



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

█
Docket No. 3766-22
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552
(b) USD 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 w/attachments
(2) DD Form 1966, Record of Military Processing – Armed Forces of the United States
(3) DD Form 214
(4) NAVPERS 1070/607, Court Memorandum, 17 September 1997
(5) NAVPERS 1070/613, Administrative Remarks, 28 August 1997
(6) NAVPERS 1070/607, Court Memorandum, 8 February 1998
(7) NAVPERS 1616/26, Evaluation Report & Counseling Record (E1-E6) (19980116 – 19980715)
(8) NAVPERS 1070/607, Court Memorandum, 10 September 1998
(9) NAVPERS 1070/613, Administrative Remarks, 23 September 1998
(10) NAVPERS 1616/26, Evaluation Report & Counseling Record (E1-E6) (19980716 – 19981015)
(11) BCNR Memo Docket No; NR20220003766, subj: Advisory Opinion ICO [Petitioner], 20 July 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 "General (under honorable conditions)."

2. The Board reviewed Petitioner's allegations of error or injustice on 16 September 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner's naval record in the interest of justice. Documentary material considered by the

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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 regulations within the Department of the Navy.

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

c. Petitioner enlisted in the Navy on 23 May 1996. His citizenship status at the time of his enlistment was reported as [REDACTED] from [REDACTED]. See enclosure (2).

d. Petitioner began a period of active duty service in the Navy on 18 November 1996. See enclosure (3).

e. On 28 August 1997, Petitioner received non-judicial punishment (NJP) for two specifications of assault upon another service member, in violation of Article 128, Uniform Code of Military Justice (UCMJ).¹ His punishment was to forfeit \$199 per month for one month and 14 days of extra duty and restriction. See enclosure (4).

f. On 28 August 1997, Petitioner was counseled regarding his misconduct, and warned that any further deficiencies in his performance and/or conduct may result in disciplinary action and in processing for administrative separation under other than honorable (OTH) conditions. Petitioner acknowledged this warning and elected not to make a statement in response. See enclosure (5).

g. On 9 February 1998, Petitioner received his second NJP for drunk and disorderly conduct and indecent language, both in violation of Article 134, UCMJ, and frauds against the United States, in violation of Article 132, UCMJ. His punishment was to forfeit \$200 per month for two months, and 45 days of extra duty and restriction. See enclosure (6).

h. Sometime between 16 January 1998 and 15 July 1998, Petitioner received his third NJP for underage drinking in violation of Article 134, UCMJ.² See enclosure (7).

i. On 10 September 1998, Petitioner received his fourth NJP for two specifications of drunk or disorderly conduct in violation of Article 134, UCMJ. He was reduced in rate to E-2, required to forfeit \$400 per month for one month, and received 30 days of extra duty. See enclosure (8).

j. On 23 September 1998, Petitioner received his fifth NJP for being drunk on duty, in violation of Article 134, UCMJ. He received 60 days of restriction. See enclosure (9).

¹ One of the assault charges was for hitting a fellow service member, while the other was for head butting another member. Both of these offenses occurred on 10 August 1997.

² This NJP hearing is not recorded in Petitioner's record, but it was referenced in his periodic fitness report (FITREP).

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k. On 14 October 1998, Petitioner received an adverse FITREP on the occasion of his separation from the Navy which indicated that he continued to drink excessively and had several alcohol-related incidents, some of which resulted in his return to the ship by law enforcement officials based upon his drunk and disorderly conduct, despite completing Counseling and Assistance Center (CAAC) Level III Alcohol Rehabilitation treatment. The FITREP also reported several additional incidents of minor misconduct not reflected above.³ See enclosure (10).

l. On 15 October 1998, Petitioner was separated from the Navy under OTH conditions for misconduct.⁴ See enclosure (3).

m. Petitioner requests an upgrade to his characterization of service based on an undiagnosed mental health condition and equity considerations involving his “total capabilities, family problems, and constant discrimination from his peers and leadership because of his Russian heritage.” He asserts that the difficulty he experienced in transitioning from Russia to American and the U.S. Navy culture exacerbated his existing mental health problems, resulting in severe depression, drinking and misconduct. Petitioner cites “the change in policy that originated with the *Manker v. Del Toro* case” as a basis for relief.⁵ Petitioner claims to be an outstanding U.S. citizen despite the limitations imposed upon his educational and employment opportunities by his OTH discharge. He also states that his undiagnosed mental health condition resulted in excessive drinking and misconduct which further plagued him after his separation from the Navy, resulting in divorce and separation from his children. He claims to have quit drinking for over 10 years, and that he has repaired his relationship with his children, holds a steady job in the construction industry and hopes to start his own business. Petitioner asserts that his life struggle to be a better citizen and person should be rewarded. Petitioner included a character reference from a retired U.S. Army Major with his application. See enclosure (1).

n. Petitioner’s application and records were reviewed by a licensed clinical psychologist, who provided an advisory opinion (AO) for the Board’s consideration. The AO noted that Petitioner was diagnosed with an alcohol use disorder while serving in the Navy, and was provided appropriate treatment. It also found no evidence that Petitioner was diagnosed with another mental health condition incurred in or exacerbated by military service, and that Petitioner

³ The FITREP stated that Petitioner had been counseled for being late for quarters on several occasions, and for being drunk and unshaven at quarters. It also stated that Petitioner had been found too drunk to return to work on several occasions, and that he was verbally disrespectful and made threatening statements to several officers when returned to the ship in a drunken state. Finally, his commander stated that Petitioner “has been given every opportunity to straighten out his life and [the ship] has helped him in every conceivable way. Until he grows up and is willing to accept responsibility for his actions, [Petitioner] will continue to fail and be a menace to others due to his inability to control his drinking.”

⁴ Petitioner’s administrative separation documents were not found in his record. Accordingly, the Board relied upon the presumption of regularity to find that he was properly discharged and afforded all due process. Petitioner did not assert any error in this process.

⁵ There was no change in policy originating from the *Manker* case. The Board presumes that Petitioner is requesting consideration pursuant to reference (b).

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provided no medical evidence to support his claims.⁶ While Petitioner's immigrant status may have provided unique stressors, the AO found no evidence that he met the diagnostic criteria for a mental health condition other than the aforementioned alcohol use disorder during his military service. The AO ultimately concluded that there is insufficient evidence of a mental health condition that may be attributed to military service to or which his misconduct could be attributed, other than his alcohol use disorder.⁷ See enclosure (11).

MAJORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Majority of the Board determined that Petitioner's request warrants full relief in the interest of justice, even beyond that requested by Petitioner.

Because Petitioner based his claim for relief in whole or in part upon a mental health condition, the Majority reviewed his application in accordance with reference (b). Accordingly, the Majority applied liberal consideration to Petitioner's claim of depression and the effect that his condition(s) may have had upon his misconduct. There was clear evidence that Petitioner suffered from Alcohol Use (Abuse) Disorder while in the Navy. Applying liberal consideration, the Majority also found plausible Petitioner's claim that he suffered from depression, especially given his unique circumstances as a [REDACTED] attempting to assimilate in a new culture amidst the inevitable discrimination and harassment he would have endured in the Fleet as a [REDACTED] native. The Majority harbored no doubt that Petitioner's Alcohol Use Disorder, contributed to his misconduct, and found it likely that his depression contributed to his excessive alcohol use. Considering the numerous opportunities and warning that Petitioner was provided to correct his behavior, the Majority did not find these conditions alone to outweigh the misconduct for which Petitioner was discharged. It did, however, consider these conditions among the totality of the circumstances to determine whether equitable relief is warranted, as discussed below.

In addition to applying liberal consideration to Petitioner's mental health conditions and the effect that they may have had upon his misconduct in accordance with reference (b), 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, that Petitioner was an alcoholic and that most of his misconduct was alcohol related; the unique and challenging circumstances of Petitioner's enlistment as an immigrant from Russia, and the harassment, discrimination, and depression that he likely endured as a result; Petitioner's post-service rehabilitation efforts, to include his claim of being alcohol-free for over 10 years; Petitioner's post-service record of employment and efforts to be a better person; the character reference provided by a retired U.S. Army Major; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. The Majority believed it likely that Petitioner faced atypical challenges

⁶ The Board informed Petitioner that he did not provide any documentation or materials to support his claimed mental health condition(s) and requested any mental or clinical evidence to support this claim by letter dated 24 May 2022. Despite this request, no such documentation was subsequently received.

⁷ This AO was provided to Petitioner for comment by letter dated 21 July 2022. Petitioner did not subsequently provide any matters in rebuttal to the AO.

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enlisting in the Navy as a [REDACTED], and that these challenges, combined with his depression and Alcohol Use Disorder during a period before the excessive use of alcohol was deglamorized in the service, contributed significantly to Petitioner's misconduct. It also believed that Petitioner's successful post-service rehabilitation efforts suggested that more rapid and direct intervention by his leadership, which would have been more likely under current policies, may have produced a different result for Petitioner. These factors, combined with Petitioner's admirable post-service rehabilitation efforts, convinced the Majority that the interests of justice are served by upgrading Petitioner's characterization of service to fully honorable.

MAJORITY RECOMMENDATION:

In view of the above, the Majority of the Board recommends that the following corrective action be taken on Petitioner's naval record in the interest of justice:

That Petitioner be issued a new DD Form 214 reflecting that his service was characterized as "Honorable."

That Petitioner be issued an Honorable Discharge certificate.

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 no evidence of any material error or injustice warranting relief.

Like the Majority, the Minority also applied liberal consideration to Petitioner's mental health conditions and the effect that they may have had upon his misconduct in accordance with reference (b). In this regard, the Board largely agreed with the Majority conclusion stated above. Specifically, the Minority had no doubt that Petitioner suffered from Alcohol Abuse Disorder, and found it plausible that Petitioner also suffered from depression which contributed to his excessive alcohol use. It also had no doubt that Petitioner's conditions contributed to at least some of his misconduct, but found that those conditions alone did not outweigh Petitioner's misconduct.

The Minority also considered the totality of the circumstances to determine whether relief is warranted in the interest of justice in accordance with reference (c). The Minority considered the same factors as did the Majority in this regard, but reached a different conclusion. Specifically, the Minority noted that Petitioner was provided numerous opportunities to improve his conduct, but failed to do so. Multiple NJPs failed to motivate Petitioner to improve his conduct, and Level III inpatient rehabilitation treatment was ineffective. Whereas the Majority saw Petitioner's successful post-service rehabilitation efforts as indicative as a failure in his command's efforts to help him, the Minority this post-service success as evidence of Petitioner's personal failure to rehabilitate in service despite multiple efforts to assist him. The Minority also

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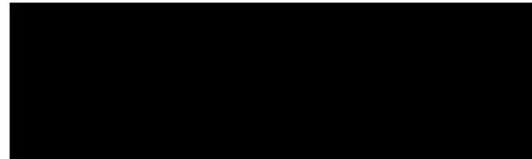
noted that not all of Petitioner's misconduct was attributable to his Alcohol Use Disorder. Specifically, the Minority noted that one of Petitioner's NJPs was for assault, and that reference (c) provides that relief is generally more appropriate for nonviolent offenses than for violent offenses. The Minority acknowledged Petitioner's post-service rehabilitation efforts, but noted that Petitioner provided no evidence of this post-service contributions to his community other than his own words to justify the relief that he seeks. Given the severity and frequency of Petitioner's misconduct, and the fact that the entirety of his relatively short naval career was characterized by repeated instances of indiscipline, the Minority did not believe that equitable relief was warranted given 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.

10/21/2022



Executive Director

ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

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

MINORITY Recommendation Approved (Deny Relief.)

Petitioner's Request Approved (I agree with the Majority conclusion that equitable relief is warranted in the interest of justice, but believe that the Majority's recommended relief goes beyond what is warranted in the interest of justice. Accordingly, I direct the relief recommended by the Majority above, except that Petitioner's characterization of service should be upgraded only to "General (under honorable conditions)," as he requested. Petitioner also will not be issued an Honorable Discharge certificate.)

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11/21/2022

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Assistant General Counsel (M&RA)

Signed by: [REDACTED]