



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

TAL
Docket No: 10623-14/
3553-11
7 July 2015

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b)

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

Pursuant to the U.S. Court of Federal Claims order in the case of 5 U.S.C. 552(b) (6) a three-member panel of the Board for Correction of Naval Records, sitting in executive session, again considered your application on 15 May 2015. The panel consisting of 5 U.S.C. 552(b) (6) 5 U.S.C. 552(b) (6) voted unanimously to deny your request. In this regard, your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. The documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record, and applicable statutes, regulations, and policies.

In addition to the foregoing documentation, as ordered by the court the Board considered the entire record of proceeding from the 8 February 2008, Administrative Discharge Board (ADB).

After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The record reflects that you enlisted in the Navy on 24 May 1989, at the age of 19. You served without disciplinary incident for over 18 years. However, on 8 August 2007, you received nonjudicial punishment (NJP) for wrongful use of cocaine. Subsequently, you were notified of pending administrative separation by reason of misconduct due to drug abuse. You elected to consult with legal counsel and requested an ADB. On 8 February 2008, the ADB found that you committed misconduct and

recommended that you be separated with a general characterization of service. The separation authority concurred with the recommendation of the ADB, and directed your commanding officer to issue you a general discharge by reason of misconduct (drug abuse) and on 19 September 2008, you were so discharged.

In your application, you raise a number of arguments that attack the basis for your separation; most prominently, the findings by the commanding officer (CO) who imposed NJP and the ADB that you knowingly and wrongfully ingested cocaine. The Board, in its review of your entire record and application carefully weighed all potentially mitigating factors, such as your many years of successful prior service, desire to upgrade your discharge, and your arguments to remove the NJP and ADB results. In particular, the Board carefully considered your arguments that the findings of wrongful use of cocaine were flawed because there was a failure to obtain "expert testimony explaining the underlying scientific methodology and the significance of the test result, so as to provide a rational basis for inferring that the substance was knowingly used and that the use was wrongful."

The Board was not persuaded that the CO or ADB committed any error or injustice in determining that you wrongfully used cocaine. Part V of the Manual for Courts-Martial lays out the rules and procedures for imposing NJP and allows for the consideration of "any relevant matter" in determining whether a servicemember committed an offense, provided certain procedural requirements are met, since the Military Rules of Evidence do not apply to NJP proceedings. In reviewing the record, the Board was unable to find any evidence that the NJP was not conducted in compliance with Part V of the MCM. Therefore, the Board determined that the CO properly considered the positive urinalysis in making his decision that you wrongfully used cocaine. Similarly, the rules of evidence do not apply at an ADB and the positive urinalysis was properly considered by the ADB when making its findings and recommendations. The testimony of the Senior Chemist/Expert Witness at the Navy Drug Lab in Jacksonville, FL, relating to that urinalysis was also properly considered. Regarding your additional arguments why the positive urinalysis should be discounted, e.g., good military character, 5 U.S.C. 552(b) (6) opinions, innocent ingestion, etc., the Board determined that the CO's and ADB's findings were not in error considering the "preponderance of evidence" burden of proof imposed on them when making a determination of misconduct. The Board determined it was not unreasonable for the CO and ADB to discount your evidence and conclude misconduct occurred based simply on the positive urinalysis.

You've also alleged that the ADB improperly reached its decision by considering your ownership of two homes and two automobiles and asking whether you were a drug dealer. The Board finds that

your financial situation, including your ownership of two vehicles and two homes, was introduced on direct examination of you by your counsel, during the ADB. There is no evidence that the questions by the ADB regarding possible drug dealing were in any way racially motivated. The Board finds that you were not charged with dealing drugs and the only basis for separation was drug use. You have also alleged that the ADB's consideration of evidence that you accepted NJP was inappropriate. Again, the Board finds that this topic was introduced by your counsel on direct examination of you. The Board also finds that your counsel didn't object to questions relating to these topics during the ADB.

You also alleged that the Board improperly considered your pre-service drug use. The Board finds insufficient evidence of error or injustice as there is no indication that the ADB considered your pre-service drug use as a basis for characterization of service. As part of your ADB, you submitted your appeal from NJP, which asserted that "I am persistently re-affirming that I have not and will not ever use any type of illegal drugs." After verifying that you made that statement, the ADB Members asked whether you also stated that you had used marijuana when you first came into the Navy. You stated that you had. The Board finds that the ADB was not considering your pre-service drug use as a basis for characterization of service but rather to contradict a statement you made. Indeed, the Board members' next question concerned another incident where you did not tell the truth.

Therefore, the Board concluded insufficient evidence exists to warrant granting relief in your case. In addition, the Board determined the seriousness of your misconduct warranted your discharge and characterization of service in light of the Navy's zero tolerance policy for drug use. The Board finds that the Navy demonstrated considerable leniency when it granted you a General discharge given that MILPERSMAN 1910-304, dated 30 Jun 2008 defines that conduct involving drug abuse qualifies for an under other than honorable (OTH) discharge. Considering the multiple Board reviews and the issues you raised in your court filing, the Board again finds that your application has been denied.

Sincerely,

5 U.S.C. 552(b) (6)

ROBERT J. O'NEILL
Executive Director