



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

██████████
Docket No: 7789-22

Ref: Signature date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER ██████████, ██████████

Ref: (a) 10 U.S.C. § 1552
(b) USECDEF Memo of 25 Jul 18 (Wilkie Memo)

Encl: (1) DD Form 149 w/ enclosures

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board) requesting that his discharge be upgraded to "Honorable." Enclosure (1) applies.

2. The Board, consisting of ██████████, reviewed Petitioner's allegations of error and injustice on 18 November 2022, and, pursuant to its regulations, determined that the corrective action indicated below should be taken. Documentary material considered by the Board consisted of Petitioner's application together with all material submitted in support thereof, relevant portions of Petitioner's naval record, applicable statutes, regulations, and policies, to include reference (b).

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. Although Petitioner's 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 the case on its merits.

b. Petitioner enlisted in the Navy and began a period of active duty on 7 September 1999. He received his first Good Conduct Medal (GCM) on 6 September 2002, reenlisted on 1 September 2004, and served without incident until 13 September 2006, at which time his urinalysis test results, from a routine drug test on 28 August 2006, returned a positive result for use of cocaine. He adamantly denied having use of cocaine, asserting the result was a false positive most likely due to his use of over-the-counter medication – specifically, Imodium AD.

c. Petitioner sought a civilian drug test from Quest labs which found negative results of drug use in a hair follicle test on 25 October 2006. He also submitted to a polygraph examination by a

civilian examiner, on 21 October 2006, which returned a result that no deception was indicated by his responses to questions regarding his alleged drug use and positive urinalysis. As a result, his command deferred action on his positive urinalysis and requested a formal retesting of his urinalysis sample. This retest was provided on 14 November 2006 and produced another positive result for cocaine metabolites.

d. Petitioner's command proceeded with legal action. Although he was not stationed aboard a ship, affording him the right to refuse nonjudicial punishment (NJP) and demand trial by court-martial, he declined to demand trial and accepted NJP on 8 December 2006. He was found guilty at NJP of a violation of Article 112a for wrongful use of a controlled substance.

e. Facing mandatory administrative separation processing for misconduct due to drug abuse, Petitioner submitted to another polygraph examination on 9 March 2007, this time conducted by Naval Criminal Investigative Service; however, he terminated the interview upon being notified that his results indicated deception. Subsequently, he was notified on 19 March 2007 of processing for administrative separation due to drug abuse, for which he elected a hearing before an administrative board. After consultation with counsel, he initially sought supplemental professional review of his previous polygraph but ultimately, on 6 May 2007, submitted to a second civilian polygraph test with another examiner. This exam found his responses truthful to relevant questions regarding his alleged drug use.

f. Petitioner submitted all potentially exculpatory evidence at his administrative separation board hearing. The Recorder for the Government called a witness from the Navy Drug Lab who explained to the board members why the negative results from the October hair follicle test would not scientifically negate a positive cocaine result for use as far back as August of that same year. Upon consideration of all available evidence, the members unanimously found that the basis of misconduct due to drug abuse had been established by a preponderance of the evidence and recommended separation with an other than honorable characterization of service. His counsel submitted a letter of deficiency asserting that the evidence presented in support of the basis had been insufficient in contrast to the exculpatory evidence presented at the hearing; however, the legal officer's response clarified that the positive urinalysis alone was sufficient evidence to meet the burden of proof and that the members had weighed the credibility of the evidence and testimony presented during their deliberations.

g. Although the concurring recommendation, which forwarded the report of the administrative board's findings, was submitted prior to an amendment to the administrative record which added the summarized and sworn testimony of Petitioner to the report, this testimony was available for consideration by Commander, [REDACTED], prior to approval of the recommendation on 10 July 2007.

h. At the time Petitioner was discharged on 20 July 2007, his record of discharge did not include a block 18 Remark documenting his period of continuous Honorable service from 7 September 1999 through 31 August 2004. Additionally, only the first of his two GCMs is recorded under his awards and decorations.

i. Petitioner applied to the Naval Discharge Review Board in 2008 contending that his discharge was unfair because all evidence wasn't taken into account at the time of his NJP. He also argued that his post-discharge conduct merited consideration for clemency under equity. In his application to the Board, he continues to maintain that he did not use cocaine and contends that he contested his positive urinalysis and attempted to prove his innocence with exculpatory evidence, which he seeks to Board to reconsider. He argues that he wanted to contest the allegation against him at court-martial but was scared off from doing so by his commanding officer, who he claims advised him that his evidence of innocence was insufficient to contradict the positive urinalysis and positive retest. He also presents post-discharge evidence of good character for consideration of clemency, to include his Master of Information Technology degree for information assurance and letters of recommendation regarding his employment.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concluded that Petitioner's request warrants favorable action in the form of partial relief. The Board reviewed his application under the guidance provided in reference (b).

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant the relief requested. The Board noted that Petitioner had an opportunity to demand trial by court-martial and to require that the Government establish his guilt beyond a reasonable doubt, rather than by a preponderance of evidence, but elected to accept NJP. Further, in spite of the difference in the standard of proof at his administrative board hearing, Petitioner exercised his right to present evidence and testimony in support of his contentions of innocence. The Board observed no evidence or reason to doubt or overturn the duly considered findings and recommendations from those proceedings. Additionally, the Board found the legal officer's detailed summary of evidence and the discussion of the relative weight of that evidence illuminating as to the supporting rationale for those findings. As a result, the Board concluded that there was insufficient evidence to support Petitioner's contention of innocence or his claim of injustice. Further, the Board determined the Petitioner's favorable evidence of post-discharge character was insufficient at this time to outweigh his wrongful use of cocaine. As a result, the Board concluded Petitioner's conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. 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 Petitioner's characterization of service or granting an upgraded characterization of service as a matter of clemency or equity.

However, as mentioned above, the Board observed that Petitioner's Certificate of Discharge or Release from Active Duty (DD Form 214) did not include the appropriate entries to document his period of honorable service and his receipt of a second GCM. Accordingly, the Board determined that this error should be corrected by adding the omitted information to Petitioner's DD Form 214.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

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RECOMMENDATION:

That Petitioner be issued a Correction to Certificate of Release or Discharge from Active Duty (DD Form 215) indicating in block 18, Remarks, his period of "Continuous Honorable service from 7 September 1999 through 31 August 2004" and in block 3, Decorations, Medals, Badges, Citations and Campaign Ribbons Awarded or Authorized, by correcting the entry "Navy Good Conduct Award" to read "Navy Good Conduct Award (2)" to reflect that he received a second award of the GCM.

That no further changes be made to Petitioner's record.

A copy of this report of proceedings be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above-entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)), and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

12/7/2022

