (19).

i. By memorandum dated 20 March 2024, the same licensed clinical psychologist who provided the AO referenced in paragraph 4b above provided another AO informed by all of Petitioner's matters. Her opinion remained unchanged. See enclosure (20).

j. By letter dated 16 April 2024, Petitioner's counsel provided a response to the AO referenced in paragraph 4i above for the Board's consideration. Specifically, Petitioner's counsel asserted that the AO failed to consider the evidence purported to substantiate Petitioner's mental health condition. Petitioner's counsel further asserted that equity and justice compel the relief requested despite the AO. See enclosure (21).

## 5. Conclusions.

### a. PTSD/Mental Health Conditions.

(1) As it had done in Docket No. 3732-22, the Board reviewed Petitioner's application in accordance with the guidance of references (b) and (c). Accordingly, the Board applied liberal consideration to Petitioner's claim that he suffered from PTSD and/or depression during his

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<sup>7</sup> Petitioner's counsel included his submission to the present remand as a basis for relief, and noted that [REDACTED] directed the Board to "[a]pply liberal consideration" to his application and to address reference (b) – (d). He also stated, erroneously, that in accordance with reference (c), Petitioner's statement alone is sufficient to establish that he suffered from a mental health condition. Reference (c) actually provides that an applicant's statement alone may be sufficient, not that it is sufficient.

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military service due to the death of his brother, and the effect that such conditions may have had upon his misconduct in accordance with references (b) and (c).

(2) Even applying liberal consideration, the Board found insufficient evidence to conclude that Petitioner was diagnosed with or suffering from PTSD during his service in the USMCR. Although he claims that he was diagnosed with and prescribed medication for PTSD at the time, he provided no clinical evidence to support that claim. While it is understandable that he may not be able to provide such evidence from 1997, the absence of any clinical evidence of this condition in the years since then is not. PTSD is not a condition which is “cured” by medication. If Petitioner suffered this condition to such an extent that it required self-medication with marijuana, the Board would expect to see evidence of on-going treatment. Even when faced with the expert opinion provided by the licensed clinical psychologist in enclosure (20), Petitioner failed to offer any clinical evidence or medical opinions to counter this AO. Rather, he offered only legal arguments in response to a clinical medical opinion. As such, that expert medical opinion that Petitioner did not meet the diagnostic criteria for PTSD is essentially unrefuted. The absence of any clinical evidence to establish the existence of what would now be a 27 year old mental health condition was telling. Also telling was the fact that Petitioner was apparently able to overcome this claimed condition without the benefit of clinical treatment to become a successful and productive member of society. This raised doubts regarding the existence of Petitioner’s claimed PTSD condition. While reference (c) provides that a Veteran’s statement alone may establish the existence of a mental health condition, it does not mandate that the Board accept only the Veteran’s word in this regard. This is not a case for which the absence of any clinical evidence of the claimed condition can be explained. Accordingly, the Board found insufficient evidence that Petitioner was suffering from PTSD during his service in the USMCR even upon the application of liberal consideration.

(3) While the Board found insufficient evidence to conclude that Petitioner was ever diagnosed with depression during his USMCR service, it did not doubt that Petitioner struggled with his brother’s tragic death and demonstrated depressive symptoms. Such a response would be natural following such an experience, and was established by the testimony provided with Petitioner’s application through the application of liberal consideration. The Board did not, however, find Petitioner’s claim that his unit’s reported response to his brother’s death which contributed to such depression to be credible. Petitioner was a reservist at the time; if he had an expectation that his USMCR unit would provide official support for a relative’s funeral his expectations in that regard were unrealistic. Even active duty Marine Corps units do not provide official support for funerals of unaffiliated family members. Any such support that he perceived for other members of the unit under similar circumstances had to be unofficial in nature, as that simply is not a function performed by USMCR units.

(4) Even if Petitioner was suffering from depression symptoms or PTSD, the Board would not find such mental health conditions to excuse or mitigate the misconduct for which he was discharged. Neither PTSD nor depression renders an individual unable to understand or appreciate the nature of their conduct, so neither condition would excuse Petitioner’s marijuana use. The Board also found that such conditions would not mitigate Petitioner’s misconduct under the circumstances of this case. Specifically, Petitioner claimed that he was prescribed medication for his mental health symptoms. However, Petitioner apparently elected to forego his

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prescribed treatment in favor of using marijuana despite knowing that such use was illegal in the Marine Corps and could result in his discharge. The existence of a mental health condition may mitigate illegal drug use when such use is to self-medicate for untreated conditions, but it does not do so when a Marine chooses to substitute an illegal substance for properly prescribed medication. Under these circumstances, the Board found that the mental health conditions claimed by Petitioner would not mitigate his illegal drug use.

b. Equitable Considerations. In addition to applying 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) and (c), the Board also considered the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice in accordance with reference (d). In this regard, the Board considered, amongst other factors, the entirety of Petitioner's USMCR career and the absence of any other misconduct; the fact that Petitioner's illegal drug use occurred soon after the tragic death of his brother; Petitioner's post-service activities and career, reflecting regular advancement through positions of increasing responsibilities and apparent rehabilitation; Petitioner's post-service contributions to his community, primarily reflected through his role as a father and through his church-related volunteer work; Petitioner's remorse and acceptance of responsibility for his misconduct; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since his discharge. The Board also considered all of the guidance of reference (d). Even considering these factors, however, the Board found insufficient basis for the equitable relief requested. Petitioner's OTH discharge for illegal drug use was warranted at the time, and he carries a high burden to establish that his post-service conduct is so meritorious that it warrants changing the characterization of his USMCR service to something that it was not. The Board also noted that an OTH discharge from the USMCR does not carry nearly the stigma or adverse impact as would a similar discharge from active duty, as Petitioner does not have a DD Form 214 reflecting this adverse characterization. He does, however, possess a DD Form 214 reflecting that he served honorably during his only period of active duty. As such, no one has reason, or even the ability, to know of the characterization of Petitioner's USMCR service unless he voluntarily decides to share it.<sup>8</sup> This fact significantly reduces the impact of any stigma resulting from Petitioner's discharge characterization. While Petitioner has demonstrated his rehabilitation and apparently succeeded in life despite the stigma of his discharge, the Board found that the mitigating circumstances were not nearly sufficient to justify the equitable relief that he seeks. Accordingly, the Board did not believe such relief was warranted given the totality of the circumstances.

6. Recommendation. In view of the above, the Board recommends that no corrective action be taken on Petitioner's naval record.

7. 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.

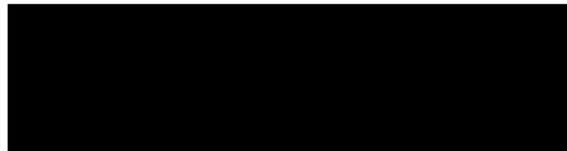
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<sup>8</sup> In this regard, the Board notes that it is not Petitioner's characterization of service which would necessarily bar him from certain Department of Veterans Affairs benefits, but rather the fact that he did not serve significant time on active duty.

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8. In accordance with Section 6(e)(2)(c) of the attachment to reference (f), I have determined that the Board's decision reflected above warrants Secretarial review. Specifically, while I agree with the Board's conclusion in paragraph 5a that Petitioner's misconduct was not excused or mitigated by any claimed mental health conditions, I disagree with its conclusion that equitable relief is not warranted in the interests of justice. Petitioner received an OTH discharge characterization for a single incident of illegal drug use approximately 27 years ago during a difficult time in his life over the course of an otherwise successful and honorable USMCR career. Additionally, Petitioner provided evidence of his post-service professional accomplishments and contributions to his community which reflect his rehabilitation and favorable character. Under these circumstances, I believe that at least some equitable relief is warranted in the interests of justice. In this regard, I note that the Board's decision reflected above was not unanimous; the Minority member of the Board believed that an equitable upgrade of Petitioner's characterization of service to general (under honorable conditions) was warranted under the circumstances. Accordingly, the foregoing action of the Board is submitted for your review and action.

6/27/2024



Executive Director



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ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

\_\_\_ Board Recommendation Approved (Deny Relief – I concur with the Board’s conclusion and therefore direct that no corrective action be taken on the Petitioner’s naval record.)

X Board Recommendation Disapproved (Grant Relief – I concur with the comments of the Board’s Executive Director in paragraph 8 above. Equitable relief is warranted given the totality of the circumstances in this case. However, I do not believe that an upgrade to fully honorable is warranted because Petitioner’s USMCR service was properly ended due to his misconduct. I also do not believe that a change to his narrative reason for separation is warranted because his discharge for this reason was proper. Accordingly, I direct that Petitioner’s naval record be corrected as necessary to reflect that his USMCR service was characterized as “General (under honorable conditions).” No other corrections shall be made to the Petitioner’s naval record.

\_\_\_ Board Recommendation Disapproved (Grant Relief – I concur with the comments of the Board’s Executive Director in paragraph 8 above. Equitable relief is warranted given the totality of the circumstances in this case. I find that the Petitioner’s single incident of drug use was exceedingly minor, especially given the circumstances at the time. A Marine would not likely be separated from the USMCR under similar circumstances today, much less separated under OTH conditions. Accordingly, I direct that Petitioner’s naval record be corrected as necessary to reflect that his USMCR was characterized as “Honorable” and that the narrative reason for his separation was “Secretarial Authority.”

[REDACTED]

Assistant General Counsel (M&RA)