



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

█
Docket No. 6344-22
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 application 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 the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo).

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 U.S. Navy and entered active duty on 24 August 1993. Your enlistment physical examination, on 12 August 1993, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 20 May 1997, you received non-judicial punishment (NJP) for insubordinate conduct. You did not appeal your NJP. The same day your command issued you a "Page 13" counseling

warning (Page 13) documenting your NJP. The Page 13 advised you that any further deficiencies in performance may result in disciplinary action and in processing for administrative discharge.

Your separation physical examination, on 19 August 1997, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 22 August 1997, you were honorably discharged at the completion of your required active service. Upon your discharge, you did not immediately affiliate with the U.S. Navy Reserve (USNR) and had a break in service.

You enlisted in the USNR for three years on 17 March 2009. On 16 October 2009, you mobilized in support of ██████████ and were honorably discharged on 20 October 2010 upon completion of your required active service. On 11 August 2001 and 9 August 2017, you reenlisted in the USNR for six and four years, respectively.

On or about 16 November 2019, you provided a urine sample over a scheduled drill weekend at ██████████. The Navy Drug Screening Laboratory (NDSL) correspondence indicated your urine sample tested positive for valium metabolites, namely, nordiazepam, oxazepam, and temazepam at levels of 314 ng/ml, 486 ng/ml, and 1,106 ng/ml, respectively, each above the Department of Defense (DoD) testing cut-off levels. On the day you provided your sample, you did not note in the testing register that you were taking any current medications or prescriptions.

On 1 June 2020, ██████████ requested from the NDSL a technical review of your drug test results to determine if any medications as previously noted in your Navy medical record would produce a false positive drug test result. On 10 June 2020, the NDSL conclusively determined that you did not have any valid prescription that would have supported the positive urinalysis results.

On or about 7 August 2020, ██████████ notified you via U.S. Certified Mail that you were being processed for an administrative discharge by reason of misconduct due to drug abuse (Certified Mail # ██████████). The package contained an administrative separation notification form and a corresponding election of rights form for you to complete and send back to the NOSC within thirty (30) days. The notification package was sent to your home of record address in ██████████, ██████████. "USPS Tracking" indicated that the package was delivered on 12 August 2020, at approximately 11:09 a.m. local time, to your ██████████, ██████████ address, and the certified mail return receipt indicated that someone at your residence signed for the package.

Unfortunately, your failure to complete the administrative separation election of rights paperwork and return it to ██████████ on a timely basis within thirty (30) days operated as a waiver of all of your rights in connection with the proposed administrative separation. Accordingly, on 6 October 2020, the ██████████ Commanding Officer recommended to Commander, Navy Personnel Command (PERS-913) that you be separated for misconduct with a General (Under Honorable Conditions) (GEN) characterization of service. On 2 November 2020, PERS-913 approved and directed your discharge for misconduct due to drug abuse with a GEN characterization of service and an RE-4 reentry code. Ultimately, on or about 8 April

2021, you were separated from the USNR for misconduct with GEN characterization of service and assigned an RE-4 reentry code. In this regard, you were assigned the correct characterization and reentry code based on your factual situation.

On 30 November 2021, the Naval Discharge Review Board (NDRB) denied your initial application for relief. You had contended with the NDRB, in part, that your discharge was improper because you did not knowingly or purposefully ingest drugs, you were never notified by the Navy about its intent to administratively separate you, you were separated in absentia, and not provided the opportunity to appear before an administrative separation board.

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 for a discharge upgrade and reinstatement to the USNR. In addition, you contend that: (a) you were unlawfully discharged without proper notice and in violation of your due process rights, (b) you were never provided the opportunity to contest the allegations at an administrative hearing, (c) you had more than nineteen (19) years in the USNR and were only one year from retirement, (d) no one at ██████████ informed either you or your chain of command of the positive urinalysis results, (e) the notification package was sent to the wrong address and no one at ██████████ ever followed up with an email or phone call, (f) by the time you were made aware of the positive urinalysis and separation notification you had already been separated from the USNR, (g) you were never afforded the opportunity to request an administrative separation board which would have likely found no basis for misconduct and retained you, (h) the punishment was disproportionate under the circumstances, and (i) you have never used illegal drugs in your life. For purposes of clemency and equity consideration, the Board considered the supporting documentation you provided in support of your application.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First, the Board determined that you did not have close to nineteen years of creditable service in the Navy. Given your break in service from August 1997 to March 2009, by the time you were discharged in April 2021 you had only accrued approximately sixteen years and one month of creditable service for retirement purposes.

Second, the Board determined that any contentions regarding not receiving any notice of your proposed administrative separation and thus your due process rights were violated was without merit. The Board determined that ██████████ properly mailed the administrative separation package to you via USPS Certified Mail, and the preponderance of the evidence shows that it was delivered and received, on 12 August 2021, at your home of record. The Board also determined that the evidence you proffered did not rebut the presumption of regularity to support the official actions of public officers in this case, or the reliability of the U.S. Postal Service. Simply asserting you either did not receive the administrative separation package, or that the mailing address was incorrect, thus resulting in the package being delivered to the wrong address, was insufficient rebuttal evidence. The Board concluded that the evidence overwhelmingly indicated you received the administrative separation package and failed to respond back to the NOSC in a timely fashion, thus acting as a waiver of all of your rights in

connection with the proposed separation. The Board concluded that your due process arguments were not supported by the evidence and not persuasive.

Third, the Board found no irregularities with your urinalysis test results. The Board unequivocally determined that the evidence of record indicated that you wrongfully used a valium-related substance or depressant in violation of Department of the Navy policy and the Uniform Code of Military Justice. The Board noted that the burden of proof at NJP or an administrative separation board is merely the preponderance of the evidence. The Board determined the NDSL correspondence alone with the urinalysis results was sufficient to meet the Government's burden of proof under the preponderance of the evidence standard without any other corroborating evidence. The Board also noted that Department of the Navy policy indicated that prescription drugs are inappropriately used when they are used outside of their intended purpose, beyond their prescribed dates, in excess of their prescribed dosing regimen, or when a service member uses another individual's prescription.

The Board also noted that knowledge of the presence of the controlled substance may be inferred from the presence of the metabolite(s) in your body or from other circumstantial evidence, and that this permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge. The Board concluded that you did not present sufficient evidence to rebut the permissive inferences of knowledge and wrongfulness.

Even assuming arguendo that additional evidence was needed to satisfy the burden of proof, the Board noted that other factors buttressed the Government's case. First, the Board noted that no evidence was introduced challenging the reliability of the on-site collection and chain of custody, a very common area to explore in urinalysis cases. Second, the NDSL technical review of your urine specimen confirmed that you had no current prescription medications that could cause a positive test result. Third, no credible evidence was introduced to question the reliability or accuracy of your particular urinalysis test on 16 November 2019. Fourth, the Board noted that the DoD employs state-of-the-art urinalysis testing technology. The Board noted that if your urine sample initially tests positive on the immunoassay screening, the urine sample is tested again at the NDSL. If the second immunoassay screening is still positive, the positive test result is confirmed using gas chromatography/mass spectrometry (GC/MS) subject to a minimum DoD cut-off level established, in part, to avoid false positive tests.

Fifth, 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 GEN or Other than Honorable conditions (OTH) 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 Sailor. 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.

Sixth, the Board 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 determined that wrongful drug use by a Sailor is contrary to Navy core values and policy, renders such Sailors unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your misconduct clearly merited receipt of a GEN characterization, and that such discharge was in accordance with all Department of the Navy directives and policy at the time of your discharge. 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 did not find evidence of an error or injustice that warrants upgrading your characterization of service, reinstating you to the USNR, or granting relief 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 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,

11/17/2022

