

DEPARTMENT OF THE NAVY

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

> Docket No: 5458-22 Ref: Signature Date



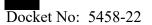
Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 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 4 November 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 to 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 Navy and began a period of active duty on 3 August 2015. On 15 December 2015, you received a positive result for a urinalysis test reflecting metabolites for oxazepam, a controlled substance in the benzodiazepine class, with a confirmatory test concentration of 121 ng/mL (in excess of the 100 ng/mL confirmatory cutoff). You were subject to nonjudicial punishment (NJP), on 22 January 2016, for a single violation of Article 112a for wrongful use of a controlled substance.

Upon notification of administrative separation processing for misconduct due to drug abuse, you requested a hearing before an administrative board. While awaiting this hearing, you obtained a hair follicle test, on 10 March 2016, which reflected results of negative for all tested substances, to include benzodiazepines (benzos) with a cutoff at 200 pg/mg. On 1 September 2016, a letter appointing the individuals assigned to the board indicated that you were represented by both civilian legal counsel as well as a detailed military judge advocate; however, the record of hearing for your administrative board, which convened on 7 December 2016, identifies a single



of the Record of Proceedings documents your Respondent's Case to include exhibits presented by your counsel which were identified as "Exhibit A." The record reflects that the Recorder had no objections to the Respondent's Exhibits. The Senior Member accepted the exhibits and made them part of the record. Upon review of all matters presented, to include your sworn statement, following which you were subject to cross examination, the members of the board unanimously found it more likely than not that the evidence substantiated the basis of drug abuse.

Notwithstanding their finding of misconduct, the members recommended by a vote of 2-1 that you should be retained in the Navy and not separated. Commanding Officer,

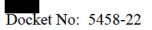
forwarded a concurring recommendation; however, the Commander,

Navy Personnel Command (CNPC), determined that the substantiated basis of misconduct due to drug abuse warranted separation, and you were discharged with a General (Under Honorable Conditions) on 27 July 2017.

On 22 May 2018, the Naval Discharge Review Board (NDRB) considered your request for an "Honorable" discharge and changes to your narrative reason for separation, separation authority, and reentry code, based on contentions that a false positive urinalysis resulted from a combination of over the counter (OTC) medications. Ultimately, the NDRB determined your discharge was proper as issued.

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, your desire to upgrade your discharge, your evidence of post-discharge character, your detailed contentions that you were administratively discharged due to a false positive result for the urinalysis, you were denied an opportunity for a retest to establish that OTC medications resulted in a false positive, the evidence of your negative hair follicle test was denied admission into evidence, and that actual evidence of wrongful drug use was inconclusive. For purposes of clemency and equity consideration, the Board noted the supporting documentation you submitted with your application.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and that it involved a drug offense. While the Board noted you submitted a request to the Naval Criminal Investigative Service seeking retesting to verify whether the same false positive might occur with the combination of OTC medications you purport to have taken, the Board found that the preponderance of the evidence does not support your contentions of a false positive. The Board observed that your hair follicle test indicated a negative result but the Board concluded that this evidence was insufficient to support relief. Specifically, the Board observed that the single test performed by the civilian testing facility indicates a cutoff for benzos similar to the initial cutoff used by the Naval Drug Lab; however, the confirmatory cutoff specific to oxazepam is not identified. The Board further lacked sufficient information to compare the two methods of testing or even information which might support the reliability of the test results. For example, the Board lacked evidence that, in the approximately 3 months between your positive urinalysis and your hair follicle test, the hair tested would have had the same exposure as if it had been tested at the time of your December 2016 urinalysis. Additionally, although you contend that this test was refused admission into evidence, the Board observed no indication that your counsel offered this test as an exhibit.



Under a presumption of regularity, the Record of Proceedings would have identified that your counsel offered an exhibit which was then excluded by the Senior Member and, presumptively, your counsel would have objected on the record to this exclusion which, if upheld, would have resulted in your counsel addressing, via a letter of deficiency. Given that no such evidence is present in your Record of Proceedings, and absent evidence to the contrary, the Board concluded that your counsel, in consultation with you, elected not to submit this evidence during your hearing.

The Board further observed that you were discharged by CNPC, contrary to the recommendation of the majority of the administrative board and by your commanding officer. However, CNPC possesses the authority and discretion to render such decisions, with the limitation that your discharge must be characterized as under honorable conditions. In this case, the Board observed that you were, in fact, discharged under honorable conditions.

Although you submitted several additional matters to substantiate your post-discharge character, such as your employment verification, a clear criminal background check, and attestations to your general good character, the Board concluded that the potentially mitigating factors you submitted for consideration at this time are insufficient to outweigh your wrongful use of a controlled substance as determined by the unanimous determination of the members of your administrative separation. As a result, the Board concluded significant negative aspects of your active service outweigh the positive aspects and continues to warrant a General (Under Honorable Conditions) characterization. While the Board commends your post-discharge good character, even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting an upgraded characterization of service as a matter of clemency or equity. 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 the 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 is attached 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.

