



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

██████████
Docket No. 9000-22
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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 you did not file your application in a timely manner, the Board waived the statute of limitation 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 14 April 2023. 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 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). The Board also considered the advisory opinion (AO) of a qualified mental health provider. Although you were afforded an opportunity to submit a rebuttal to the AO, you chose not to do so.

You enlisted in the Navy and, after receiving waivers for pre-service marijuana related civil conviction, you began a period of active duty on 20 August 1980. You were administratively counseled, in April of 1981, for deficiencies in behavior and issued warnings regarding the potential for administrative separation if such behavior continued. You were subject to nonjudicial punishment (NJP), on 14 September 1981, for a violation of Article 86 of the Uniform Code of Military Justice due to an unauthorized absence (UA) of 3 days.

You again absented yourself without authority from 20 – 29 July 1982. After returning, you were subject to toxicology screening and, although this screening reflected a positive result for use of the controlled substance marijuana, your NJP for any related offense was set aside in

compliance with policy and at the request of your defense counsel. However, you were convicted by Summary Court-Martial (SCM) for your second Article 86, UA offense and confined for a period of 30 days. As a result of your misconduct, you were notified of processing for administrative separation by reason of misconduct due to drug abuse. After consultation with legal counsel, you requested to exercise your right to a hearing before an administrative board.

On 19 October 1982, you were evaluated by the Counseling and Assistance Center (CAAC) and found able to return to duty. As part of the evaluation, it was determined that you were accountable for your actions.

The record of proceedings from your administrative board hearing included statements from your officer-in-charge, who expressed that your initial negative attitude had improved and that you had the potential to be “outstanding” and from your senior enlisted leader, who described that you were a poor performer, argumentative, and had used an injury to avoid work even though you would participate in wrestling contests. The members found that the basis of separation for misconduct due to drug abuse was supported by a preponderance of the evidence, and your commanding officer concurred with their recommendation that you should be discharged under other than honorable conditions. However, action on your separation was held in abeyance after you were placed on medical hold due to hospitalization and a medical board. Ultimately, you were discharged, on 27 May 1983, for drug abuse with a characterization of General (Under Honorable Conditions) (GEN).

Your previous application to the Board was considered on 31 March 2010. In that application, you contended that your youth and overall service record were potentially mitigating factors with respect to your misconduct. The Board denied your request after noting that you were fortunate to have received a GEN discharge in spite of the seriousness of your misconduct.

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 to upgrade your discharge and contentions that the recent Presidential declaration of a Federal pardon for simple marijuana possession should be considered as a basis for granting your request. For purposes of clemency and equity consideration, the Board noted you did not provide documentation describing post-service accomplishments or advocacy letters.

Because you also contend that a mental health condition affected your discharge, the Board also considered the AO. The AO stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct. Additional records (e.g., post-service mental health

records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

The AO concluded, "it is my clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to a mental health condition."

After thorough 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 and SCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included a drug offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. Further, the Board concurred with the AO and found there is insufficient evidence to attribute your misconduct to a mental health condition. The Board determined your drug abuse was likely a continuation of your pre-service drug abuse. Finally, the Board did not find your arguments regarding the recent Presidential pardon for simple marijuana possession to be persuasive since marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. As a result, the Board concluded significant negative aspects of your service outweighs the positive aspects and continues to warrant a GEN 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 granting you the relief you requested 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 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,

4/24/2023

