



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

█  
Docket No: 7136-21

Ref: Signature Date



Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 5 July 2022. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations, and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations, and policies, as well as the 22 February 2022 advisory opinion (AO) furnished by the Navy Office of Legal Counsel (BUPERS-00J) and your response to the AO.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

The Board carefully considered your request to set aside your 11 December 2017 non-judicial punishment (NJP); to remove all references to the NJP; restore your paygrade to E-6; overturn your separation from the Navy; grant constructive active duty credit from the date of your discharge to the present day or until you are retirement eligible; transfer to the Fleet Reserve; and back pay and allowances. The Board considered your contentions that a lack of due process, unfairness, inequities, and irregularities plagued your NJP and administrative separation (ADSEP) board process. As a result, you were found guilty at NJP and the ADSEP board

determined that you committed misconduct despite a lack of reliable evidence. The Board also considered your numerous contentions regarding your NJP proceedings; hair follicle testing; [REDACTED] urinalysis testing program; and ADSEP board proceedings. You noted that the Navy Discharge Review Board (NDRB) corrected your record by upgrading your discharge from General to Honorable, changed your reentry code to RE-1 and your separation code to JFF. You further contend that although the NDRB determined there were inequities in the case, it also ruled that you "accepted" NJP and was provided due process due to your willingness to accept NJP. Because you were assigned to a ship, you were not permitted to refuse NJP. Thus, you did not accept NJP, but NJP was forced upon you.

The Board, however, substantially concurred with the AO that your record should remain unchanged. In this regard, the Board noted that you tested positive for cocaine during a command urinalysis. You subsequently received NJP for violating Article 112a Uniform Code of Military Justice (UCMJ) for the wrongful use of a controlled substance. You were awarded reduction to the next inferior paygrade, forfeiture of pay, and restriction. The Board also noted that your NJP was imposed while you were assigned to a vessel, and according to the *Manual for Court Marital* (MCM) (2016 ed.), the right to demand trial is applicable *except* in the case of a person attached to or embarked in a vessel. The Board determined that although you had no right to demand trial, you were afforded due process and the same rights as any member subject to the UCMJ that is similarly situated. Based upon the available evidence you were properly notified of the offense, you acknowledged your Article 31(b) UCMJ Rights, you were afforded the right to consult with a military lawyer or civilian lawyer retained at your expense, you requested a personal appearance, and you did not include any witnesses to be present at your NJP.

Concerning the NJP proceedings and the commanding officer's (CO's) refusal to delay your NJP, the Board determined that there was sufficient evidence to prove each element of the offense by a preponderance of the evidence. The MCM provides that knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence and this permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge. The Board found no evidence that you somehow innocently or unknowingly ingested cocaine and you provided none. The Board also determined that your CO was not obligated to grant your request to delay the NJP, thus he did not violate any order or regulation by proceeding with your NJP. The Board further determined that your positive urinalysis constituted sufficient and reliable evidence that you violated Article 112a, UCMJ, your NJP is valid, and your CO acted within his discretionary authority pursuant to the MCM.

Concerning the results of the hair follicle test, the Board was not persuaded that the hair follicle test constitutes conclusive evidence that you did not use cocaine and determined that the only approved drug testing method is a certified Navy Drug Lab (NDL) tested urinalysis. The Board noted that you appealed your CO's finding of guilt at NJP and Commander, Carrier Strike Group [REDACTED], as the appeal authority, upheld the CO's finding of guilt at NJP. The appeal authority noted that, as the fact finder in this case, your CO did in fact consider and re-considered all of the evidence in your case, too include the hair follicle test. In addition, the appeal authority reviewed all of your evidence and found that your CO did not abuse his discretion in his findings

or punishment awarded and concluded that the findings at NJP were just and proportionate. The Board also noted that during the ADSEP board, the expert testified that hair samples can show use or not use and he testified that he was not an expert in whether one time use could show up in a hair sample.

Concerning the [REDACTED] urinalysis testing program, the Board found no evidence that your urine sample was tampered with or improperly tested and you provided none. The Board considered the NDL Great Lakes Discrepancy Report and noted that your specimen number was not listed as having a discrepancy. The Board also noted that the CO directed a command investigation and the investigation found that the integrity of the 18 positive urine samples, remain intact. Moreover, contrary to your contentions the urinalysis discrepancies did not reveal any errors by the NDL, none of the other samples in your batch tested positive, and the NDL confirmed that there were no discrepancy codes assigned to the sample that belonged to you. The Board acknowledged that the command investigation revealed concerns with the USS [REDACTED] urinalysis testing program, however, the Board determine that there is no evidence that the issues related to the urinalysis testing program affected the integrity of your urine sample.

Concerning the ADSEP board proceedings, the Board noted that the ADSEP board unanimously found that the preponderance of evidence supported the basis for separation for drug abuse, unanimously voted for your retention, but also recommended a characterization of service as General (under Honorable conditions) in the event of separation. Your CO and chain of command disagreed with the board's recommendation for retention and, on 14 May 2018, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN (M&RA)) ordered your separation from naval service. ASN (M&RA) considered the letter of deficiency furnished by your civilian defense counsel and your chain of command's response. Ultimately, he found no evidence that your sample was discrepant or mishandled or that your sample was improperly tested. The Board determined that your chain of command sufficiently addressed your arguments regarding members of the ADSEP board and the handling of requested documents related to the NDL Discrepancy Report. The Board found no errors or injustice regarding your ADSEP board proceedings.

The Board noted the corrections to your record by the NDRB, the Board, however, determined that your NJP proceedings and ADSEP board proceedings were conducted in accordance with applicable instructions. Those proceedings were reviewed by ASN (M&RA) along with the evidence in the case. The Board thus determined that you were afforded all the due process required by instruction. Moreover, the Board is not an investigative body and relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. After consideration of the voluminous evidence you provided, the Board found this evidence insufficient to overcome this presumption. Accordingly, the Board concluded that there is no probable material error, substantive inaccuracy, or injustice in the imposition of the NJP or your administrative separation from the Navy. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

7/19/2022

  
Executive Director

Signed by: 