



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

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Docket No: 7387-21

Ref: Signature Date

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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 you did not file your application in a timely manner, the statute of limitation was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 11 February 2022. The names and votes of the panel members 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, to include the Kurta Memo, the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). Additionally, the Board also considered an advisory opinion (AO) furnished by a qualified mental health provider. You were afforded an opportunity to submit an AO rebuttal, and you did do so.

You enlisted in the Navy and commenced active duty on 23 July 1999. Your pre-enlistment physical examination on 16 July 1999 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 11 December 2000, you received a "Page 13" counseling sheet documenting your fraudulent enlistment in the naval service for failing to disclose certain pre-service arrests/convictions. On 12 December 2000, you received a waiver from administrative processing for fraudulent enlistment. On 22 September 2002, you reported for duty on board Naval Air Station, █

On 29 October 2003, you received non-judicial punishment (NJP) for the wrongful use of cocaine. Your sample tested positive for the cocaine metabolite at 626 ng/mL, well above the established Department of Defense testing cutoff level. You did not appeal your NJP.

On 6 November 2003, you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with military counsel and, on 26 November 2003, you elected your right to request an administrative separation board (Adsep Board).

On 18 February 2004, an Adsep Board convened in your case. Following the presentation of evidence and witness testimony, the Adsep Board members consisting of an O-4, an O-2, and an E-9 unanimously determined that you committed the misconduct as charged. Subsequent to the misconduct finding, the Adsep Board members unanimously recommended that you be separated from the Navy with an other than honorable conditions (OTH) characterization of service. Your military counsel did not submit a letter of deficiencies post-Adsep Board. Ultimately, on 4 June 2004, you were separated from the Navy for drug abuse with an OTH discharge characterization and assigned an RE-4 reentry code.

On 30 April 2019, the VA granted you a service-connection for treatment purposes only for major depressive disorder. On 18 December 2020, the VA granted you a service-connection for treatment purposes only for major depressive disorder with PTSD and alcohol use disorder.

As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an initial AO dated 23 December 2021. The Ph.D. initially noted that there was no evidence you were diagnosed with a mental health condition on active duty. The Ph.D. noted that evidence provided by you supported a post-discharge mental health diagnosis. However, the Ph.D. noted that your unsworn statement at the Adsep Board provided alternative reasoning for your misconduct. The Ph.D. concluded that there was sufficient evidence you exhibited behaviors associated with a mental health condition on active duty, however, the preponderance of available objective evidence failed to establish your active duty misconduct could be mitigated by a mental health condition.

Following your AO rebuttal response that included certain VA records, a personal statement, character reference letters, and a letter from a VA mental health practitioner, the Ph.D. issued a second AO on 1 February 2022. The Ph.D. noted that you explained you used “legal” steroids to deal with your mental health symptoms and that your personal statement proffered an accidental ingestion explanation. Contrary to the first AO, the Ph.D. opined that there was sufficient evidence you exhibited behaviors associated with a mental health condition on active duty and your misconduct may be a mental health condition.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to: (a) at the time of your dirty urinalysis you were experiencing serious symptoms of PTSD, (b) your situation overseas and the sexual assault

incident in █ met the VA's definition of insanity, (c) you did whatever you could to cope and your misconduct was not willful because you were experiencing a mental health crisis at the time and not acting deliberately, (d) your misconduct was not persistent -- only one dirty urinalysis in five years, (e) your service was honest, honorable, faithful, and meritorious, (f) you may not be eligible for certain VA programs due to your OTH, (g) please consider your untreated mental health diseases of severe depression and PTSD while in █ and stationed overseas, (h) you want to apologize for the indiscretion of a dirty urinalysis, and (i) you used legal steroids to deal with your mental health issues for years following your traumatic experiences. However, given the totality of the circumstances, the Board determined that your request does not merit relief.

In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced and their possible adverse impact on your service. However, contrary to the AOs, the Board concluded that there was no nexus between any mental health conditions and/or related symptoms and your drug-related misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. The Board also concluded that although you have a post-discharge VA service-connection for PTSD and depression, your records contemporaneous to your service lacked sufficient evidence to establish a nexus between your mental health conditions/symptoms and your in-service misconduct. As a result, even under the liberal consideration standard the Board concluded that your cocaine use was not due to mental health-related conditions or symptoms. Even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. The Board also concluded that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should otherwise not be held accountable for your actions.

Moreover, the Board determined that it was factually and pharmacologically impossible for you to test positive for cocaine through the use of anabolic steroids. The Board noted the Navy Drug Lab expert's testimony at your Adsep Board where he stated that steroid use would not result in a positive urinalysis for cocaine. The Board also noted the expert's testimony where he opined that to obtain the cocaine metabolite level in your system it would involve repeated exposure to the drug. Thus, the Board unequivocally concluded that your cocaine use was knowing and willful, and any innocent/unknowing ingestion defense was not persuasive and entirely without merit.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide

the underlying basis for discharge characterization. The Board determined that characterization under OTH conditions is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. The Board carefully considered any matters submitted regarding your character, post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded given the totality of the circumstances your request does not merit relief. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your misconduct clearly merited your receipt of an OTH.

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,

2/22/2022

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Executive Director
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