



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: 5488-22
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 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 August 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 began a period of active duty on 19 September 2005. You served without incident until an investigation by the Criminal Investigation Division (CID) discovered that you had used another Marine's Vicodin and wrongfully possessed Prozac. You accepted nonjudicial punishment (NJP) for wrongful use and possession of those controlled substances and were processed for administrative separation by reason of misconduct due to drug abuse. In your notification of processing, your commanding officer informed you that he was recommending suspension of your separation or, alternatively, if you were separated that he was recommending separation under honorable conditions. You elected to waive consultation with legal counsel and your right to a hearing before an administrative board. Instead, you elected to submit a written response stating, "Most of my career I have been on light duty and unable to perform ... in a satisfactory manner ... I believe that I should not be retained for it could give other Marines the idea that they could get abuse." In addition to your commanding officer, both your first sergeant and battery commander recommended that you be retained and given an

opportunity to complete your enlistment. However, Commanding General, ██████████, directed your separation under Other Than Honorable (OTH) conditions without suspension. As a result, you were discharged on 4 May 2007 with an OTH.

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 and your contentions that you incurred two inguinal hernias which required surgery and repair mesh, that the mesh had unknowingly malfunctioned and caused continuous pain, that you elected to use the other Marine's painkillers as a result of your chronic condition, and that you ultimately were prescribed prescription painkillers once the ruptured mesh was discovered. However, you assert this occurred after you had already misused someone else's medication and accepted NJP. You also describe your post-discharge character as additional evidence in support of clemency but did not provide supporting documentation describing post-service accomplishments or advocacy letters.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJP, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included two separate drug offenses. While the Board noted the positive recommendations of your command and considered it reasonable that your chain of command had awareness of mitigating factors in your favor, the Board lacked sufficient evidence to substantiate your claims regarding the effect of your contended medical condition upon the circumstances of your misconduct. Additionally, the Board was not persuaded by your arguments regarding the extenuating circumstances of your drug use since you had reasonable alternatives to wrongfully procuring and using controlled substances. As a result, the Board concluded your conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH characterization. While the Board commends your post-discharge good character and accomplishments, 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 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.

Sincerely,

8/19/2022

[REDACTED]

Executive Director

Signed by: [REDACTED]