



**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: 2214-22

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 17 June 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.

The Board determined that your personal appearance, with or without counsel, would 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.

You enlisted in the Navy 20 May 1999. Your pre-enlistment physical examination on 27 April 1999 and self-reported medical history both noted no psychiatric or neurologic conditions or



symptoms. You admitted pre-service marijuana use. On 6 September 1999 you reported for duty on board █ in █, █.

On 22 March 2001 you received a processing waiver for fraudulent enlistment for failing to disclose multiple pre-service arrests. On or about 26 November 2002 you received non-judicial punishment (NJP) for the wrongful use of a controlled substance (marijuana). You did not appeal your NJP.

On 13 December 2002 you were admitted to the Naval Medical Center █ for a second inpatient psychiatric treatment. You were diagnosed with an adjustment disorder with depressed mood, cocaine dependence with physiologic dependence, and cannabis abuse. While undergoing treatment, your inpatient records indicated that you tested positive for cannabinoids. Your medical records stated the following regarding your wrongful polysubstance drug abuse:

The patient is a 23 year-old African American-Italian male who was brought to the ER by his command for suicidal ideations and gestures as well as alleged homicidal threats. The pt. is currently on restriction pending a courts-martial for alleged use of a controlled substance while on active duty aboard ship. The patient states that his troubles began back in July of this year when he became increasingly dissatisfied with his job and began using cocaine as a way to relieve his stress. He subsequently increased his use to the point where he would use it on the day prior to work knowing that it would increase his chances of getting caught. He tested positive for cocaine during a command urinalysis and was scheduled for Captain's mast. Prior to the mast, the patient went UA four times including two episodes of missing ship's movement. He admits to smoking marijuana and using cocaine during these times. When he returned [to] duty he went immediately to mast where he was given a reduction in rate and placed on restriction. Approximately ten days into his restriction the patient tested positive for marijuana and was then charged with using a controlled substance while aboard ship and recommended for courts-martial... Since the source of the patients depressed mood and suicidal ideations was an impending courts-marital, he was given a diagnosis of an adjustment disorder with depressed mood. The patient also admitted to cocaine use that involved using higher quantities than usual to get the desired effect, using despite legal problems and spending a[n] increased amount of time trying to obtain the drugs. In addition, the patient admitted to using marijuana despite the fact it would lead him in further trouble. (emphasis added).

The mental health staff contacted your commanding officer (CO) soon after your initial assessment and your CO decided to expeditiously administratively separate you. You were discharged from the hospital on 17 December 2002.

Your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. On 18 December 2002 your command issued you a

“Page 13” notifying you that you were not eligible for reenlistment. Ultimately, on 19 December 2002 you were separated from the Navy for misconduct due to drug abuse with an other than honorable conditions (OTH) discharge characterization and assigned an RE-4 reentry code.

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 25 April 2022. The Ph.D. observed that you did not provide any post-service medical evidence in support of your claims. The Ph.D. determined that there was no evidence in the record demonstrating that you were not competent or responsible for your active duty behavior. The Ph.D. concluded by opining that while there was evidence of service-connected mental health conditions, there was insufficient evidence that your misconduct could be attributed to 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) you developed a mental health condition on active duty while going through a divorce, (b) you had no issues in three years of service until you began going through your divorce which put you in a very depressed state, (c) you were hospitalized for depression but continued to experience symptoms which resulted in your misconduct as an attempt to self-medicate such symptoms, (d) in spite of your issues your service was honorable in nature and received a Good Conduct Medal after three years of good service, and (e) you hope your discharge characterization is upgraded so you can access VA mental health services. 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, 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. As a result, even under the liberal consideration standard the Board concluded that your drug 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 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.

The Board was aware that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average was 2.33 in conduct. Navy regulations in place at the time of



your discharge required a minimum trait average of 3.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your pattern of serious misconduct which justified your OTH characterization of discharge.

The Board further 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 concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. 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. Moreover, absent a material error or injustice, the Board generally will not summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. Lastly, the Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. The Board carefully considered any matters submitted regarding your character, post-service conduct, and personal/professional accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that 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 serious 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,

6/30/2022

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