

Subj: REVIEW OF NAVAL RECORD OF [REDACTED],
USMC, XXX-XX-[REDACTED]

(14) BCNR Memo Docket No: NR20220002019, subj: Advisory Opinion ICO [Petitioner],
3 May 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 characterization of service be upgraded to honorable.¹
2. The Board considered Petitioner's allegations of error or injustice on 24 August 2022 and, pursuant to its regulations, determined that the corrective action indicated below is warranted. 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).
3. The Board, having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or 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 limitation and consider Petitioner's application on its merits.
 - c. Petitioner enlisted in the Marine Corps and began a period of active duty service on 21 July 1998. See enclosure (2). After completing his basic training, he reported to the [REDACTED] at [REDACTED], for his military occupational specialty training. See enclosure (10).
 - d. On 23 December 1998, Petitioner was counseled for disobeying orders by drinking alcohol in the barracks in violation of Article 92, Uniform Code of Military Justice (UCMJ), and for underage drinking in violation of Article 134, UCMJ. He was advised not to violate the UCMJ, and that failure to take corrective action may result in administrative separation. Petitioner elected not to make a statement in response to this counseling. See enclosure (3).
 - e. In January 1999, Petitioner submitted a urine sample which tested positive for the use of marijuana. See enclosure (4).
 - f. On 12 February 1999, Petitioner received nonjudicial punishment (NJP) for the wrongful use of marijuana in violation of Article 112a, UCMJ. He was reduced to the grade of E-1, required to forfeit \$400 pay per month for two months, and restricted to the limits of the MCSS and assigned extra duty for 45 days.² See enclosure (5).

¹ On the DD Form 149 submitted with Petitioner's application, he requested that his characterization of service be upgraded only to general (under honorable conditions). However, in the letter signed by Petitioner which was attached to and supplemented the DD Form 149, Petitioner requested that his characterization of service be upgraded to honorable.

² Petitioner's restriction and extra duty was suspended for six months.

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g. By memorandum dated 18 February 1999, the [REDACTED] assessed that Petitioner's drug abuse was an isolated incident and recommended that Petitioner should be held accountable for his actions and processed for administrative separation in accordance with Marine Corps regulations. See enclosure (6).

h. By letter dated 18 February 1999, Petitioner requested leniency for his misconduct. He admitted to his drug use, and acknowledged the wrongfulness of his actions. He apologized for his conduct, and claimed to have renewed his commitment to himself and the Marine Corps. See enclosure (7).

i. By memorandum dated 4 March 1999, Petitioner was notified that he was being processed for administrative discharge from the Marine Corps by reason of misconduct due to drug abuse. See enclosure (8).

j. By memorandum dated 5 March 1999, Petitioner waived his right to consult with counsel and to an administrative discharge board. See enclosure (9).

k. By memorandum dated 5 March 1999, Petitioner's the [REDACTED] commander recommended that Petitioner be retained in the Marine Corps. In support of this recommendation, his commander praised Petitioner's performance and potential, and expressed his sincere belief that Petitioner had learned from his mistake and would be a future asset to the Marine Corps. See enclosure (10).

l. The [REDACTED] commander subsequently endorsed the recommendation made by the [REDACTED] commander, and further recommended Petitioner's retention in the Marine Corps. See enclosure (11).

m. By memorandum dated 26 March 1999, the separation authority, contrary to the recommendations made by the subordinate chain of command, directed that Petitioner be separated from the Marine Corps under other than honorable (OTH) conditions by reason of misconduct due to drug abuse. See enclosure (12).

n. On 9 April 1999, Petitioner was discharged under OTH conditions for misconduct due to drug abuse. See enclosure (2).

o. Petitioner acknowledges that he made the horrible mistake of using marijuana while he was in the Marine Corps, and expressed his remorse for his conduct and deep regret that this isolated incident cost him his career in the military. His application included the following:

(1) Petitioner addressed the incident which resulted in the counseling statement described in paragraph 3d above. Specifically, he explained that he was invited to a gathering in another Marine's barracks room where his peers were already drinking. He claims to have left the gathering, but later found out that an underage female Marine who was present became so intoxicated that she failed to report to formation that evening. Petitioner asserts that he was

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praised by his gunnery sergeant for being the only Marine who provided a fully honest account of the incident during the inquiry which followed.

(2) With regard to his marijuana use, Petitioner asserts that his childhood friends tricked him into smoking marijuana while he was home on leave. When he returned to base and ordered to take a random drug test, he did not make any excuses or inform his commander of the circumstances because he was embarrassed about what happened. This incident resulted in Petitioner being retained at the [REDACTED] rather than reporting to his next assignment.

(3) Petitioner offered an explanation of the circumstances which influenced the separation authority to direct his discharge under OTH conditions contrary to the recommendations of his chain of command. Specifically, he claims that while this decision was pending he was a passenger in a vehicle when the driver was cited for driving under the influence of alcohol, and that as a result he was also cited for aiding and abetting such conduct. Those charges were ultimately dismissed by the court, but the attention that his involvement in this incident caused resulted in the decision to separate him under OTH conditions.

(4) Petitioner described and provided evidence of an impressive record of post-service accomplishment and public service. He completed college and law school, and currently maintains a legal practice focusing on lower- and middle-income clients. He also claims (and in some cases presents documentary evidence of) a long history of active public service, to include recognition while in law school for his community outreach activities, service with the [REDACTED] providing aid to the less fortunate, helping to feed and clothe the poor in [REDACTED], and service with the [REDACTED]. His work with the latter reportedly resulted in his recruitment to serve as the [REDACTED] for a law firm in [REDACTED]. Petitioner's resume, which was provided, is very impressive.

(5) Petitioner provided numerous letters of support from family, friends, co-workers, and employers, attesting to his strong moral character, work ethic, family values, and contributions to his community.

(6) Although Petitioner did not mention any mental health conditions in his narrative, he indicated on his DD Form 149 that "Other Mental Health" conditions were related to his request for relief. Among the matters submitted by Petitioner was a letter from his psychotherapist, stating that Petitioner has been receiving counseling regarding his recurring feelings of anxiety and depression since February 2020 and has been diagnosed with an Adjustment Disorder. Petitioner's psychotherapist opined that Petitioner's adjustment disorder was exacerbated by the series of events that tarnished his otherwise distinguished service, and that this condition influenced the choices that he made. See enclosure (13).

See enclosure (1).

p. Because Petitioner's claim for relief was based in part upon his claimed mental health condition, his 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 contain no evidence of any diagnosed mental health condition or

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reported psychological symptoms/behavioral changes indicative of a diagnosable mental health condition. The only evidence of any mental health condition was the post-service diagnosis of an Adjustment Disorder reflected at enclosure (13). Enclosure (13) described how Petitioner's adjustment disorder was exacerbated by his experience in the Marine Corps, but did not suggest that Petitioner's misconduct resulted from his Adjustment Disorder. Furthermore, Petitioner's own statement suggested an alternative, more plausible, explanation for Petitioner's misconduct. Based on the available evidence, the AO found that Petitioner's mental health condition can be attributed to his military service, but that his misconduct cannot be attributed to his Adjustment Disorder.³ See enclosure (14).

MAJORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Majority of the Board determined that partial relief is warranted in the interest of justice.

The Majority found no error in Petitioner's discharge under OTH conditions for misconduct due to drug abuse. There was no evidence presented to call the results of the urinalysis into question, and Petitioner admitted to the misconduct prior to the decision to separate him. Further, Petitioner was informed of his rights with regard to the separation proceedings, and his knowing waiver of those rights was reflected in the record. There simply is no evidence to call the propriety of his discharge under OTH conditions into question.

Because he based his claim for relief in part upon a mental health condition, Petitioner's application was reviewed in accordance with the guidance of reference (b). Accordingly, the Majority applied liberal consideration to the claim that Petitioner suffered from an Adjustment Disorder while in the Marine Corps, and the effect that this condition may have had upon his misconduct. Applying liberal consideration, the Board did not question that Petitioner suffered from an Adjustment Disorder during his military service, or even that the circumstances of his military service exacerbated that condition. However, even applying liberal consideration the Board could find no evidence or reason to believe that this condition mitigated or excused the misconduct for which Petitioner was discharged. Petitioner provided a credible explanation for his misconduct with his application, which was completely unrelated to any mental health condition. Further, there is no logical nexus between Petitioner's mental health condition and the use of marijuana. Despite finding no evidence that Petitioner's mental health condition mitigated or excused Petitioner's misconduct, the Majority did consider Petitioner's mental health condition and its exacerbation due to the circumstances of his service in the Marine Corps among the totality of the circumstances to determine whether equitable relief is warranted in the interest of justice, as discussed below.

In addition to reviewing the circumstances of Petitioner's discharge at the time that it was implemented and applying liberal consideration to Petitioner's mental health condition as discussed above, the Majority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interest of justice in accordance with reference (c). In this regard, the Majority considered, among other factors, Petitioner's impressive post-service

³ Petitioner was invited to comment upon this AO, but failed to do so within the 30 days allotted.

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record of academic and professional accomplishments, achieved despite the challenges presented by his adverse characterization of service, and his record of valuable public service; the letters of support provided for review attesting to Petitioner's favorable character, work ethic, and contributions to his family and community; Petitioner's demonstrated remorse for his misconduct, both in its immediate aftermath and continuing today; that Petitioner's preexisting Adjustment Disorder may have been exacerbated by the circumstances of his military experience, and that he continues to experience anxiety and depression; the impressive potential that Petitioner demonstrated during his relatively short military career; that Petitioner's chain of command advocated for his retention despite his misconduct; the circumstances of Petitioner's drug use claimed by Petitioner; the extremely minor nature of Petitioner's misconduct; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. As the Majority believed that these mitigating circumstances outweighed the severity of Petitioner's misconduct, it determined that Petitioner's characterization of service should be upgraded to general (under honorable conditions) in the interest of justice. The Majority did not, however, find that the mitigating circumstances so significantly outweighed Petitioner's misconduct to warrant the extraordinary relief of an upgrade of his characterization of service to fully honorable as he requested, given the fact that Petitioner's short military career was characterized by multiple instances of misconduct.

Although not specifically requested by the Petitioner, the Board also determined that Petitioner's narrative reason for separation should be changed to minimize the likelihood of negative inferences being drawn from Petitioner's short period of service in the Marine Corps.

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:

That Petitioner be issued a new DD Form 214 reflecting that his service was characterized as "General (under honorable conditions)"; that his narrative reason for separation was "Secretarial Authority"; that his separation authority was "MARCORSEPMAN PAR 6214"; and that his separation code was "JFF1."

That a copy of this record of proceedings be filed in Petitioner's naval record.

That no further corrective action be taken on Petitioner's naval record.

MINORITY CONCLUSION:

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

The Minority concurred with the Majority conclusion that there was no error or injustice in Petitioner's discharge under OTH conditions. It also agreed with the Majority conclusion that there was insufficient evidence that Petitioner's mental health condition did not mitigate or excuse the misconduct for which he was discharged.

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The Minority disagreed with the Majority, however, that equitable relief was warranted in the interest of justice. Like the Majority, the Minority also considered the totality of the circumstances in accordance with reference (c), and considered the same mitigating factors as did the Majority. However, among those circumstances was the fact that Petitioner had three separate incidents of misconduct before he even reported to his first permanent duty station. Despite the fact that he demonstrated significant potential as a Marine during his initial entry training and has an impressive record of post-service accomplishments and service, the entirety of his short military career was characterized by multiple acts of misconduct. Each of these incidents provided Petitioner the opportunity to learn from his mistake and recover, but each time he failed to do so. Accordingly, the Minority did not believe that the mitigating circumstances outweighed the misconduct for which Petitioner was discharged. Accordingly, the Minority did not believe that equitable relief was appropriate under the totality of the circumstances.

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.

9/28/2022

[REDACTED]

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ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

MAJORITY Recommendation Approved (Partial Relief – I direct the relief recommended by the Majority above.)

MINORITY Recommendation Approved (Deny Relief)

Petitioner's Request Approved (Full Relief – I believe that the mitigating circumstances so significantly outweighs the misconduct for which Petitioner was discharged that his requested relief is warranted. Accordingly, I direct the relief recommended by the Majority above, except that his new DD Form 214 shall reflect that his service was characterized as honorable. Petitioner is also to be issued an Honorable Discharge Certificate.)

10/17/2022

