



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: 6278-22

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 23 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 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 qualified mental health provider and your response to the AO.

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 originally enlisted in the Navy and entered active duty on 19 July 1989. Your pre-enlistment physical examination, on 16 May 1989, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. As part of your enlistment application, on

13 May 1989, you signed and acknowledged the “Drug and Alcohol Abuse Statement of Understanding.” After a period of Honorable service, you reenlisted on 14 October 1992. On 11 January 1993, you received a briefing on the Navy policy on drug and alcohol abuse, the Navy’s urinalysis screening program, and the legal and administrative consequences of illicit drug use.

On 6 August 1993, you received non-judicial punishment (NJP) for unauthorized absence (UA), and making a false official statement. You not appeal your NJP. On 9 August 1993, your command issued you a “Page 13” counseling sheet (Page 13) documenting your NJP. The Page 13 expressly warned you that a failure to take corrective action may result in disciplinary action and in processing for administrative separation. You did not submit a Page 13 rebuttal statement.

On 28 November 1994, you checked into your new command. On 30 November 1994, you provided a urine sample. On 15 December 1994, a Navy Drug Screening Laboratory message indicated your urine sample tested positive for marijuana (THC) above the proscribed Department of Defense metabolite cut-off level for THC.

On 5 January 1995, you received NJP for the wrongful use of a controlled substance (marijuana). You appealed your NJP. In your NJP appeal, you specifically denied ever using marijuana and argued, in part:

I believe my test result was a false positive or there was some type of procedural error, there has been an increased number of discrepancies noted by the Navy Drug Lab, Jacksonville in the past year...I have never used any type of illegal substance during my entire life I request that I have an opportunity to take a polygraph examination before the submission of my appeal to the admiral and the results of the test be included in the package. I am a conscientious, reliable, and responsible sailor who understands and fully supports the Navy's drug policy...I would never jeopardize my membership or my career with the Navy by doing any type of illegal substance.

On 11 January 1995, your command unfavorably endorsed your NJP appeal. Your Commanding Officer (CO) specifically noted:

...a review of his dental and medical records as well as the hospital pharmacy’s records shows no record of any prescriptions or other drugs prior to 2 December 1994.

On 20 January 1995, your NJP was denied by higher authority. On 20 January 1995, your CO requested a retest of your urine sample. On 23 January 1995, your urine sample tested positive again for THC at the same metabolite level as the original urinalysis test result.

On 23 January 1995, your command notified you that were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with counsel and elected your right to request an administrative separation board (Adsep Board).

On 3 February 1995, an Adsep Board convened in your case. At the Adsep Board you were represented by counsel. You provided sworn testimony at the Adsep Board and again vehemently denied any wrongful drug use. You testified, in part:

I did not use marijuana in November 1994. I have never used illegal drugs. I would be willing to do anything to prove to the command that I did not use drugs. I have offered before and offer now to take any type of test. I think that something went wrong with the test. I don't know what and I can't pin point it. That is not the type of person I am and not the type of atmosphere I have ever been around. It is not something I would ever do. I have offered to take lie detector tests and all kinds of tests but I was not given the opportunity to do so...When they came up to me and told me that I had THC in my urine I didn't know what THC was. They said it was marijuana and I tried to tell them that they had the wrong guy. I am sorry but it is not the type of person I am. Here I am one day doing my job and the next day someone comes up and tells you that you popped positive on your urine test. Regardless of what anyone else might think, I do know what I did and what I didn't do and that is something I didn't do...My urine was retested and again affirmed...There have been four tests run on my urine sample and they all have been positive...I have no reason to believe that it was not my urine that was tested...

Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined by a preponderance of the evidence 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 (OTH) characterization of service. Ultimately, on 20 March 1995, you were discharged from the Navy for misconduct with an OTH discharge and assigned an RE-4 reentry code.

On 18 November 2009, the Naval Discharge Review Board denied your initial application for relief. On 8 April 2019, the BCNR denied your initial petition for relief. On 25 September 2019 the BCNR again denied you any relief. On 23 June 2021, the Department of Veterans Affairs (VA) determined that your service was considered Honorable for their internal purposes. In March 2022, the VA granted you a service-connection for PTSD.

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, your desire for a discharge upgrade and contentions that: (a) since your last BCNR application the VA diagnosed you with PTSD as a result of trauma resulting from a dive accident, (b) you are still battling PTSD today, (c) you were diagnosed with Wolff-Parkinson-White syndrome on active duty, and (d) the VA determined your service was deemed "honorable." For purposes of clemency and equity

consideration, the Board noted you provided a personal statement and supporting evidence with your application.

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 AO dated 25 October 2022. The Ph.D. stated in pertinent part:

There is no evidence of a diagnosis of PTSD during military service. Post-service, he has received a diagnosis of PTSD that is temporally remote to his military service and attributed to his military service. It is possible that his marijuana use following the diving accident could be attributed to an attempt to self-medicate unrecognized symptoms of PTSD. Unfortunately, the Petitioner's report is unreliable, as his statements regarding his traumatic precipitant and his marijuana use have not been consistent over time. Additionally, his first NJP, which included making a false official statement, occurred prior to the diving accident and could not be attributed to PTSD.

The Ph.D. concluded, "it is my considered clinical opinion there is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence all of his misconduct may be attributed to PTSD."

In response to the AO, you submitted a brief from your legal counsel that contained arguments in rebuttal and another personal statement that provided additional information regarding the circumstances of your case.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First and foremost, the Board noted the inconsistencies in your story over time regarding your drug use, and the Board determined such inconsistencies negatively affected your credibility in the process and suggested a lack of candor with your petition. The Board noted that when you were originally charged with drug use in late 1994/early 1995, you categorically denied any/all drug usage at such time or at any point in your life. At your Adsep Board in February 1995, you testified under oath and continued to unequivocally deny any drug use, and even attempted to lay blame on an error with the urinalysis test. The Board noted that you have now completely shifted your story to admit that you knowingly and willingly used marijuana, but that your drug use was done instead to self-medicate undiagnosed PTSD symptoms following a diving accident.

In accordance with the Hagel, Kurta, 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 convincing evidence of any nexus between any mental health conditions and/or their related symptoms and your misconduct, and the Board 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, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms

