



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: 3617-22

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 reconsideration application on 24 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 the 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 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo).

You enlisted in the Marine Corps and commenced active duty on 4 February 2013. Your pre-enlistment physical, on 26 July 2012, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms. As part of your pre-enlistment paperwork you disclosed pre-service experimental marijuana use three times in April 2011. You denied all other drug abuse and alcohol abuse. As part of your enlistment application, on 23 July 2012, you signed the "Statement of Understanding Marine Corps Policy Concerning Illegal Use of Drugs," where you expressly acknowledged that illegal distribution, possession, or use of drugs was not tolerated in the Marine Corps.

On 5 January 2017, your command issued you a “Page 11” counseling warning (Page 11) documenting your lack of judgment, poor decision making, and inability to report back on time for duty. The Page 11 expressly warned you that failure to take corrective action may result in judicial or adverse administrative separation, including but not limited to administrative separation. You did not submit a Page 11 rebuttal statement.

Following your positive urinalysis test for both marijuana (THC) and cocaine, on 25 July 2017, your command notified you of administrative separation proceedings by reason of misconduct due to drug abuse. You consulted with military counsel and subsequently elected your right to request an administrative separation board (Adsep Board).

On 7 November 2017, an Adsep Board convened in your case. At the Adsep Board, you were represented by a Marine Corps Judge Advocate. Prior to the substantive portion of the Adsep Board, both sides were given the opportunity to voir dire each board member and challenge any board member for cause based on such inquiries. Neither you nor the recorder challenged any member for cause.

At the Adsep Board, a Navy Drug Screen Lab Chemist (Chemist) testified that your urine sample tested positive for both THC metabolites (73 ng/ml) and cocaine (776 ng/ml), well above the Department of Defense testing cutoffs for each drug of 15 ng/ml and 100 ng/ml, respectively. The Chemist testified that there was no spillage, seepage, or contamination of your urine sample, and stated that if metabolites are found in the urine that means the tested person ingested it. The Chemist also testified regarding the hair sample test results you provided. The Chemist noted that the toxicology report showed traces of Gamma Hydroxybutyric Acid (GHB) at an endogenous level (less than 50 picograms) well below the cut off level of 3,000 picograms. The Chemist determined that given the toxicology report results, there was not an external source for GHB in your system, and determined that your GHB levels were instead endogenous to your body. The Chemist concluded, in stark contrast to your expert witness, that you were not the victim of unknowing GHB intoxication given that the lab results are consistent with endogenous levels of GHB in your system and not from external introduction. Your defense expert witness opined that you did not knowingly use drugs because, *inter alia*, the GHB found in the hair string was positive for GHB and she never met someone who wants to go out and party and take GHB. Your expert witness did not have an explanation for why THC was present in your urine. Your expert also testified that she has never met a drug user who wants to take GHB and also wants to use other substances.

Following the presentation of all evidence and witness testimony, the Adsep Board members, consisting of an O-4, an O-3, and an E-7, determined by majority vote that the preponderance of the evidence proved you committed the misconduct as charged. Subsequent to the misconduct finding, the Adsep Board members recommended that you be separated from the Marine Corps with a General (Under Honorable Conditions) (GEN) characterization of service. The O-3 board member submitted a minority report. On 27 November 2017, your detailed defense counsel

submitted a letter of deficiencies (LOD). Your defense counsel argued, in part, that the Adsep Board contained a legal deficiency resulting in forfeiture of due process, and that given the confusion of the members and lack of full consideration of the evidence presented, that the Separation Authority retain you. Your commanding officer (CO)'s LOD endorsement noted your erratic behavior and demeanor and any statements made following the urinalysis (prior to the results being made available) were inconsistent with the evidence presented at the Adsep Board.

The Staff Judge Advocate to the Separation Authority concluded that the Adsep Board proceedings were legally and factually sufficient. On 21 December 2017, the Separation Authority approved and directed your separation for drug abuse with a GEN characterization and an RE-4B reentry code. The Separation Authority clearly stated in his discharge approval that prior to making his separation decision he considered your counsel's LOD. Ultimately, on 8 January 2018, you were separated from the Marine Corps for misconduct due to drug abuse with a GEN discharge characterization and assigned an RE-4B reentry code.

On 1 October 2019, the Naval Discharge Review Board (NDRB) denied your initial application for relief. The NDRB determined your discharge was proper as issued and no change was warranted. The NDRB specifically disagreed with your due process and innocent ingestion defenses. In denying relief the NDRB, *inter alia*, concluded that nothing in the record indicated your discharge was in any way inconsistent with U.S. Naval Service disciplinary standards, and noted that you made no effort to explain how THC was found in your system alongside the cocaine.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo. These included, but were not limited to: (a) you were denied due process at your Adsep Board, (b) the Adsep Board was fundamentally unfair, (c) the majority of the Adsep Board members did not impartially provide you with a fair hearing, (d) you did not knowingly use any illegal drugs, (e) you believe you were provided a "date rape" drug and had little to no recollection of what occurred when you visited an area bar on the evening in question, (f) those who testified from my current command stated I was a good Marine and contributed to the mission and should be retained, (g) two of the three Adsep Board members did not want to consider the evidence and wanted a quick vote within ten minutes, and (h) that Board should correct the blatant and documented misconduct of those two Adsep Board members. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments, or advocacy letters.

The Board was not persuaded by your contentions and concluded that your proffered arguments lacked merit. First and foremost, the Board concluded by clear and convincing evidence that you knowingly used not one, but two different illegal controlled substances. The Board determined that cocaine and THC metabolites were present in your system because you indeed knowingly

ingested them. The Board noted that the Chemist concluded that any such unknowing GHB intoxication theory was not plausible given the endogenous GHB levels from your tested hair samples. The Board also took issue with your board member misconduct contention and noted from the summarized record that the Adsep Board closed for deliberations at 1626 hours and reconvened at 1907 hours, a period of two hours and forty-one minutes. Even assuming arguendo that there may have been an initial rush to judgment, the Adsep Board summarized record otherwise indicates that the members deliberated for such time to allow them meaningfully and thoughtfully consider, weigh, and discuss all of the evidence presented prior to rendering a decision. Lastly, the Board noted that the Separation Authority stated on the record on 21 December 2017 that he considered the LOD prior to making his discharge decision. The Board noted that had the Separation Authority determined the LOD substantiated any due process, procedural, substantive, and/or evidentiary issues adversely tainting the Adsep Board, the Separation Authority could have ordered a new Adsep Board at such time.

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. Additionally, the Board determined that illegal drug use by a Marine is contrary to USMC core values and policy, renders such Marines unfit for duty, and poses an unnecessary risk to the safety of their fellow Marines. The Board determined that characterization under GEN or Other Than Honorable conditions (OTH) conditions is generally warranted for misconduct and 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 Marine. The Board determined that the record clearly reflected your misconduct was intentional and willful and indicated you were unfit for further service. Moreover, the Board noted that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not otherwise be held accountable for your actions.

The Board also 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. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. 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. As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your substantiated drug-related misconduct clearly merited your receipt of a GEN, and that such discharge was in accordance with all Department of the Navy directives and policy at the time of your discharge. After applying liberal consideration, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting clemency in the form of an upgraded

characterization of service. 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,

7/5/2022

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Executive Director

Signed by: █