



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

██████████  
Docket No: 1083-20  
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552  
(b) USD 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 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 with attachments  
(2) DD Form 214  
(3) Special Court-Martial Order 11-94, 22 Sep 94  
(4) Navy Resale and Services Support Office Promissory Note, 18 Jan 94  
(5) Navy Resale and Services Support Office Promissory Note, 29 Apr 94  
(6) *U.S. v. [Petitioner]*, Pretrial Agreement, 8 May 94  
(7) ██████████ Memo Ser 09, subj: Petitioner for Clemency ICO [Petitioner], 5 Aug 94  
(8) ██████████ Memorandum, dtd 9 Aug 94  
(9) Naval Consolidated Brig ██████████ CO Memo 1910/22, subj: Notice of an Administrative Board Procedures Proposed Action, 9 Aug 94  
(10) Petitioner Memo, subj: Statement of Awareness and Request for, or Waiver of, Privileges, 9 Aug 94  
(11) ADB President Memo, subj: Report of Administrative Board in the Case of [Petitioner], undated  
(12) ██████████ Memo, subj: Letter of Deficiencies Regarding the Administrative Board Proceedings ICO [Petitioner], 31 Aug 94  
(13) Naval Consolidated Brig ██████████ CO Memo Ser 22/280, subj: [Petitioner] Recommendation for Separation due to Commission of a Serious Offense, 12 Oct 94  
(14) CNP Memo Ser 832/194, subj: [Petitioner], 25 Nov 94  
(15) ██████████ Wellness Clinic Ltr, dtd 21 Nov 19  
(16) NDRB Review of Discharge, Docket No. ND95-01632  
(17) BCNR Memo, subj: Advisory Opinion IC [Petitioner], 27 Feb 21  
(18) Petitioner's Memo, subj: Rebuttal and Petitioner Seeks Relief Pursuant to the Wilkie Memo and the Kurta Memo, 26 Mar 21

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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 characterization of service be upgraded to honorable.

2. The Board reviewed Petitioner's allegations of error and injustice on 26 April 2021, and, pursuant to its regulations, determined that no corrective action 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) and (c).

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 regulation within the Department of the Navy.

b. Although enclosure (1) was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review Petitioner's application on its merits.

c. Petitioner enlisted in the Navy and began a period of active duty on 15 February 1991. See enclosure (2).

d. Between 29 October 1993 and 10 December 1993, Petitioner wrote 51 with insufficient funds in his account to receive cash, purportedly to gamble at a casino. Among the recipients of these bad checks were the [REDACTED] disbursing office (referred to elsewhere herein as the Navy Resale and Services Support Office) and the Navy Exchange. See enclosure (3).

e. Petitioner was subsequently charged with 51 specifications of making and uttering checks without sufficient funds between 29 October 1993 and 13 December 1993 in violation of Article 123a, Uniform Code of Military Justice (UCMJ), and 51 specifications of making and uttering worthless checks by dishonorably failing to maintain funds in violation of Article 134, UCMJ.<sup>12</sup> See enclosure (3).

f. On 18 January 1994, Petitioner signed a Promissory Note acknowledging that the Navy Resale and Services Support Office was in possession of 22 dishonored checks written by him and/or his dependent for whom he was responsible, with a total value of \$2,641.31, and promised to repay a total of \$3,147.31. Payments were to be made in semi-monthly installments of not less than \$150 each. See enclosure (4).

g. On 29 April 1994, Petitioner signed a Promissory Note acknowledging that the Navy Resale and Services Support Office was in possession of 21 dishonored checks written by him

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<sup>1</sup> The 51 specifications in violation of Article 123a, UCMJ, mirrored the 51 specifications in violation of Article 134, UCMJ.

<sup>2</sup> The eight worthless checks written by Petitioner to his fellow Sailor discussed in paragraph 3d above were not among those charged.

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and/or his dependent for whom he was responsible, and promised to repay a total of \$2,999.31.<sup>3</sup> Payments were to be made in semi-monthly installments of not less than \$250 each. See enclosure (5).

h. On 8 May 1994, Petitioner entered into a pretrial agreement with the convening authority whereby he agreed to plead guilty to the 51 specifications preferred against him in violation of Article 134, UCMJ, and to cooperate in an investigation of the disbursing office of the [REDACTED]. In exchange for these promises, the convening authority agreed to refer the charges to a special court-martial (SPCM). See enclosure (6).

i. On 18 July 1994, Petitioner was convicted by a SPCM, pursuant to his pleas, of 51 specifications of making and uttering worthless checks in violation of Article 134, UCMJ.<sup>4</sup> He was sentenced to 60 days of confinement and reduction to E-2. See enclosure (3).

j. By memorandum dated 5 August 1994, Petitioner, through counsel, requested clemency from the convening authority. In making this request, he noted that Petitioner demonstrated accountability for his actions by pleading guilty and that the testimony presented at trial established that Petitioner's misconduct was out of character. He also noted that Petitioner had already paid off his entire debt to the Navy Resale and Services Support Office,<sup>5</sup> and that he had executed a promissory note with the Navy Exchange to liquidate that debt. Finally, the clemency request explained that Petitioner's misconduct arose out of the traumatic experience of Petitioner discovering that his fiancé was having an affair. He requested that any confinement in excess of 29 days be disapproved and that the adjudged reduction in rank be suspended. See enclosure (7).

k. By memorandum dated 9 August 1994, one of Petitioner's shipmates disclosed that Petitioner had borrowed \$1,250 from him in August 1993 to purchase a vehicle. In exchange for this loan, Petitioner provided the other Sailor with 14 post-dated checks for the amount of \$89.50 each. He then borrowed an additional \$250 for insurance, and provided another post-dated check. After the seventh post-dated check cleared, Petitioner closed his bank account without informing the other Sailor, causing the checks to bounce. As a result, Petitioner uttered eight checks without adequate funds, with a value of \$876.50. See enclosure (8).

l. By memorandum dated 9 August 1994, Petitioner was notified that he was being considered for an administrative separation for the naval service by reason of misconduct due to commission of a serious offense as evidenced by his SPCM conviction. See enclosure (9).

m. On 11 August 1994, Petitioner elected to exercise his right to an administrative separation board after consulting with counsel. See enclosure (10).

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<sup>3</sup> It is not clear from the record whether any of the checks addressed in this promissory note were the same as those addressed in the previous promissory note.

<sup>4</sup> Petitioner was found not guilty of the 51 specifications in violation of Article 123a, UCMJ.

<sup>5</sup> A disbursing officer certified that Petitioner had repaid his debt of \$7,781.25.

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n. On 30 August 1994,<sup>6</sup> an administrative separation board unanimously determined that the preponderance of the evidence supported the allegation that Petitioner committed a serious offense. By a vote of 2-1, the administrative separation board recommended that Petitioner be separated from the naval service, but that the separation be suspended for a period of six months.<sup>7</sup> See enclosure (11).

o. By memorandum dated 31 August 1994, Petitioner's defense counsel submitted a letter of deficiencies regarding the administrative separation board proceedings. He asserted that the board's findings and recommendation were erroneous, as he presented testimonial and documentary evidence in mitigation while the recorder presented no evidence to support the board's recommendation that he be separated. This letter requested that the administrative separation board's recommendation that Petitioner be separated be disapproved or, alternatively, that its recommendation for suspension be approved. See enclosure (12).

p. By memorandum dated 12 October 1994, Petitioner's commander recommended that Petitioner be separated from the Navy under other than honorable (OTH) conditions as soon as possible despite the administrative separation board's recommendation that the separation be suspended and the assertions of error made by Petitioner's defense counsel. In making this recommendation, Petitioner's commander stated that Petitioner "engaged in an ongoing scheme to defraud the [REDACTED], the Navy Exchange, numerous loan companies, and his shipmates," and that his statement that he made "a simple mistake" is belied by the facts in the case. Specifically, he noted that Petitioner wrote 51 checks without sufficient funds, and that he wrote them out of sequence. His commander also questioned Petitioner's claim that he started gambling in despair over the loss of his girlfriend, as he was married to another woman within a period of a few months. Finally, he asserted that Petitioner had no real plan to repay his extensive debts, that Petitioner was still over \$15,000 in debt to various individuals and entities, and questioned Petitioner's assertion that he had repaid his debt to the [REDACTED] by clarifying that his pay had actually been garnished by the ship. See enclosure (13).

q. By memorandum dated 25 November 1994, the Chief of Naval Personnel (CNP) recommended to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) that Petitioner be separated under OTH conditions for misconduct due to commission of a serious offense resulting in conviction by a SPCM.<sup>8</sup> See enclosure (14).

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<sup>6</sup> Enclosure (11) reports that the administrative separation board was held on 30 April 1994. The Board concluded based upon the context that this was a scrivener's error, and that they Board was actually conducted on 30 August 1994.

<sup>7</sup> The administrative separation board unanimously determined that if Petitioner was separated, it should be under other than honorable conditions.

<sup>8</sup> The ASN (M&RA) was the separation authority for this proposed action because the SPCM did not adjudge a punitive discharge for the same misconduct which served as the basis for the administrative separation.

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r. On 23 December 1994, the ASN (M&RA) approved the recommendation of the CNP that Petitioner be discharged under OTH conditions for misconduct due to commission of a serious offense.<sup>9</sup> See enclosure (14).

s. On 13 January 1994, Petitioner was discharged from the Navy under OTH conditions for misconduct. See enclosure (2).

t. Subsequent to his discharge from the Navy, Petitioner was diagnosed with Major Depressive Disorder and an unspecified Anxiety Disorder, for which he continues to receive ongoing treatment. See enclosure (15).

u. On 12 September 1995, the Naval Discharge Review Board (NDRB) denied Petitioner's application to upgrade his characterization of service to honorable. Petitioner submitted 11 issues for consideration by the NDRB.<sup>10</sup> Specifically, he asserted that: (1) his rights were violated while he was confined in the brig; (2) he should have been retained in the Navy since he did not receive a punitive discharge; (3) he was not notified of suspension or afforded the right to make a statement; (4) the letter of deficiency prepared by his defense counsel was not considered; (5) a favorable witness did not attend his separation Board because he was deployed; (6) an unsworn statement was admitted by the administrative separation board indicating further fraudulent conduct by Petitioner; and (7) there was an irregularity in the administrative separation board's composition. The NDRB found no merit in any of these contentions. See enclosure (16).

v. Petitioner contends that the misconduct for which he was court-martialed and discharged was not merely the product of a gambling addiction, as was alleged at the time, but rather a means to suppress or "self-medicate" his constant sense of hopelessness and despair. He asserts that this sense of despair manifested itself in suicidal tendencies and reckless behavior, as reflected in the number of bad checks that he wrote in pursuit of that "quick-fix feeling or winning rush to forget painful feelings and emotions." See enclosure (1).

w. Petitioner further contends that the military judge at his SPCM should not have accepted his plea of guilty to writing back checks in violation of Article 134, UCMJ, because his creditors were satisfied with his conduct with respect to payment. Specifically, he asserts that he had already made restitution to the Navy Exchange and the Navy Resale and Service Support Office, as evidenced by the letter submitted to the court from the [REDACTED] disbursing officer. He cites to paragraph 71(c) of the Manual for Court-Martial (MCM), which was referenced by paragraph 68 (i.e., the offense for which Petitioner was convicted), which provides that the offense of dishonorably failing to pay debts is not committed if the creditor or creditors involved "are satisfied" with the conduct of the debtor "with respect to payment." Because he provided evidence that some of his creditors were satisfied with his plan to repay his debts,

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<sup>9</sup> Enclosure (14) reflects the ASN (M&RA)'s signature, but does not indicate his decision. The Board presumes that the ASN (M&RA) intended to endorse the CNP's recommendation with his signature.

<sup>10</sup> Four of the issues presented by Petitioner to the NDRB related to the propriety of the court-martial findings or sentence. As these were not matters upon which the NDRB was authorized to grant relief, there were not considered by the NDRB.

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Petitioner asserts that he never should have been convicted of the 51 specifications in violation of Article 134, UCMJ, for which he was discharged, despite his guilty plea. See enclosure (1).

x. Petitioner's 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 records reflected that Petitioner demonstrated good duty performance apart from the misconduct for which he was court-martialed. It also contrasted Petitioner's testimony at court-martial with his present application to the Board, noting that in the former he attributed his misconduct to his gambling addiction while in the latter he attributed it to self-medication of his "constant feelings of hopelessness and despair" due to the dim financial prospects of a junior enlisted Sailor. The AO noted no in-service diagnosis of a mental health condition or any evidence of any psychological/behavioral changes, and that Petitioner was never referred for a mental health evaluation which suggests that he did not display mental health symptoms that significantly interfered in his life. The AO found that Petitioner's description of his mental health symptoms most closely met the criteria for a gambling disorder, and that his post-service diagnosis of Depressive Disorder is counter to the available objective evidence of his mental health during his enlistment. Accordingly, the AO found that the preponderance of available objective evidence failed to establish that he suffered from a mental health condition at the time of his military service, or that his in-service misconduct could be mitigated by a mental health condition. See enclosure (17).

y. By memorandum dated 26 March 2021, Petitioner rebutted the findings of the AO. First, he challenges the factual assertion in the AO that he was found guilty of uttering 51 bad checks "with intent to defraud," since he was found not guilty of the Article 123a, UCMJ, specifications which included the "intent to defraud" element.<sup>11</sup> He also reiterated his claim that he was erroneously found guilty of uttering bad checks, and that he was administratively discharged contrary to the terms of his pretrial agreement. Petitioner also claimed ineffective assistance of counsel, in that his military defense counsel "advised and insisted" that he plead guilty. With regard to the AO, however, he asserts that even the AO's finding that Petitioner most closely resembled a gambling disorder should be afforded liberal consideration under reference (b), since such condition is itself a mental health condition. He also claimed that there was no evidence in his record of his mental health condition because he hid the symptoms from his superiors because of shame and self-imposed guilt. Petitioner's sea service and incarceration also contributed to the lack of mental health treatment records. See enclosure (18).

#### BOARD CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board found insufficient evidence of any error or injustice warranting relief.

First, the Board found Petitioner's contention that his conviction of uttering bad checks in violation of Article 134, UCMJ, was contrary to law to be without merit. Petitioner asserts that the promissory notes that he signed with one of his creditors and a letter from the [REDACTED]

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<sup>11</sup> The Board found this distinction to be irrelevant with regard to the substance of the AO, and therefore a harmless error.

[REDACTED] disbursing officer indicating that he had liquidated a significant portion of his debt indicated that his creditors were satisfied with his repayment plan, so he should not have been convicted of the offense to which he plead guilty. In support of this contention, Petitioner cites to paragraph 68c of Part IV, MCM, which states that “[a]s in the offense of dishonorable failure to pay debts, dishonorable conduct of the accused is necessary (see paragraph 71), and the other principals discussed in paragraph 71 also apply here.”<sup>12</sup> He then incorporates the provision of paragraph 71c, which states that “[t]he offense [of dishonorably failing to pay a debt] is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment.” The Board is not convinced that the portion of paragraph 71c cited by Petitioner is among those principles of paragraph 71 which are applicable to paragraph 68. The satisfaction of creditors would necessarily negate the requirement of dishonorable conduct under paragraph 71, since a creditor’s satisfaction would negate the dishonorable element of a failure to pay a debt. That logic, however, does not apply to making or uttering worthless checks by dishonorably failing to maintain funds. The fact that a creditor may be satisfied that the debtor will repay the debt does not negate the dishonorable act of failing to maintain funds to cover the written check. The provision of paragraph 71 cited by Petitioner simply does not logically apply to paragraph 68.<sup>13</sup> Further, there is no evidence that Petitioner’s creditors were satisfied at the time he was charged with the offense of making or uttering worthless checks by dishonorably failing to maintain funds to cover the debt. Petitioner does not avoid culpability for the offense by purporting to negate an element after the crime has been committed. Finally, Petitioner’s conduct with regard to uttering his bad checks was clearly dishonorable. He continued to write bad check after bad check knowing that he did not have the funds to cover them, selfishly taking money from his creditors to satisfy his gambling addiction. Accordingly, the Board disagrees with Petitioner’s contention that the military judge should not have accepted his plea of guilty to 51 specifications of violating Article 134, UCMJ.

The Board was also not persuaded by Petitioner’s contention in enclosure (18) that he received ineffective assistance of counsel at his SPCM. As discussed above, the Board does not accept Petitioner’s legal analysis regarding his criminal culpability for his conduct. Neither his defense counsel nor the military judge were wrong that his conduct could be charged and convicted under paragraph 68 of Part IV, MCM, under the circumstances. It was apparent to the Board that Petitioner was the beneficiary of more than adequate counsel during his SPCM, as he escaped from this process with a much lighter sentence than his conduct warranted. As a result of the pretrial agreement negotiated by his defense counsel, Petitioner avoided the need to defend against 51 additional specifications in violation of Article 123a, UCMJ, and was tried by a SPCM rather than a general court-martial. Finally, the Board was not persuaded by Petitioner’s contention that he would not have agreed to plead guilty if he knew that he could still be administratively discharged. Even if he was so authorized, however, there was nothing in Petitioner’s pretrial agreement which precluded an administrative discharge. Petitioner is clearly

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<sup>12</sup> Paragraph 68 of Part IV, MCM, pertains to the enumerated Article 134, UCMJ, offense of “Making or uttering bad checks by dishonorably failing to maintain sufficient funds.” This is the offense that Petitioner was convicted of by the SPCM. Paragraph 71 of Part IV, MCM, pertains to the enumerated Article 134, UCMJ, offense of “Dishonorably failing to pay debts.”

<sup>13</sup> The Board would reconsider its decision in this particular regard if Petitioner produces relevant case law that supports his contention regarding paragraph 68 of Part IV, MCM.

an intelligent individual capable of reading and understanding the documents that he signs. Accordingly, the Board finds no error or injustice in his administrative discharge subsequent to his guilty plea.

Because Petitioner based his claim for relief in whole or in part on his mental health condition(s), the Board reviewed his application in accordance with the guidance of reference (b). Accordingly, the Board applied liberal consideration to Petitioner's claim that he was suffering from the symptoms of depression and that his misconduct was mitigated by that condition. Even applying liberal consideration, however, the Board found insufficient evidence Petitioner was suffering from depression (or anxiety) during his military service. In this regard, the Board substantially agreed with the analysis of the AO. The Board does not doubt that Petitioner currently suffers from Major Depressive Disorder and an Anxiety Disorder, as he has been diagnosed, but can find insufficient evidence that these conditions were present during his service. He was never diagnosed with these conditions at the time, and by all accounts his duty performance never suffered despite his misconduct. Additionally, the fact that he recovered from the shock of discovering the infidelity of his fiancé so quickly by marrying another woman within months suggests that his social functions were not impaired. The Board was not convinced by Petitioner's contention that he merely hid these symptoms from his command, because if he was capable of hiding such symptoms and performing his duties at a high standard, he would have been equally capable of suppressing his impulses to write bad checks over and over again. The Board does, however, believe that Petitioner suffered from a gambling addiction. The Board disagreed with Petitioner's contention in enclosure (18) that the AO contradicted itself in this regard; the AO merely directed its attention to the mental health condition that Petitioner asserted was mitigating and disregarded a mental health condition that would have minimal mitigating effect. In this regard, the Board agrees. Whatever minimal mitigating effect Petitioner's gambling addiction may have had upon his misconduct, he already received the benefit of it through a very generous court-martial sentence. Although the Board considered this condition among the totality of the circumstances to determine whether relief is warranted, as discussed below, it found the mitigating effect of a gambling addiction upon Petitioner's misconduct to be minimal.

In addition to applying liberal consideration to Petitioner's mental health condition(s) and the effect that they may have had upon his misconduct in accordance with reference (b), the Board also considered the totality of the circumstances to determine whether relief is warranted in the interests of justice in accordance with reference (c). In this regard, the Board considered, among other factors, that Petitioner suffered from a gambling addiction at the time of his misconduct and the mitigating effect that this condition may have had upon his misconduct; that Petitioner's gambling addiction may have developed during his military service after the traumatic experience of discovering his fiancé's infidelity; Petitioner's contention that he committed his misconduct to obtain the "winning rush" from gambling that "self-medicated" his feelings of despair; that Petitioner pled guilty to his offenses at his SPCM and agreed to cooperate in an investigation of the [REDACTED] disbursing office; that Petitioner has been diagnosed with and suffers the effect of a Major Depressive Disorder and an unspecified Anxiety Disorder; that Petitioner was by all accounts a good Sailor and that several of his supervisors would have taken him back even after his misconduct and court-martial; that the SPCM did not adjudge a punitive discharge and Petitioner's contention that he would not have pled guilty if he



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knew that he would be administratively discharged; that Petitioner's administrative separation board recommended that his separation under OTH conditions be suspended for six months; that Petitioner eventually paid back most, if not all, of his debts, either through his own efforts or through the garnishment of his wages; that Petitioner joined the U.S. Navy for the noble purpose of providing a better life for his family and found himself unable to do so; Petitioner's relative youth and immaturity at the time of his discharge; and the passage of time since Petitioner's discharge. Even considering these potentially mitigating factors, however, the Board determined that relief is not warranted under the totality of the circumstances. Specifically, the Board found that the nature and frequency of Petitioner's misconduct far outweighed all of the potentially mitigating factors, and that Petitioner's OTH characterization of service was, and remains, appropriate in the interests of justice.

**BOARD RECOMMENDATION:**

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

4. It is certified that 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.

6/14/2021

[REDACTED]

Executive Director

ACTING ASSISTANT SECRETARY OF THE NAVY (MANPOWER AND RESERVE AFFAIRS) DECISION:

Board Recommendation Approved (Deny Relief)

**JUN 22 2021**

Petitioner's Request Approved (Upgrade to Honorable)

Petitioner's Request Partially Approved (Upgrade to General (under honorable conditions))

[REDACTED]

Acting Assistant Secretary of the Navy  
(Manpower and Reserve Affairs)