



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

██████████  
Docket No. 1125-24  
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

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) DD Form 214  
(3) P601-7R, Court Memorandum, 28 March 1994  
(4) ██████████ Message, subj: [Petitioner]: Recommendation for Admin Separation by Reason of Misconduct due to Drug Abuse, dtg 052100Z APR 94  
(5) BUPERS Message, subj: Admin Discharge Authorization PERS 832, dtg 121826Z APR 94  
(6) Naval Discharge Review Board Review of Discharge, Docket No. ND95-01372  
(7) Department of Veterans Affairs, Administrative Decision, 19 December 2023

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.<sup>1</sup>

2. The Board reviewed Petitioner's allegations of error or injustice on 23 February 2024 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 (b).

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.

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<sup>1</sup> Petitioner requested that his discharge be updated "to reflect the recent upgrade by the Department of Veterans Affairs [(VA)]." By letter dated 19 December 2023, the VA determined Petitioner's service for the period 17 December 1991 to 18 April 1994 to be "other than dishonorable" for VA purposes.

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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 consider Petitioner's application on its merits.

c. Petitioner enlisted in the Navy and began a period of active duty service on 17 December 1991. See enclosure (2).

d. On 28 March 1994, Petitioner received non-judicial punishment (NJP) for the wrongful use of marijuana in violation of Article 112a, Uniform Code of Military Justice (UCMJ). He was restricted for 45 days; required to perform extra duties for 45 days and to forfeit \$511.50 pay per month for two months; and reduced in grade to E-2. See enclosure (3).

e. On 1 April 1994, Petitioner was notified that he was being considered for administrative separation from the Navy for misconduct due to drug abuse. He subsequently waived all of his rights in this regard. See enclosure (4).

f. By message dated 5 April 1994, Petitioner's commander recommended that Petitioner be administratively discharged from the Navy under other than honorable (OTH) conditions for misconduct due to drug abuse. In making this recommendation, Petitioner's commander stated that Petitioner admitted to intentionally smoking marijuana, and that Petitioner should therefore "be separated at the earliest opportunity and the nature of that separation should be other than honorable" in accordance with the Navy's "zero tolerance" policy. See enclosure (4).

g. By message dated 12 April 1994, the separation authority directed that Petitioner be discharged from the Navy under OTH conditions for misconduct due to drug abuse. See enclosure (5).

h. On 18 April 1994, Petitioner was discharged from the Navy under OTH conditions for misconduct due to drug abuse. See enclosure (2).

i. On 11 September 1995, the Naval Discharge Review Board unanimously determined that no change was warranted in Petitioner's discharge. See enclosure (6).

j. On 30 September 2009, the VA determined that service to be dishonorable for VA purposes, and therefore a bar to VA benefits. See enclosure (7).

k. On 7 November 2023, the VA, relying upon a legal opinion from its Office of General Counsel which provided that the "illegal use of drugs involves moral turpitude," again determined that Petitioner's service was considered dishonorable for VA purposes because his drug use "represents a willful act ... committed without justification or legal excuse which gravely violates accepted moral standards and which, by reasonable calculation, would be expected to cause harm or loss to person or property." See enclosure (7).

l. By letter dated 19 December 2023, the VA reversed its decision of 7 November 2023, finding that the OGC opinion cited was improperly relied upon.<sup>2</sup> Resolving all doubt in Petitioner's favor, the VA determined that Petitioner's drug use did not constitute an offense involving moral turpitude and that his service was therefore considered to be other than

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<sup>2</sup> The VA OGC opinion in question pertained to a case involving multiple instances of drug use.

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dishonorable for VA purposes. See enclosure (7).

m. Petitioner asserts that relief is warranted solely based upon the VA's determination. See enclosure (1).

#### MAJORITY CONCLUSION:

After 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 in Petitioner's discharge under OTH conditions for misconduct due to drug abuse at the time it was administered. The occurrence of Petitioner's drug use is not in controversy, as he reportedly admitted to such use during his NJP hearing and has not denied it. It also appears that all procedural requirements were satisfied to administratively separate Petitioner from the Navy for misconduct, as he was properly notified of the proposed action and waived all of his rights in that regard. Finally, Petitioner's misconduct was of sufficient severity to justify a discharge under OTH conditions.

The Majority found no relevance in the VA's determination that Petitioner's service was other than dishonorable for VA purposes. The VA applies a different criteria for such determinations than does the Navy to characterize a Sailors service/discharge, and the VA's determination serves an entirely different purpose. As such, the VA's favorable determination in this regard has no bearing upon or relevance to the proper characterization of Petitioner's service as reflected in this naval record.

Although it rejected Petitioner's stated basis for relief, 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, the relatively minor and non-violent nature of Petitioner's misconduct; that marijuana use is considered to be relatively less severe misconduct today than it was in 1994; that Petitioner would reasonably expect a more favorable outcome under similar circumstances today than he received in 1994; that Petitioner's known misconduct consisted of only a single instance of marijuana use; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. Based upon these mitigating factors, the Majority determined that equitable relief is warranted in the interests of justice. Specifically, the Majority believed that Petitioner's characterization of service should be upgraded to general (under honorable conditions) to more accurately reflect the relative severity of the misconduct for which he was discharged.

#### 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:

That Petitioner be issued a new DD Form 214 reflecting that his service ending on 18 April 1994 was characterized as "General (under honorable conditions)." All other entries currently reflected on Petitioner's DD Form 214 are to remain unchanged.

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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 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 in Petitioner's discharge from the Navy under OTH conditions for misconduct due to drug abuse at the time that it was administered, and that the VA's determination that his service was other than dishonorable for VA purposes is irrelevant.

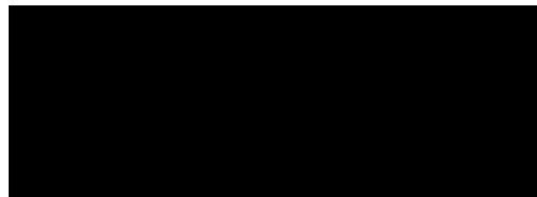
Like the Majority, the Minority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice. In this regard, the Minority considered the same potentially mitigating circumstances as did the Majority but reached a different conclusion. While agreeing that each of these factors might weigh in favor of equitable relief, the Minority nonetheless found that Petitioner failed to meet his burden to prove the existence of any injustice. As there was no error or injustice in Petitioner's discharge under OTH conditions for misconduct due to drug abuse at the time it was administered, it was his burden to prove that his post-service conduct and/or accomplishments have been sufficiently meritorious to justify changing the characterization of his naval service to something that it was not. In this regard, Petitioner provided no evidence, or even a description, of his post-service conduct and accomplishments which might otherwise justify such equitable relief. The Minority did not believe that Petitioner would need to provide much to justify an upgrade to his characterization of service under the circumstances, but was unwilling to gratuitously upgrade his characterization of service when he provided nothing in this regard.

**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.

3/21/2024



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ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

X 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.)

