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[REDACTED]

c. Petitioner received surgery for an avulsion fracture and torn rotator cuff on 24 October 2018 and was placed on convalescent leave for 2 months, during which time he remained behind while his unit was deployed. On 6 February 2019, Petitioner voluntarily self-referred to the Substance Abuse Counseling Center (SACC); his treatment record reflects diagnoses of: alcohol use disorder, severe; other use disorder, moderate; stimulant use disorder, mild. On 11 February 2019, Petitioner went to [REDACTED] Medical Facility for a blood test which returned negative results for any indication of drug use.

d. From 18 March 2019 through 19 April 2019, Petitioner attended an intensive outpatient addiction treatment program.

e. On 24 April 2019, a gunnery sergeant (GySgt) in his unit made a statement that he had observed Petitioner's unusual behavior and demeanor on 11 February 2019, had a corporal take Petitioner to the emergency room, and then requested that a doctor conduct a blood test. However, he admitted that the doctor "could not provide the results" of the blood test, stating that the doctor suggested questioning Petitioner instead, whom he claims then admitted to using cocaine, marijuana, and over the counter medicine to get high notwithstanding that the laboratory results from his blood test that were negative.

f. Petitioner was discharged from SACC services on 31 May 2019 due to incomplete aftercare due to failure to show for his continuing care appointments. There is an unsigned disposition agreement request from Petitioner, dated 16 July 2019 and witnessed by a defense counsel, agreeing to waive his right to a hearing before an administrative separation board and accept NJP in lieu of trial for an alleged violation of Article 112a. This request was dated and signed by Commanding Officer, [REDACTED] Marines, on 30 July 2019, without an indication whether the agreement was or was not approved. That same day, Petitioner accepted his second NJP for a violation of Article 112a for wrongful use of the controlled substances cocaine, marijuana, dextromethorphan, and methamphetamine on or about 11 February 2019.

g. On 1 August 2019, Petitioner was served notification of administrative separation for misconduct due to commission of a serious offense, specifically the wrongful use of controlled substances on 11 February 2019. Although only a copy of Petitioner's waiver is documented in his official military personnel, Petitioner initially elected a hearing before an administrative board before later waiving his hearing. The recommendation for his separation under Other Than Honorable (OTH) conditions was forwarded and submitted to legal review prior to Commanding General, [REDACTED] Marine Division's approval of Petitioner's separation for misconduct due to commission of a serious offense. Petitioner was discharged on 28 September 2019 with an OTH.

h. Petitioner previously applied to the Naval Discharge Review Board in 2020, initially contending that his discharge was improper because he had been informed he would receive a characterization of "General (Under Honorable Conditions)." He applied to NDRB again in 2022, contending that his post-service conduct merited an upgraded discharge and that his discharge was unjust because his command had acted without discretion by discharging form

drug use incident to post-operative pain management rather than afford him an opportunity to rehabilitate. On both occasions, the NDRB denied his request.

i. Petitioner contends now, through counsel, that the suspended reduction from his first NJP was inadvertently processed as a reduction, resulting in loss of pay which rendered him unable to pay his bills during the time his unit was deployed when he was recovering from his surgery. He states that he turned to self-medicating to cope with the pain of his recovery and the stress of his financial troubles; however, he self-referred to seek substance abuse treatment and asserts that he was told he would receive a discharge of General (Under Honorable Conditions), as the only evidence of his drug use was his admission. He contends that assigning him an OTH characterization of service was an “error of discretion” [read as abuse of discretion], and he believes his service should not be characterized by “one incident.”

j. Petitioner includes allegations of procedural errors related to his discharge. First, he contests the assignment of separation code “JKQ1” of “serious misconduct,” which he purports indicates a much more serious offenses such as sexual assault, when the basis for his separation was specifically and more properly drug abuse or misconduct due to drug abuse, for which the Marine Corps as dedicated codes. Further, he alleges that he had initially requested a hearing before an administrative separation board and that failure to afford him a hearing, notwithstanding his subsequent waiver, was a fatal procedural error.

k. Finally, Petitioner submits evidence of post-discharge character in consideration of clemency and equity, to include documentation of his post-discharge education and training certifications, his employment in the plumbing field, and 12 character letters, which includes a positive recommendation from the employer with whom he is apprenticing and numerous statements from Marines with whom he served describing that Petitioner experienced unfair treatment, was punished disproportionately in comparison to similarly situated peers, and suffered due to a lack of proper concern from his leadership following his injury and need for surgery before resorting to self-medication.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concluded that Petitioner’s request warrants favorable action in the form of partial relief. The Board reviewed the application under the guidance provided in references (b) and (c).

The Board first addressed the recorded basis for Petitioner’s separation and concurred that the basis of drug abuse was the most specific, and therefore appropriate, under governing policy and regulations which establish that, when there is any conflict between a specific requirement applicable to one reason and a general requirement applicable to another reason, the specific requirement shall be applied or, if a conflict in procedures cannot be resolved, the procedures most favorable to the respondent shall be used. At a minimum, the Board determined from the outset that Petitioner’s narrative reason for separation, separation authority, and separation code merited correction. As a result, the Board focused on the specific limitations which reference (c) establishes in regard to characterization of service for misconduct due to drug abuse following

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self-referral, without prior evidence of drug use, and the limitations on use of information disclosed in the pursuit of rehabilitative treatment.

In this regard, the Board noted Petitioner's admitted drug abuse and does not condone it, notwithstanding his claims of self-medication; however, the Board observed that Petitioner clearly self-referred for substance abuse treatment on 6 February 2019, nearly a week prior in time to purported date the witness statement asserts to have observed behavior suitable for referral to medical to determine fitness for duty. The Board considered the specific claims made within the witness statement, which reveal that the medical testing conducted on 11 February 2019 was, more likely than not, *not* command-directed or, as alleged by the witness, requested to determine fitness for duty; the Board arrived at this conclusion given the GySgt's admission that medical would not release the results of the laboratory tests in addition to the lack of any mention of these results otherwise within the administrative record except by Petitioner, who provided documentation of the negative results. Likewise, the Board specifically noted that the laboratory tests were *negative* for any indication of substance use – which the Board found to be a significant and contradictory fact vis-à-vis the GySgt's claim that he observed behavior by Petitioner which caused him to suspect substance use and thus “sent” him to medical. Further, the Board found other aspects of the GySgt's witness statement problematic, to include: his claim that a uniformed medical officer, who was presumptively trained regarding the legal implications of his performance of duties, purportedly advised him to question Petitioner directly since the medical test results were not releasable; that, after unequivocally asserting he “sent” Petitioner to medical because he suspected substance use, he made no mention of having advised Petitioner of his rights under Article 31(b) prior to questioning him; and, most telling, that this statement documenting events from 11 February 2019 was not made until after the Petitioner's completion of intensive outpatient rehabilitation at the end of April 2019 – by which time formal notice regarding his completion of substance abuse treatment would presumptively have been reported to his command with a recommendation regarding mandatory processing for administrative separation due to drug abuse. To this extent, the Board also observed that an admission by Petitioner such as that documented via this witness statement would have been necessary to pursue an OTH characterization in light of the limitations on characterization following Petitioner's self-referral and the limitations on use of his admissions of substance abuse in the course of seeking rehabilitation. Applying a rule of general common sense to how a senior enlisted Marine might be expected to react to the enormity of a direct admission of drug abuse by a junior enlisted Marine, the Board concluded that the witness statement was, at best, contrived to establish Petitioner's admission without the limitation on use prescribed by reference (c).

Similarly, and accounting for the concerns already noted, the Board found it problematic, although not fatal, that the witness allegation of Petitioner's purported admission of drug abuse was disposed of via an extra-judicial agreement “in lieu of trial” without formal charges, pre-trial agreement, or request for separation in lieu of trial, all of which are procedurally provided for within reference (c). However, to the extent that Petitioner alleges procedural error in not affording him a hearing before an administrative separation board, the Board found this contention without merit. Although Petitioner submitted documentation which appears to request a hearing before an administrative board, the acknowledgment of rights recorded in his

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official military personnel file reflects a waiver of his board hearing and is consistent with the terms of the "disposition agreement." As regards his specific contention of error, the Board determined that the waiver, which he signed and executed, would have been sufficient to cure any defect regarding an initial request for a hearing, especially when considering that Petitioner would have presumptively been sent to consult with defense counsel regarding the legal implications of making such a request after having negotiated to waive his hearing in lieu of trial.

Additionally, the Board considered Petitioner's evidence of post-discharge rehabilitation and his claims of inequity based on disproportionate treatment. The Board expressly noted that Petitioner was first formally counseled regarding his violation of tattoo policy prior to receiving NJP for violating the same after having been duly warned. Notwithstanding the numerous statements asserting that Petitioner was unfairly being made an example of and was punished more harshly than other Marines who committed "identical" violations, the Board concluded that his NJP for his second violation of a lawful General order or regulation was, itself, fair and reasonable in light of the repetitive nature of the offense. However, the Board viewed these character letters as informative of Petitioner's overall circumstances and persuasive to the extent that multiple members of his unit describe him as having been left behind by his command to recover from a debilitating surgical procedure, alone in the barracks and unsupported, while the rest deployed. Although the Board found that Petitioner submitted insufficient evidence at this time to substantiate his specific contention of lost pay as a result of improper action on his otherwise suspended reduction in rank, the Board concluded that Petitioner's request merits a grant of partial relief upon consideration of the totality of the matters of record in concert. Specifically, the Board concluded it was more likely than not that Petitioner's medical condition during his unit's deployment contributed to the self-medication for which he ultimately self-referred into substance abuse rehabilitation. Additionally, based upon the sum of regulatory inconsistencies reflected in the records of his disciplinary action and administrative separation processing, the Board concluded it was also more likely than not that Petitioner should have been afforded the protections of the limitation on characterization and on the limitation of admissions of drug use in light of his self-referral. Accordingly, the Board determined that it is in the interest of justice to grant partial relief with respect to upgrading Petitioner's characterization of service and correcting his narrative reason for separation, separation code, and separation authority to remove reference to commission of a serious offense.

Notwithstanding the recommended corrective action below, the Board was not willing to grant an upgrade to an Honorable discharge. The Board determined that an Honorable discharge was appropriate only if the Marine's service was otherwise so meritorious that any other characterization of service would be clearly inappropriate. Considering Petitioner's disciplinary history of counseling and NJP for his violations of tattoo policy, the Board found his service merited only a General (Under Honorable Conditions) conditions rather than an Honorable. Ultimately, the Board concluded by opining that certain negative aspects of the Petitioner's conduct and/or performance outweighed the positive aspects of his military record even under the liberal consideration standards for mental health conditions, and that a General (Under Honorable Conditions) discharge characterization and no higher was appropriate.

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Based on similar reasoning, the Board also concluded Petitioner's reentry code remains appropriate. In making this finding, the Board considered Petitioner's record of misconduct and concluded he remains unsuitable for further military service.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

That Petitioner be issued a new Certificate of Release or Discharge from Active Duty (DD Form 214) indicating that, on 28 September 2019, his "General (Under Honorable Conditions)" discharge was issued under the authority of "MARCORSEPMAN par 6214" for the narrative reason of "Secretarial Authority" with a separation code of "JFF1."

That no further changes be made to Petitioner's record.

A copy of this report of proceedings be filed in 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-entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)), and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

1/8/2023

[REDACTED]  
Executive Director  
[REDACTED]