



**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: 6431-22

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 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 reconsideration 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).

You originally enlisted in the U.S. Navy and entered active duty on 17 September 2007. Your pre-enlistment physical examination, on 23 April 2007, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms. You last reenlisted, on 6 October 2016, for five additional years.

On or about 10 April 2020, you provided a urine sample as part of a random urinalysis test. A subsequent Navy Drug Screening Laboratory (NDSL) message indicated that your sample tested positive for cocaine above the Department of Defense cutoff level. The NDSL message indicated two accession errors with your urine sample: your sample leaked in transit, and there

was a smaller amount of urine in the bottle than testing policy dictated.

Based on the positive urinalysis result, on or about 9 June 2020, you were notified of administrative separation proceedings 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 18 November 2020, an Adsep Board convened in your case. At the Adsep Board, you were represented by civilian counsel and a Navy Judge Advocate. Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined that the preponderance of the evidence presented proved you were guilty of drug abuse. Subsequent to the misconduct finding, the Adsep Board members unanimously recommended that you be separated from the Navy with a General (Under Honorable Conditions) (GEN) characterization of service. Your civilian and military defense counsel each submitted post-Adsep Board letters of deficiencies for the Separation Authority's consideration. On 9 September 2021, contrary to the Adsep Board recommendation, your commanding officer recommended your retention, in part, noting that the testing discrepancies called into question the validity of your positive urinalysis. Commander, Navy Personnel Command (PERS-832) reviewed your case in accordance with MILPERSMAN Article 1910-710 and determined that a preponderance of the evidence supported your administrative separation. Ultimately, on 18 February 2022, you were separated from the Navy for misconduct due to drug abuse with a GEN discharge characterization and assigned an RE-4 reentry code.

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 RE-1 reentry code along with your contentions that: (a) your Adsep Board was held contrary to policy because the board members were not fair and impartial due to at least one of them holding a predisposition of guilt, (b) the evidence does not support that you knowingly ingested cocaine, (c) the testing process was flawed given the number of discrepancies with your sample, and (d) the signature on the urinalysis bottle was not yours. For purposes of clemency and equity consideration, the Board noted the supporting documentation you provided.

At the Adsep Board, the Government presented evidence of your positive urinalysis test for the cocaine metabolite at approximately 137 ng/ml, which was above the DOD testing cutoff level of 100 ng/ml. The Board unequivocally determined that the positive urinalysis result alone more than meets the Government's evidentiary burden at non-judicial punishment or an Adsep Board. Accordingly, the Board agreed with the Adsep Board's finding of misconduct. How the Adsep Board members, as the trier of fact, ultimately reached their decision is of no consequence here with the Board. The Board determined the drug message alone was sufficient to meet the Government's burden of proof under the preponderance of the evidence standard.

The Board also determined that your argument that the Adsep Board members were not fair and impartial, or otherwise were predisposed as to your guilt was not persuasive. The Board noted

that the Adsep Board members will rely upon their own judgment and experience in determining the weight and credibility to be given material or testimony received in evidence. Nothing proffered by you indicates that the Adsep Board members were biased or acted improperly before, during, or after your hearing. Additionally, the Board determined any suggestion that the Government either did not meet its burden of proof at your Adsep Board, and/or improperly shifted the burden of proof to you was entirely without merit.

The Board noted that at all times the standard of proof is a preponderance of the evidence as to all matters before the Adsep Board. The Board determined that the Government did not engage in improper burden shifting in your case. The Board noted that the wrongful use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the Government to show your use was wrongful. The Board also noted that knowledge of the presence of the controlled substance may be inferred from the presence of the metabolite 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 determined that any evidence introduced at the Adsep Board challenging the reliability of the on-site collection and chain of custody was not persuasive. The Board noted that no other urine samples in the shipment box leaked, and thus the Board concluded that it was factually improbable for any cross-contamination to occur. While the total amount of urine remaining in the sample bottle did not meet testing requirements, the Board determined that such a scenario did not somehow taint the remaining amount of urine in your sample bottle that was ultimately tested by the NDSL. Second, 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. The Board determined that no matter how many articles your counsel submitted regarding testing errors or anomalies at DOD drug testing facilities, no credible evidence or article was tendered that called into question the testing of your specific urine sample in the Spring of 2020, or suggesting a false positive result occurred in your specific case.

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 GEN or Other Than Honorable characterization is generally warranted for drug related 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.

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 illegal 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 serious 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. 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 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 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,

11/9/2022

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Executive Director

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