



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

█
Docket No. 6594-23
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER █
XXX XX █/█ USMC

Ref: (a) 10 U.S.C. § 1552
(b) USD (P&R) 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) █, subj: Request for a Moral Waiver Case of: [Petitioner], 10 June 1994
(3) █, subj: Morale Waiver for [Petitioner], 20 July 1994
(4) DD Form 214
(5) NAVMC 118(12), Offenses and Punishments
(6) █
(7) Memorandum of Pretrial Agreement, in the case of *United States v. [Petitioner]*, undated
(8) NAVMC 118(13), Record of Conviction by Court-Martial, 8 November 1996
(9) █, subj: Notification of Separation Proceedings, 5 March 1997
(10) Petitioner's Memo, subj: Acknowledgment of my Rights to be Exercise or Waived in Administrative Separation Proceedings, 5 March 1997
(11) █, subj: Recommendation for Administrative Separation in the case of [Petitioner], 9 April 1997

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 and that his narrative reason for separation (and corresponding entries on his DD Form 214) be changed.

2. The Board considered Petitioner's allegations of error or injustice on 28 August 2023 and, pursuant to its governing policies and procedures, determined that the equitable relief indicated below is warranted in the interests of justice. Documentary material considered by the Board included of the enclosures; relevant portions of Petitioner's naval record; and applicable statutes, regulations, and policies, to include reference (b).

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] [REDACTED] USMC

3. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board 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 enclosure (1) was not filed in a timely manner, it is in the interests of justice to waive the statute of limitations and review Petitioner's application on its merits.

c. On 20 July 1994, Petitioner received a moral waiver to enable his enlistment in the Marine Corps. This waiver was necessary due to several pre-service drug related offenses, to include possession of a Class D substance, conspiracy, and possession of a Class D substance with intent to distribute in 1992. See enclosures (2) and (3).

d. Petitioner enlisted in the Marine Corps pursuant to the moral waiver, and began a period of active duty service on 7 September 1994. See enclosure (4).

e. On 30 June 1995, Petitioner received non-judicial punishment (NJP) for being absent from his place of duty in violation of Article 86, Uniform Code of Military Justice (UCMJ); and disobeying a direct order from a superior noncommissioned officer in violation of Article 91, UCMJ. He was reduced in grade to E-2; required to forfeit \$400 pay per month for one month; and was restricted for 24 days.¹ See enclosure (5).

f. On 20 January 1996, Petitioner received his second NJP for being disrespectful to a superior noncommissioned officer in violation of Article 91, UCMJ; and for using provoking words in violation of Article 117, UCMJ. He was reduced in grade to E-1; required to forfeit \$400 pay per month for two months; and restricted for 60 days.² See enclosure (5).

g. On 30 July 1996, Petitioner received his third NJP for being disrespectful toward a superior commissioned officer in violation of Article 89, UCMJ; being disrespect toward a superior noncommissioned officer in violation of Article 91, UCMJ; and for verbally threatening a noncommissioned officer in violation of Article 128, UCMJ. He was required to forfeit \$200 per month for two months, and was restricted for 60 days. See enclosure (5).

h. In August 1996, a urine sample submitted by Petitioner tested positive for the presence of the metabolites for nandrolone, an anabolic androgenic steroid. See enclosure (6).

i. Petitioner was subsequently charged with the wrongful use of steroids between 24 July 1996 and 30 July 1996 in violation of Article 112a, UCMJ. He then entered into a pretrial agreement (PTA) with the convening authority whereby he agreed to plead guilty to the charge pending against him at a summary court-martial (SCM) and to unconditionally waive his right to an administrative discharge board, in exchange for the convening authority's agreement to withdraw referral of the charge to a special court-martial. Petitioner acknowledged that the basis

¹ The forfeitures were suspended for six months.

² The forfeitures were suspended for six months, but that suspension was subsequently vacated and ordered executed upon the commission of additional misconduct.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] [REDACTED] USMC

for his discharge would be "Misconduct Due to Drug Abuse" and that his service could be characterized as "Under Other Than Honorable Conditions." See enclosure (7).

j. On 8 November 1996, Petitioner was convicted by a SCM, pursuant to his plea, of wrongful use of steroids in violation of Article 112a, UCMJ. He was sentenced to 29 days of confinement and to forfeit \$583 pay per month for one month. See enclosure (8).

k. By memorandum dated 5 March 1997, Petitioner was formally notified that he was being recommended for an administrative separation by reason of misconduct due to drug abuse. See enclosure (9).

l. On 5 March 1997, Petitioner waived his right to an administrative discharge board in accordance with the terms of his PTA. See enclosure (10).

m. On 9 April 1997, the separation authority directed Petitioner's administrative separation from the Marine Corps under other than honorable (OTH) conditions for misconduct due to drug abuse. See enclosure (11).

n. On 16 April 1997, Petitioner was discharged from the Marine Corps under OTH conditions for misconduct due to drug abuse. See enclosure (4).

o. Petitioner contends that he used a legal, over-the-counter supplement that he purchased from General Nutrition Center, and was unaware that the product converted in the human body into the metabolites for nandrolone. He asserts that he would not have used the product if he had known this, and that he regrets doing so. However, he believes that the consequences were unjust since his life was destroyed for using a performance enhancing supplement which was legal with the intent of becoming a stronger, faster, and all-around better physically fit Marine, and that his discharge does not represent his overall service record and the contribution he made to his unit and the Marine Corps. Petitioner further contends that he accepted the PTA upon the advice of counsel who advised him that he could otherwise be subject to considerable confinement and possibly a dishonorable discharge. Petitioner claims that he has suffered embarrassment, severe anxiety, depression, and the stigma of his discharge, and has twice been denied jobs due to his discharge status. Since his discharge, Petitioner became an Auxiliary Firefighter and spent three years working a 24-hour shift every week in this non-paid volunteer position. He also served as a paid Emergency Medical Technician (EMT) with an ambulance company responding to 911 calls for the rest of the week. However, he was denied the opportunity for a full-time paid position with the fire department due to his discharge status. After being denied the opportunity to serve full-time as a fire fighter, he started a real estate company flipping houses. He continues to do this today, but states that he feels a "gut-wrenching loss" every time he sees a fire truck. Petitioner claims that he was recently accepted into the [REDACTED] due to the efforts of the "Hero to Hero Foundation" founder, whom he stated believed in his moral compass and ability to be a fire fighter despite his discharge status. He also claims to have recently completed EMT school and certification as a licensed EMT, which is a prerequisite to be a fire fighter. Petitioner's application is supported by a letter from the Chief Administrator of the [REDACTED] that he attended in 1997-1998, praising his efforts and performance, as well as a letter from the Auxiliary Coordinator for the

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] USMC

[REDACTED], confirming his service from 1999 to 2002 and praising his skills and performance.

MAJORITY CONCLUSION:

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

The Majority found no error or injustice in Petitioner's discharge at the time that it was administered. There was no controversy regarding the legitimacy of his misconduct, as the evidence reflects that he used a prohibited substance and he pled guilty to the offense at SCM. Petitioner's claimed ignorance of the fact that the substance he ingested would cause him to test positive for a prohibited substance does not provide an affirmative defense to this offense. A violation of Article 112a, UCMJ, carries a maximum punishment which includes confinement of six months or more and/or a punitive discharge, so his misconduct was of sufficient severity to justify a discharge under OTH conditions. Finally, the evidence reflects that Petitioner received all process due to him in his discharge process. He was properly notified of the administrative separation proceedings, and waived his right to an administrative discharge board with the assistance of counsel. There was simply nothing erroneous or unjust about Petitioner's discharge at the time that it was administered.

In addition to reviewing the circumstances of Petitioner's discharge at the time it was administered, the Majority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice in accordance with reference (b). In this regard, the Majority considered, among other factors, Petitioner's claimed ignorance that the substance he ingested would cause him to test positive for use of a prohibited substance; Petitioner's post-service volunteer service as an Auxiliary Fire Fighter; Petitioner's post-service employment as an EMT, and subsequent successful long-term efforts to build and operate a real estate company; Petitioner's passionate desire to serve his community as a fire fighter; Petitioner's sincere remorse for his misconduct; the non-violent 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. The Majority found that the combined weight of these mitigating circumstances sufficiently outweighed the severity of Petitioner's misconduct to justify an equitable upgrade of his characterization of service to general (under honorable conditions).

Although the Majority found the mitigating circumstances to be of sufficient weight to justify an upgrade of Petitioner's characterization of service to general (under honorable conditions), it did not find those mitigating circumstances to so significantly outweigh the severity of Petitioner's misconduct to justify the extraordinary relief of an upgrade to fully honorable as he requests. In this regard, the Board notes that Petitioner received three NJPs in his two years of service before testing positive for the use of anabolic steroids, which weighed heavily against such extraordinary relief. The Majority also found no basis to change Petitioner's narrative reason for separation. Although it found sufficient basis for the equitable relief described above, the Majority believed that Petitioner's narrative reason for separation was, and remains, appropriate under the circumstances.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] USMC

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 interests of justice:

That Petitioner be issued a new DD Form 214 reflecting that his service ending on 16 April 1997 was characterized as "General (under honorable conditions)." All other entries currently reflected on his DD Form 214 are to remain unchanged.

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 at the time that it was administered.

Like the Majority, the Minority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice in accordance with reference (b). In this regard, the Minority considered the same potentially mitigating circumstances as did the Majority. However, the Minority did not concur with the Majority conclusion that these mitigating circumstances outweighed the severity of Petitioner's misconduct. In less than two years of service before he tested positive for the use of anabolic steroids, Petitioner had received NJP on three separate occasions. His service record was notable for repeated instances of disobedience and disrespect. The Minority disagreed with Petitioner's contention that his discharge did not represent his overall service record and the contributions that he made to his unit, because his overall service record reflects that his service was far from honorable even before he tested positive for a prohibited substance. The Minority also noted that Petitioner was on notice that his conduct was under scrutiny and that further misconduct could result in the consequences he received. The three NJPs he received certainly put his future in the Marine Corps into jeopardy, and his receipt of a moral waiver to enlist in the Marine Corps should have influenced him to conform his conduct to the standards from the start of his enlistment. Under these circumstances, the Minority was not persuaded by Petitioner's claim of ignorance of the effect of the supplement he claims to have ingested – he had already exhausted any benefit of the doubt that may have been afforded to him. Accordingly, the Minority found that equitable relief is not 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.

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]
XXX XX [REDACTED] / [REDACTED] USMC

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.

10/20/2023



ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

- MAJORITY Recommendation Approved (Partial Relief – I concur with the Majority conclusion and therefore direct the relief recommended by the Majority above.)
- MINORITY Recommendation Approved (Deny Relief – I concur with the Minority conclusion and therefore direct that no corrective action be taken on Petitioner's naval record.)
- Petitioner's Request Approved (Full Relief – I generally concur with the Majority conclusion that equitable relief is warranted in the interests of justice, but do not believe that the relief recommended by the Majority goes far enough to serve the interests of justice. Specifically, I believe that the mitigating circumstances did so significantly outweigh the severity of Petitioner's misconduct to justify the full relief that he requested. Accordingly, I direct that Petitioner be issued a new DD Form 214 reflecting that his service ending on 16 April 1997 was characterized as honorable, and that his narrative reason for separation was "Secretarial Authority" (with corresponding changes to his separation authority and separation code). Petitioner is also to be issued an Honorable Discharge Certificate.)

11/6/2023

