



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

[REDACTED]
Docket No. 5224-23
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. § 1552
(b) USD (P&R) 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 (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/enclosures
(2) DD Form 214
(3) NAVACRUIT 1133/7, USN Alcohol and Drug Abuse Screening Certificate
(4) NAVPERS 1070/613, Administrative Remarks
(5) [REDACTED] Msg, subj: [Petitioner]; Recommendation for Admin Separation by Reason of Misconduct due to Drug Abuse, dtg 102320Z OCT 91
(6) [REDACTED] CO Memo 1910 FFG16/Legal, subj: Notice of Administrative Board Procedure Proposed Action, 3 October 1991
(7) Petitioner's Memo, subj: Statement of Awareness and Request for, or Waiver of, Privileges, 3 October 1991
(8) BUPERS Msg, subj: Misconduct Discharge ICO [Petitioner], dtg 171837Z OCT 91
(9) NDRB Docket No. ND93-00412, 29 April 1994
(10) NDRB Letter, 3 May 1994

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 discharge be upgraded.¹

2. The Board considered Petitioner's allegations of error or injustice on 6 October 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 references (b) and (c).

¹ Petitioner did not specify the precise relief that he desired. His desire for a discharge upgrade is implied by the context of his statement to the Board.

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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 5 July 1989. See enclosure (2). His enlistment documentation reflects that he acknowledged having used marijuana in the past, but his recruiter determined that an enlistment waiver was not required. See enclosure (3).

d. Petitioner received a commendation for his superior performance while deployed in support of [REDACTED] and [REDACTED] from 23 August 1990 through 10 March 1991. See enclosure (4).

e. On 3 October 1991, Petitioner received non-judicial punishment (NJP) for the wrongful use of cocaine and marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ). See enclosure (5).

f. By memorandum dated 3 October 1991, Petitioner was notified that he was being considered for an administrative separation from the Navy by reason of misconduct due to drug abuse, as evidenced by his positive urinalysis test for cocaine and tetrahydrocannabinol. See enclosure (6).

g. Petitioner immediately acknowledged receipt of the administrative separation notice, and waived his right to consult with counsel or to request an administrative discharge board hearing. See enclosure (7).

h. By message dated 10 October 1991, Petitioner's commander recommended that Petitioner be discharged from the Navy under other than honorable (OTH) conditions for misconduct due to drug abuse. In making this recommendation, Petitioner's commander noted that Petitioner admitted to drug use in his pre-NJP hearing statement and used drugs prior to entering the Navy. See enclosure (5).

i. By message dated 17 October 1991, the separation authority directed that Petitioner be discharged from the Navy under OTH conditions for misconduct due to drug abuse. See enclosure (8).

j. On 17 October 1991, Petitioner was discharged from the Navy under OTH conditions for misconduct due to drug abuse. See enclosure (2).

k. In December 1992, Petitioner requested a discharge upgrade from the Naval Discharge Review Board (NDRB). In support of his request, he contended that his overall service record was good and that his OTH discharge was based upon a single incident where his judgment was

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impaired due to drinking with her peers. He claimed at the time to be pursuing a college education to make himself a contributing member of society. See enclosure (9).

1. On 29 April 1994, the NDRB determined that Petitioner's discharge was proper as issued and that no charge was warranted. See enclosure (10).

m. Petitioner contends that his drug offense was the first time he had ever been in trouble while in the Navy. He admitted smoking some marijuana while visiting his home in [REDACTED], but claims that his ship had just received a new Captain who was looking to send a message. Accordingly, he was not considered for any lesser consequences, and received the harshest punishment possible. Petitioner further claimed that he was dealing with a lot of anxiety at the time due to his previous service in [REDACTED] and his naval service in general.² He believes that he could have learned how to deal with his anxiety better and remained in the Navy if he had been offered any help. See enclosure (1).

MAJORITY CONCLUSION:

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

The Majority found no error or injustice in Petitioner's discharge under OTH conditions at the time that it was executed. There does not appear to be any controversy regarding whether Petitioner actually committed the misconduct for which he was discharged, as he reportedly admitted to it at the time and has admitted to marijuana use in his present application. There also does not appear to be any controversy regarding the process by which Petitioner was discharged. He was properly notified that he was being considered for an administrative separation for misconduct due to drug abuse and that his discharge could result in a discharge under OTH conditions, and voluntarily waived all of his rights in that regard. Finally, there is no question that the misconduct for which Petitioner was discharged was of sufficient severity to justify a discharge under OTH conditions. Petitioner tested positive for the use of two separate controlled substances, and either such use alone carried a sufficient maximum sentence to sustain a discharge under OTH conditions.

Because Petitioner claimed that he was suffering from anxiety at the time of his drug use and implied that that condition contributed to his drug use, the Majority reviewed Petitioner's application in accordance with the guidance of reference (b). Accordingly, the Majority applied liberal consideration to Petitioner's claim that he was dealing with anxiety at the time and that that condition contributed to his drug use. Even applying liberal consideration, however, the Majority found insufficient evidence to support this claim. Petitioner provided no evidence, other than his own statement, to support his claim that he was dealing with anxiety at the time at the time of his drug use. While the Majority acknowledges that reference (b) provides that the applicant's statement alone may support the existence of a mental health condition claim upon the application of liberal consideration, the Majority did not find Petitioner's statement alone to be sufficient evidence in this case. Specifically, Petitioner claimed in 1992 that he used drugs

² Petitioner did not provide any documentation to support his claim that he was suffering from anxiety at the time, and did not respond to a letter from the Board inviting him to submit any such evidence that he might have.

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only because his judgment was impaired by alcohol use with his peers. As such, the Majority found it more likely that he used drugs because of his impaired judgment, rather than due to any anxiety that he was experiencing. Additionally, the Majority noted that he claimed to have used drugs while he was home on leave, when his service-connected anxiety would presumably be at its lowest point. Accordingly, even applying liberal consideration, the Majority found insufficient evidence to conclude that anxiety contributed to or mitigated Petitioner's drug use.

In addition to applying liberal consideration to Petitioner's claimed anxiety and its potential effect 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 interests of justice in accordance with reference (c). In this regard, the Majority considered, among other factors, that Petitioner's drug use was the only evidence of misconduct in his record; Petitioner's combat service in support of [REDACTED] and [REDACTED], for which he was commended; that Petitioner would not reasonably expect to receive such harsh consequences under similar circumstances today; Petitioner's claim that he has lived a "decent life" despite the stigma of his discharge; 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 factors sufficiently outweighed the relatively minor misconduct for which Petitioner was discharged, and that equitable relief was therefore warranted in the interests of justice. Specifically, the Majority believed that an upgrade of Petitioner's characterization of service to "General (under honorable conditions)" was warranted given the totality of the circumstances. The Majority also believed a change to Petitioner's narrative reason to be warranted to lessen the stigma associated with his discharge.

Although the Majority determined that the mitigating circumstances sufficiently outweighed the severity of Petitioner's misconduct to justify the equitable relief discussed above, it did not find those mitigating circumstances to so significantly outweigh the severity of Petitioner's misconduct to justify the extraordinary relief of upgrading his discharge 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 interests of justice:

That Petitioner be issued a new DD Form 214 reflecting that his service ending on 17 October 1991 was characterized as "General (under honorable conditions)"; that the narrative reason for his separation was "Secretary Plenary Authority"; that his separation authority was "MILPERSMAN 3630900"; and that his separation code was "JFF." All other entries reflected on Petitioner's current 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:

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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. The Minority also concurred with the Majority conclusion that, even upon the application of liberal consideration, there was insufficient evidence offered that Petitioner was suffering from anxiety, or that an anxiety-related condition contributed to his drug use

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 (c). In this regard, the Minority considered the same potentially mitigating circumstances as did the Majority, but reached a different conclusion. Specifically, the Minority noted that Petitioner tested positive for not just one, but two controlled substances. He tested positive for the use of both marijuana and cocaine, which made his offense more severe than a simple one-time drug use. Additionally, the Minority notes that Petitioner acknowledged only his marijuana use in his personal statement to the Board, which suggested to the Minority that he was minimizing his misconduct. The Minority also found that Petitioner has offered different explanations for his conduct over time. Specifically, in 1992 he claimed that his drug use was due to alcohol-impaired judgment, while in his current application he claims that it was due to the anxiety he was experiencing at the time. This inconsistency caused the Minority to doubt Petitioner's sincerity, which weighed against the grant of equitable relief. Finally, the Minority noted that Petitioner failed to provide the Board with any evidence of his post-service accomplishments or contributions to society which might otherwise justify the relief that he seeks. Rather, he simply stated that he has been able to "lead a decent life" in spite of discharge. As there was no error or injustice in his discharge under OTH conditions at the time that it was administered, it is Petitioner's burden to prove that equitable relief is warranted. As he made no effort to convince the Board that his post-service record warrants favorable consideration, the Minority was not inclined to vote in favor of such relief.

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.

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11/13/2023

[REDACTED]

ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

____ MAJORITY Recommendation Approved (Grant 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.)

11/24/2023

[REDACTED]