



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

██████████  
Docket No. 9724-23  
Ref: Signature Date

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

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Ref: (a) 10 U.S.C. §1552  
(b) MILPERSMAN 1910-146, Separation by Reason of Misconduct – Drug Abuse,  
9 October 2019  
(c) OPNAVINST 5350.4E, Navy Alcohol and Drug Misuse Prevention and Control,  
28 March 2022  
(d) MILPERSMAN 1910-142, Separation by Reason of Misconduct – Commission of a  
Serious Offense, 9 October 2019  
(e) 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  
(f) Manual for Courts-Martial (2019 ed.)

Encl: (1) DD Form 149 w/attachments  
(2) DD Form 214  
(3) ALNAV 057/19, subj: Prohibition on the Use of Hemp Products,  
dtg 071247Z AUG 19  
(4) NAVPERS 1070/605, History of Assignments  
(5) NAVPERS 1910/31, Administrative Separation Processing Notice, 27 January 2020  
(6) NDRB Discharge Review Decisional Document, Docket No. ██████████  
(7) eScreen Specimen Result Certificate, printed 22 October 2019

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; that his narrative reason for separation be changed to “Secretarial Authority” (with a corresponding change to his separation code); and that his reentry code be changed to “RE-1.”

2. The Board considered Petitioner’s allegations of error or injustice on 8 December 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 the enclosures; relevant portions of Petitioner’s naval record; and applicable statutes, regulations, and policies, to include reference (e).

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3. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board found 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 limitation and consider Petitioner's application on its merits.

c. Petitioner enlisted in the Navy and began a period of active duty service on 1 October 2018. See enclosure (2).

d. On 20 December 2018, the President signed into law the Agriculture Improvement Act of 2018, removing industrial hemp from the Controlled Substances Act (21 U.S.C. § 802(16)), and excluding from the definition of marijuana those hemp products containing up to 0.3 percent tetrahydrocannabinol (THC) on a dry weight basis.<sup>1</sup> As a result of this change in the law, hemp products, the use of which could cause a positive result for the presence of THC during a urinalysis, became commercially available in the United States, and Sailors and Marines could no longer rely upon packaging and labeling of hemp products to determine whether the product contains THC concentrations that could cause a positive urinalysis result. See enclosure (3).

e. After completing his initial recruit training, Petitioner reported for Basic Underwater Demolition/SEAL (BUD/S) training on 19 February 2019. See enclosure (4)

f. As a result of the change in the law discussed in paragraph 3d above, the Secretary of the Navy published ALNAV 057/19 on 7 August 2019. ALNAV 057/19 specifically prohibited all Sailors and Marines from knowingly using products made or derived from hemp, including cannabidiol, regardless of the product's THC concentration and it could be lawfully bought, sold, and used by civilians. It also specified that failure to comply with this prohibition constituted a lawful general order, the violation of which could be punished pursuant to Article 92, UCMJ, and could result in administrative and/or disciplinary action. See enclosure (3).

g. On 3 September 2019, Petitioner submitted to a routine urinalysis test which produced a positive result for THC. See enclosures (1) and (5).

h. The urine sample submitted by Petitioner on 3 September 2019 subsequently tested positive for the presence of THC with a concentration of 20 ng/mL. See enclosure (5).

i. On 7 October 2019, Petitioner received non-judicial punishment (NJP) for two specifications of failure to obey lawful general order in violation of Article 92, UCMJ, by using products made or derived from hemp and for seeking outside medical care in a non-emergency;<sup>2</sup>

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<sup>1</sup> This change had the effect of excluding use of certain hemp products containing THC from prosecution as a violation of Article 112a, Uniform Code of Military Justice (UCMJ).

<sup>2</sup> The former offense constituted an alleged violation of ALNAV 057/19, as discussed in paragraph 3f above, while the latter offense constituted an alleged violation of NSWBTCINST 1500.7B. See enclosure (5).

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and wrongful use of a controlled substance in violation of Article 112a, UCMJ. He was reduced in grade to E-2 and received 30 days of restriction. See enclosures (1) and (6).

j. Petitioner's subsequently appealed the NJP referenced in paragraph 3i above. In support of this appeal, Petitioner obtained a drug test from an independent lab which tested negative for any controlled or illegal substance. This appeal, however, was denied. See enclosures (1) and (7).

k. On 28 January 2020, Petitioner was notified that he was being processed for administrative separation by reasons of misconduct for commission of a serious offense and drug abuse. Specifically, he was put on notice that his misconduct constituting commission of a serious offense consisted of the two violations of Article 92, UCMJ, for which he received NJP (see paragraph 3i above), and that the drug abuse was evidenced by his positive urinalysis results. See enclosure (5).

l. On 29 January 2020, Petitioner elected to exercise his right to consult with counsel and to submit a statement for consideration by the separation authority. See enclosure (5).

m. On 8 April 2020, Petitioner was discharged from the Navy for misconduct due to drug abuse with a general (under honorable conditions) characterization of service.<sup>3</sup> See enclosure (2).

n. In September 2022, Petitioner applied to the Naval Discharge Review Board (NDRB) for the same relief that he presently requests from the Board. In his application to the NDRB, he contended that his discharge was unjust because he was not afforded the right to an administrative separation board and because his THC use was unintentional. Specifically, he claimed that he rated a separation board due to his unintentional drug use, and that the unintentional nature of his THC use warrants an upgrade of his characterization of service to honorable. On 7 March 2023, the NDRB denied Petitioner's request for relief, finding that he was not entitled to an administrative separation board since he had less than six years of service at the time of his notification of administrative separation processing and was being recommended for a discharge under honorable conditions, and that he knowingly consumed a product containing hemp seeds. Accordingly, the NDRB directed that Petitioner's characterization of service, narrative reason for separation (and corresponding separation code), and reentry code to remain unchanged. See enclosure (6).

o. Petitioner, through counsel, asserts that the following errors or injustices warrant the relief requested:

(1) He was found guilty at NJP for use of a controlled substance in violation of Article 112a, UCMJ, and discharged for drug abuse despite evidence that showed he innocently ingested hemp seeds.

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<sup>3</sup> Petitioner's record does not include the separation authority's action, or evidence of Petitioner's statement. In the absence of evidence to the contrary, the presumption of regularity applies to establish that Petitioner's discharge was ordered by proper authority and that Petitioner was afforded all process due to him in this regard.

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(2) He was found guilty at NJP for the use of a controlled substance in violation of Article 112a, UCMJ, and discharged for drug abuse, but he did not consume a substance prohibited by either Article 112a, UCMJ, or reference (b).

(3) Reference (c) requires all innocent ingestion cases to be reviewed by an administrative separation board. Although this was not the policy in effect at the time of Petitioner's discharge,<sup>4</sup> Petitioner's counsel asserted that a discharge is unjust where: (1) the policies and procedures under which the applicant was discharged materially differ from current policies and procedures; (2) the current policies and procedures represent a substantial enhancement of rights afforded to servicemembers; and (3) there is substantial doubt that the applicant would have received the same discharge under current policies and procedures.<sup>5</sup>

He asserts that he was diagnosed with an upper respiratory infection and bronchitis and was prescribed medication by the BUD/S medical staff on 30 August 2019, but his symptoms worsened over the course of the long holiday weekend. The following day, he decided to seek treatment from an Urgent Care clinic because it had become increasingly difficult to breath and his military medical options were closed for the holiday weekend. As he had a critical test coming up for his BUD/S training, on 2 September 2019 he purchased a product labeled "Hemp-Seed Blue" to help expedite his recovery. He claims that this product was marketed as being THC-free and containing "legal hemp seeds."<sup>6</sup> See enclosure (1).

#### MAJORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Majority of the Board found an injustice warranting partial relief.

The Board found no error in Petitioner's discharge for misconduct. First, Petitioner misstates the basis for his administrative separation. Although only the drug abuse basis pursuant to reference (b) appears on his DD Form 214, that was not the only basis for his administrative separation. He was also placed on notice and discharged for misconduct due to commission of a serious offense pursuant to reference (d) for two separate violations of lawful orders. Petitioner has essentially admitted to the conduct which constituted these violations, as his admitted purchase and consumption of "Hemp-Seed Blue" was a rather blatant and obvious violation of ALNAV 057/19 and he admitted to seeking outside medical care from an Urgent Care clinic under circumstances which clearly did not constitute an emergency. Any claim of ignorance that a product labeled "Hemp-Seed Blue" would violate the prohibition against the use of any hemp products in ALNAV 057/19 would lack credibility, as does Petitioner's claim that no military

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<sup>4</sup> Reference (c) was published on 28 March 2022.

<sup>5</sup> Petitioner's counsel cites to 32 C.F.R. § 70.9(c)(1) as the authority for this standard. However, that provision applies only to the NDRB review of the equity of a discharge and does not apply to the deliberations of this Board. This Board does not assess discharges for equity, but rather for error and/or injustice in accordance with reference (a).

<sup>6</sup> In support of this claim, Petitioner provided a photograph of the product, which was purchased by his attorney on 23 September 2019. However, nothing on the packaging suggested that it was "THC free." Rather, the packaging states "No Active THC." The Board also notes that none of the possible benefits from the product listed on the packaging corresponded to the symptoms from which he claimed to be seeking relief.

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medical facilities were available to him over the holiday weekend given his location and the fact that the Navy Medical Center ██████████ has an emergency room open at all times. Additionally, ignorance of lawful order is not a defense. Accordingly, even if the Board accepted Petitioner's claim of error in that he did not knowingly use a controlled substance in violation of Article 112a, UCMJ, his administrative separation would remain valid for misconduct due to commission of a serious offense pursuant to reference (d).

Petitioner has also not proven to this Board that he did not use a controlled substance in violation of Article 112a, UCMJ. Rather, he has proven only that he violated the prohibition of ALNAV 057/19 by consuming a product labeled "Hemp-Seed Blue." Petitioner's alleged violation of Article 112a, UCMJ, was evidenced by his positive urinalysis results, so the charged violation of Article 112a, UCMJ, was supported by substantial evidence. In the absence of evidence to the contrary, the Board applies the presumption of regularity to establish that naval authorities properly performed their functions. In this regard, the Majority presumed that the commander who adjudicated Petitioner's NJP considered the evidence of his "innocent ingestion" defense and found it lacking. Likewise, the Majority presumes that a judge advocate properly conducted a legal review of Petitioner's appeal and found the proceedings to be sufficient in law and fact in accordance with Part V of reference (f) before the appeal authority reviewed the evidence and also rejected Petitioner's innocent ingestion defense. Given the relative lack of probative value of the independent drug test performed weeks after the fact, and the questions regarding Petitioner's credibility related to his claimed reason for seeking outside medical care and the fact that "Hemp-Seed Blue" was not advertised to relieve any of the symptoms for which he claimed to be seeking relief, the Majority found this conclusion to be reasonable. Finally, the Majority noted that Petitioner had the option to refuse NJP and demand trial by court-martial if he desired for his innocent ingestion defense to be fully litigated with all the due process afforded in court-martial proceedings, but elected not to do so. This decision negated Petitioner's current claim of error, as he essentially agreed to have the validity of his defense adjudicated by his commander in relatively informal NJP proceedings, and waived the additional due process protections that would come with a court-martial in order to avoid the potential consequences of such a forum. Accordingly, even though the Majority believed it likely under the circumstances that Petitioner's positive urinalysis resulted from his consumption of "Hemp-Seed Blue," rather than the use of actual marijuana, it also found no error in his receipt of NJP and/or administrative separation for misconduct due to drug abuse based upon the evidence which clearly supported this allegation.

There was also no error in Petitioner's discharge without an administrative separation board. As Petitioner had less than six years of service and a discharge under other than honorable conditions was not contemplated, he was not entitled to an administrative separation board. The provision of reference (c) which requires review by an administrative separation board for cases involving unknowing ingestion of controlled substances was not in effect at the time of his discharge, and is not retroactive. If it had been in effect, Petitioner's command likely would have foregone his administrative separation on the basis of misconduct due to drug abuse and relied exclusively on the basis of misconduct due to commission of a serious offense. Given that the conduct at issue for the alleged drug abuse was virtually the same as that for the violation of ALNAV 057/19, the end result likely would have been the same.

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In addition to reviewing the circumstances of Petitioner's administrative discharge for error, the Majority also considered the totality of the circumstances in accordance with reference (e) to determine whether relief is warranted on the basis of an injustice. In this regard, the Majority considered, among other factors, the likelihood that Petitioner did not actually violate Article 112a, UCMJ; that Petitioner likely had no criminal intent in consuming "Hemp-Seed Blue," but rather was desperately seeking relief to enable him to successfully complete the demanding BUD/S training for which he had volunteered; Petitioner's otherwise successful performance during BUD/S training; Petitioner's relative youth and inexperience, which may have contributed to his decisions to use a prohibited substance and to seek civilian medical care under the circumstances; that Petitioner may have been entitled to an administrative separation board if his administrative separation process had been initiated under the current procedures; and the non-violent and relatively minor nature of Petitioner's misconduct. Given these considerations, the Majority believed that the interests of justice warranted partial relief. Specifically, while the Majority believed that Petitioner's discharge from the Navy was appropriate given Petitioner's blatant violation of orders, it found no reason to continue stigmatizing and undermining Petitioner's future employment opportunities for a mistake made after such a relatively short period of service. Accordingly, the Majority found that Petitioner's narrative reason for separation should be changed and his characterization of service upgraded. However, since Petitioner's violation of orders raised significant doubts regarding his potential for future service, the Majority determined that his reentry code should remain unchanged.

#### MAJORITY RECOMMENDATION:

In view of the conclusions 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 ending on 8 April 2020 was characterized as "Honorable"; that the narrative reason for his separation was "Secretarial Authority"; that his separation authority was "MILPERSMAN 1910-164"; and that his separation code was "JFF." All other entries currently reflected on Petitioner's DD Form 214, to include his reentry code, are to remain unchanged.

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 also found an injustice warranting partial relief.

The Minority concurred with the Majority conclusion that there was no error in Petitioner's discharge for misconduct with a general (under honorable conditions) characterization of service.

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The Minority also considered the totality of the circumstances to determine whether relief is warranted on the basis of an injustice in accordance with reference (e). In this regard, the Minority considered the same potentially mitigating factors as did the Majority, but reached a different conclusion with regard to the scope of relief appropriate to address the injustice identified. Specifically, the Minority believed it appropriate to relieve Petitioner of the stigma of his narrative reason for separation for the same reason suggested by the Majority, but did not believe that an upgrade to his characterization of service to be appropriate under the circumstances. The Minority found that the severity of Petitioner's misconduct outweighed the relatively limited mitigating circumstances which otherwise may have justified relief on injustice grounds. If Petitioner had been discharged under other than honorable conditions for the misconduct in question, the Minority likely would have found an upgrade to general (under honorable conditions) to be appropriate under the circumstances. However, as Petitioner's service is already characterized as general (under honorable conditions), the Minority did not believe that further relief was warranted in the interests of justice since Petitioner was, in fact, properly discharged for misconduct which warranted this relatively minor consequence. The Minority also believed that the Majority's recommended relief would set an unsustainable precedent by granting a discharge upgrade from a properly imposed discharge based upon such limited mitigating circumstances. Accordingly, the Minority believed that Petitioner's relief on injustice grounds should be limited to a change to his narrative reason for separation (and its associated separation code).

The Minority also concurred with the Majority conclusion that Petitioner's reentry code was, and remains, appropriate under the circumstances.

#### MINORITY RECOMMENDATION

In view of the above, the Minority 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 the narrative reason for his separation from the Navy on 8 April 2020 was "Secretarial Authority"; that his separation authority was "MILPERSMAN 1910-164"; and that his separation code was "JFF." All other entries currently reflected on Petitioner's DD Form 214, to include his characterization of service and reentry code, 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.

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.

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

1/16/2024

[REDACTED]

Executive Director

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 (Partial Relief – I concur with the Minority conclusion and therefore direct the relief recommended by the Minority above.)

\_\_\_ Petitioner’s Request Approved (Full Relief – I generally concur with the Majority conclusion, but I do not believe that the relief recommended by the Majority goes far enough to serve the interests of justice. Specifically, I believe that the interests of justice, and the best interests of the Navy, are best served by changing Petitioner’s reentry code to “RE-1” in addition to the other relief recommended by the Majority above. Accordingly, I direct the relief recommended by the Majority above, except that Petitioner’s reentry code is also to be corrected to reflect “RE-1.”

\_\_\_ Board Recommendation Disapproved (Deny Relief – I concur with Board’s determination that there was no error in Petitioner’s discharge for misconduct, but I do not concur with its determination that equitable relief is warranted in the interests of justice. Specifically, I agreed with the Minority’s determination that the severity of Petitioner’s misconduct outweighed the limited mitigating circumstances presented in his case. Accordingly, I found no basis for any relief on the basis of an injustice.)

1/20/2024

[REDACTED]

Assistant General Counsel (M&RA)

Signed by: [REDACTED]