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

[redacted]
Docket No: 4157-20
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER [redacted]
XXX-XX-[redacted], USNA

Ref: (a) 10 U.S.C. § 1552
(b) SECNAVINST 5420.193, 19 November 1997
(c) COMDTMIDNINST 1610.2G, 15 August 2014
(d) 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 w/attachments
(2) USNA Conduct Report, Case Number 170267
(3) USNA Superintendent Memo, subj: Recommendation for Disenrollment from the Naval Academy of [Petitioner], 17 November 2016
(4) Petitioner's Show Cause Statement, 30 November 2016
(5) DD Form 214

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 disenrollment from the United States Naval Academy (USNA) and discharge from the Navy be revoked, that all records relating to his disciplinary hearing conducted pursuant to reference (c) and subsequent disenrollment and discharge, to include the recommendations of any and all members of his chain of command, the findings that Petitioner's conduct was unsatisfactory, and references the events of 3 September 2016 that were the subject of Petitioner's disciplinary hearing, be removed from his record. Implied within this request was the revocation of Petitioner's obligation to repay the educational expenses made on his behalf.

2. The Board reviewed Petitioner's allegations of error and injustice on 7 December 2020 and, pursuant to its regulations, determined that corrective action was not warranted. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval service records, and applicable statutes, regulations, and policies, to include reference (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 Petitioner did not file enclosure (1) in a timely manner, it is in the interests of justice to waive the statute of limitations and consider Petitioner's application on its merits.

c. Petitioner was appointed to the USNA on 27 June 2013 pursuant to a Secretary of the Navy (SECNAV) nomination.

d. During the afternoon of 3 September 2016, Petitioner attended a USNA football game. Following the game, he attended his sponsor's tailgate, during which he claims to have consumed only a small amount of beer and a cup of lemonade that was offered by a neighboring tailgate. Later that evening, Petitioner was found to be intoxicated in Bancroft Hall and escorted to his room. Due to his intoxication, Petitioner was unable to perform his shore patrol watch duty scheduled for 2200 hours that evening, and a replacement was found. During that night, a fellow midshipman conducting rounds in Bancroft Hall heard what she believed to be someone falling out of their bed in Petitioner's room. When this midshipman entered Petitioner's room and identified herself, Petitioner, seemingly unaware of his surroundings, exposed himself and began urinating on the floor.

e. Prior to the events of 3 September 2016, Petitioner had one prior honor offense for lying, and 14 conduct offenses, predominantly for minor unauthorized absences (UA) (i.e., late to classes, formations, etc.).

f. On 5 September 2016, a disciplinary proceeding was initiated in Petitioner's case in accordance with reference (c), charging him with the offenses of bringing discredit upon the Naval service by being under the influence of alcohol, irresponsible drinking, absence without authority due to negligence, and sexual harassment. A preliminary investigation was convened on 6 September 2016. After a preliminary investigation discovered the facts discussed in paragraph 3d above,[1] an adjudicative hearing was convened by the USNA Deputy Commandant. On 3 October 2018, Petitioner pled not guilty to the offenses pending against him. According to Petitioner's affidavit, one of Petitioner's fellow midshipmen testified that he smelled alcohol on the Petitioner only after previously denying such observation and being repeatedly questioned in different ways. The Deputy Commandant ultimately found Petitioner guilty and awarded 100 demerits and 60 days of restriction. See enclosure (2).

g. On 11 October 2016, the Deputy Commandant and Petitioner's chain of command recommended to the Commandant that he be disenrolled from USNA, noting that Petitioner continues to make serious judgment errors as a first class midshipman despite more than three years of instruction, training, and attempts to hold him accountable. See enclosure (3).

h. On 18 October 2016, the Commandant of Midshipmen conducted a personal hearing with Petitioner. According to Petitioner's affidavit, the Commandant called four civilian women who Petitioner provided as potential witnesses to his conduct during this hearing. The Commandant

[1] The charge of sexual harassment was dropped at some point during these proceedings and not adjudicated.

ultimately found Petitioner's conduct to be unsatisfactory and recommended that he be disenrolled from the USNA. See enclosures (1) and (3).

i. On 10 November, the Superintendent, USNA, personally interviewed Petitioner and determined his conduct to be unsatisfactory. By memorandum dated 17 November 2016, the Superintendent recommended to the SECNAV that Petitioner be disenrolled from the USNA. In making this recommendation, the Superintendent found Petitioner to lack potential for future service as a commissioned officer based not only upon his conduct of 3 September 2016, but also upon his continuous pattern of misconduct. The Superintendent further recommended recoupment of the $164,727.99 in educational benefits expended on Petitioner's behalf, and that Petitioner be separated from the Navy for unacceptable conduct with a general (under honorable conditions) characterization of service. See enclosure (3).

j. By memorandum dated 30 November 2016, Petitioner provided a Show Cause Statement to the SECNAV explaining why he should be retained. In this statement, Petitioner expressed his belief that a cup of lemonade provided to him by a neighboring tailgate after the USNA football game contained an unknown substance that caused him to become intoxicated. He claimed that he requested that a drug screen be conducted upon him, but was not able to be so screened until approximately 20 days after the incident, therefore impeding his ability to defend himself from charges of misconduct. Responding categorically to enclosure (3), Petitioner asserted that he was not intoxicated in Bancroft Hall on 3 September 2016 because he was unwittingly drugged and subsequently denied the opportunity to gather proof of this fact; that he does not recall urinating in the middle of his room in front of another midshipman; that the midshipman who observed Petitioner urinating in his room did not report that Petitioner smelled of alcohol, thereby supporting his claim of innocent ingestion of another controlled substance; that Petitioner's prior honor offense occurred early in his USNA for lying about a medical condition for fear of being found physically unfit; that Petitioner's previous conduct offenses for being UA generally occurred as the result of being late for formations due to a sleep disorder; that the chain of command recommendation that Petitioner be disenrolled was excessive given the denial of Petitioner's opportunity to gather evidence that he was possibly drugged; and that Petitioner does not have a history of being a problematic midshipman with numerous honor or conduct offenses, other than those for being UA. Petitioner further asserted that his mistake in judgment was in accepting an offered drink from people that he did not know based upon his belief that they were supportive of the USNA and midshipmen in general. Finally, in response to the claim by his chain of command that he continues to make "serious judgment errors" as a first class midshipman, Petitioner requested that each of the "serious judgment errors" be set forth in detail so that he could address each one of them. See enclosure (4).

k. Petitioner was subsequently disenrolled from USNA and discharged from the Navy on 11 May 2017 with an honorable characterization of service based on his failure to complete a course of instruction. See enclosure (5).

l. Petitioner asserts that his disenrollment from the USNA and discharge from the Navy was unjust because: (1) he was denied due process by not being adequately notified of the charges against which he would have to defend himself, nor informed of the burden or standard of proof necessary to sustain a finding of guilty in the conduct system to the charges pertaining to the

events of 3 September 2016; (2) that the charges against Petitioner were multiplicious as they arose out of the same alleged act of misconduct, thus artificially inflating the apparent severity of his misconduct and therefore the punishment imposed; (3) USNA officials and personnel failed to assist Petitioner in preserving potentially exculpatory evidence by refusing to conduct a timely drug test after Petitioner had informed officials of his belief that he had been drugged;[2] (4) USNA failed to permit Petitioner the opportunity to have an independent drug test conducted by restricting him to the grounds of the USNA; (5) that there was insufficient competent evidence to support the charge of being under the influence of alcohol; and (6) the SECNAV determination to disenroll Petitioner was based upon a report and record that did not afford Petitioner adequate due process during the adjudicative hearings under reference (c), and during all of the other prior adjudicative hearings against Petitioner during his tenure at USNA. Petitioner's application goes into detail regarding each of these asserted errors or injustices, and provides an affidavit describing the events of 3 September 2016 and the subsequent proceedings that resulted in his disenrollment.

CONCLUSION:

After careful and conscientious consideration of the entire record and each of the Petitioner's contentions, the Board found the evidence submitted insufficient to establish the existence of probable material error or injustice.

The Board found that the evidence more than sufficient to substantiate the allegations against Petitioner. By Petitioner's own statements, he was voluntarily consuming alcohol at his sponsor's tailgate upon completion of the football game, several hours prior to his scheduled shore patrol duty. Petitioner's affidavit also confirms that he was offered at least one shot of alcohol in a hotel room sometime after 1800 hours. Accordingly, there is no question that Petitioner was consuming some amount alcohol mere hours from his scheduled shore patrol duty. There is also no question that Petitioner was found to be so intoxicated in Bancroft Hall that a replacement had to be found to perform his duty, and that he later was observed in an incoherent state exposing himself to another midshipman and urinating on the floor of his room. Finally, at least one midshipman testified that Petitioner smelled of alcohol, although Petitioner has raised questions regarding the credibility of this testimony. Accordingly, there is more than sufficient evidence, both direct and circumstantial, to establish that Petitioner was under the influence of alcohol to an extent that brought discredit upon the Naval service.

The Board considered Petitioner's contention that his intoxication was not voluntary, but rather the result of his innocent ingestion of an unknown substance. However, the Board did not find this contention to be convincing. As noted above, there is no question that Petitioner had voluntarily consumed alcohol mere hours before he was to report for shore patrol duty. The Board also noted that Petitioner's innocent ingestion explanation was considered and apparently disregarded by every decision maker along the way. In fact, the Commandant went so far as to call each of the civilian ladies that Petitioner suggested would provide exculpatory testimony. However, upon hearing their testimony, the Commandant recommended that Petitioner be

[2] Petitioner asserts, generally, that his chain of command made no efforts to assist Petitioner to obtain a drug test until 20 days after the 3 September 2016 incident, despite his claims of innocent ingestion

disenrolled from USNA. Although Petitioner did not provide the Board with the substance of this testimony, the Board doubted that the Commandant merely disregarded their testimony due to their status civilians as the Petitioner suggested because it is unlikely that he would have bothered to called them if he did not value their input. Finally, the Board believes that the Petitioner vastly overstates the value that a positive drug test would have had upon his case. A positive drug test would not have proven innocent ingestion, as Petitioner asserts, but rather would have proven only that illegal substances were present in the Petitioner's system. Petitioner offered no evidence, other than his own testimony, that such a substance, if discovered, would have been innocently ingested. He offered no evidence, to either this Board or to the decision makers who recommended and approved his disenrollment and discharge from USNA, to corroborate his assertion that he was not drinking or that such consumption would be out of character for him. Nonetheless, every decision maker along the way considered Petitioner's defense of innocent ingestion, and none were persuaded by him claim. Likewise, the Board was not so persuaded.

The Board was not persuaded by Petitioner's assertion that he was not adequately notified of the charges for which he would have to defend himself. To the contrary, the Board found that Petitioner's actions demonstrated sufficient and obvious knowledge of what exactly he was defending himself against. As Petitioner himself notes, he raised the defense of innocent ingestion almost immediately upon learning of the charges against him. Accordingly, Petitioner's own actions belie his claim that he was not put on adequate notice of the charges that he would have to defend against.

The Board was also not persuaded by Petitioner's claim that he was denied due process by the unreasonable multiplication of charges against him. There is no evidence that any decision maker along the way was confused by the charges or believed that they represented more than one event, as the preliminary inquiry would have informed each of them of the circumstances. Further, Petitioner's chain of command, to include the Superintendent, recommended that Petitioner be discharged not only because of the events of 3 September 2016, but rather because of a continuous pattern of misconduct dating back to his fourth class year. It was not disputed that Petitioner had already been punished for one honor offense and 14 conduct offenses. Regardless of the nature of these conduct offenses, the frequency of Petitioner's misconduct, culminating in the events of 3 September 2016 that found him too intoxicated to perform his duties and urinating on the floor, was more than sufficient to justify Petitioner's discharge from USNA and the Navy.

The Board found Petitioner's assertion that he was not adequately notified of the burden of proof required to find him guilty at the conduct hearing to be without merit. In this regard, the Board noted that reference (c) establishes that a "preponderance of the evidence" must support a finding of guilty in at least three locations.[3] Accordingly, the Petitioner, like all similarly situated

[3] See reference (c), paragraphs 1.6b (establishing that disciplinary action may be taken if sufficient independent evidence exists to establish guilt by a preponderance of the evidence, but that evidence improperly derived from a Midshipman's response to questioning may not be used), 3.4b (establishing that Midshipmen who plead "not guilty" may request reconsideration of a guilty finding, but must indicate that there was not sufficient evidence to substantiate the charge by a preponderance of the evidence), and 5.2b (establishing that the Awarding Authority shall determine whether the accused is guilty based upon a preponderance of the evidence).

midshipmen, are on effective notice of the burden of proof necessary to find guilt under reference (c).

The Board also found no merit in Petitioner's assertion that he was denied due process by USNA's failure to provide him with a drug test. First, as mentioned above, the Board determined that a positive drug test would have limited probative value absent additional proof of innocent ingestion that the Petitioner has not provided. Additionally, assuming the accuracy of Petitioner's affidavit, approximately 60 hours passed between Petitioner's claimed innocent ingestion and his first attempt to obtain a drug test from the Brigade medical at approximately 0600 on 6 September 2016. Petitioner's battalion commander personally called the Brigade Medical Commander on his behalf that afternoon almost immediately upon hearing his side of the story for the first time to inquire about getting Petitioner a urinalysis, and an appointment was scheduled at the earliest opportunity. By this time, however, almost 72 hours had already passed, so a drug test taken at that moment presumably would be little more effective than one taken three days later when the Brigade Medical Commander informed Petitioner that it was too late to test for substances of the type that Petitioner suggested might be found. The Board found it unreasonable to expect USNA to anticipate the need to coordinate for a drug test to support an innocent ingestion defense for which there was no other evidence. Additionally, there was nothing preventing Petitioner from seeking an independent drug test during this period, as he was not yet under restriction for his misconduct. In any case, every decision maker along the way had the opportunity to consider Petitioner's innocent ingestion defense. Testimony regarding Petitioner's alcohol consumption, or lack thereof, during the period in question or simply in general, would have been far more probative of Petitioner's claim, but was never offered. Petitioner had the opportunity to testify and to present evidence during his adjudicatory hearing, in his hearing with the Commandant, in his hearing with the Superintendent, and in his Show Cause statement to the SECNAV. Accordingly, the Board found no violation of Petitioner's due process rights.

Finally, having found no error or injustice in the disciplinary proceedings that ultimately resulted in Petitioner's discharge from USNA, the Board also found no error or injustice in the ultimate decision to disenroll and discharge Petitioner from USNA. By approving a characterization of service and reason for discharge more favorable than that recommended by the Superintendent, the Board found it apparent that SECNAV (or his designee) gave careful consideration to Petitioner's arguments in his Show Cause statement. Accordingly, the Board agreed with Petitioner's statement on page 11 of his argument in support of his application that the SECNAV determination that Petitioner should be disenrolled was reasonable and well-founded. Contrary to Petitioner's argument, however, the Board determined that that reasonable and well-founded decision was based upon a fair process that afforded Petitioner all rights he was due.

In addition to reviewing Petitioner's disenrollment and discharge action for error or injustice, the Board also considered the totality of the circumstances to determine whether the interests of justice warrant relief in accordance with reference (d). In this regard, the Board considered all potentially mitigating circumstances, including but not limited to, the fact that Petitioner had completed three years at USNA and was less than a year away from graduation and commissioning at the time of his discharge; Petitioner's desire to serve as a Naval Officer; that Petitioner was intoxicated and likely not aware of his actions; Petitioner's assertion that he was

not voluntarily intoxicated, but rather innocently ingested an unknown substance; Petitioner's assertion that he was denied due process; and Petitioner's cooperation in the disciplinary process. Even considering these potentially mitigating factors, however, the Board determined that relief was not warranted. Specifically, the Board found that Petitioner's long pattern of misconduct, culminating in the events of 3 September 2016, far outweighed these potentially mitigating factors. Additionally, the Board applied significant weight to the determination of the Superintendent that Petitioner lacks potential for future service as a commissioned officer. Accordingly, the Board determined that no relief is warranted under the totality of the circumstances.

RECOMMENDATION:

In light of the above, the Board recommends that Petitioner's application be denied.

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-entitled matter.

5. The foregoing action of the Board is submitted for your review and action.

1/12/2021

[redacted]

Executive Director

PRINCIPAL DEPUTY, ASSISTANT SECRETARY OF THE NAVY (M&RA) DECISION:
(Performing the Duties of the Assistant Secretary of the Navy (M&RA))

BOARD RECOMMENDATION APPROVED (Relief Denied)

PETITIONER'S REQUEST APPROVED (Disenrollment revoked, correct record)

2/10/2021

[redacted]

PTDO ASN(M&RA)