



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. 9141-22

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 case on its merits. A three-member panel of the Board, sitting in executive session, considered your reconsideration application on 27 January 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 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo).

You enlisted in the Navy and entered active duty on 10 March 1987. Your pre-enlistment physical examination, on 9 February 1987, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms. As part of your pre-enlistment application, you signed and acknowledged the "Drug and Alcohol Abuse Statement of Understanding." On 13 March 1987, you also acknowledged being briefed on the Navy's Policy on Drug and Alcohol Abuse, the legal consequences of illicit drug use, and the Navy's urinalysis program. You disclosed pre-service marijuana use, but denied all other drug/alcohol abuse. On 13 September 1987, you reported for duty on board the █) in █.

On 19 October 1987, you commenced a period of unauthorized absence (UA) that terminated

after twenty-nine days, on 17 November 1987, with your surrender to military authorities in ██████████. The Department of Veterans Affairs (VA) screened you for drug dependency and you were admitted into a VA detoxification program.

Following your return to your duty station, you underwent a mental health evaluation. During the examination, you disclosed daily cocaine usage since August-October 1987. You were diagnosed with polysubstance abuse and with a personality disorder not otherwise specified with immature and narcissistic traits. The Navy Medical Officer found you fit for full duty, fully accountable and responsible for your actions, and recommended your administrative separation for drug abuse if your command determined you no longer had potential for future service.

On 8 January 1988, you received non-judicial punishment (NJP) for your UA, as well as for the wrongful use of a controlled substance (both marijuana and cocaine). You did not appeal your NJP. On the same day, you were admitted to ██████████, ██████████. The Navy Medical Officer noted that you disclosed daily marijuana use since age eighteen until entering the military and cocaine use intermittently for seven years with recent usage being three times per week. Upon your discharge on 14 January 1988, the Medical Officer deemed you psychologically fit for return to duty and recommended that you should be held responsible and accountable for your actions. The Medical Officer determined that you were not considered mentally ill, but instead manifested a longstanding disorder of character and behavior of such severity to render you incapable of serving adequately in the Navy. The Medical Officer determined that you did not presently require psychiatric hospitalization, but would benefit from a drug treatment program.

On 14 January 1988, you were notified of administrative separation proceedings by reason of misconduct due to drug abuse, and misconduct due to the commission of a serious offense. Although expressly afforded such rights in writing, on 14 January 1988, you waived your rights to consult with counsel, submit written rebuttal statements, and to request an administrative separation board. On 15 January 1988, your commanding officer (CO) recommended your separation with an under Other Than Honorable (OTH) conditions characterization of service. In his endorsement, your CO noted:

SNM verbally admitted the wrongful use of marijuana and cocaine at CO's NJP. ██████████ has been extremely disruptive to this command in the brief period he has been on board. He states he will continue to abuse drugs and absent himself from the ship...I strongly recommend that ██████████ be discharged from the naval service, and that the discharge be under other than honorable conditions.

Ultimately, on 29 January 1988, you were separated from the Navy for misconduct with an OTH discharge characterization and assigned an RE-4 reentry code.

On 7 August 2007, this Board denied your initial petition for relief. On 1 July 2022, this Board denied your second petition for discharge upgrade relief.

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 a “Secretarial Authority” discharge along with your contentions that: (a) the punishment was and remains too harsh in light of specific mitigating factors, including the sacrifices you made on behalf of your country, your denial you ever knowingly or intentionally used a controlled substance, and your remarkable post-service conduct, (b) the presence of a controlled substance in your urine is not sufficient to conclude you committed misconduct, (c) there is no evidence to support the command’s allegation of wrongful use besides the urinalysis, (d) the weight of the evidence indicates you did not commit drug abuse, and (e) you deny you were ever advised of your right to consult with counsel, the right to elect an administrative board, and the right to have qualified counsel represent you at such administrative separation board. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. The Board was not persuaded by your contentions and concluded that your proffered arguments lacked merit. Further, 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. Additionally, 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. The Board determined that characterization under OTH conditions 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.

With regard to your proffered evidentiary and due process arguments, the Board was not convinced. First, your wrongful drug use was confirmed beyond all doubt with your voluntary disclosures to your health care practitioners, as well as your voluntary admission at NJP to your CO of specifically using both cocaine and marijuana on active duty. Second, the record is painstakingly clear that, on 14 January 1988, you were advised in writing of all of your rights in connection with your pending administrative separation. That same day, you waived all of your substantive rights including, but not limited to, your rights to request counsel and to elect an administrative separation board. Your signed waiver was properly witnessed by a Chief Petty Officer. Lastly, the Board noted that in the absence of any positive urinalysis tests in the record, your arguments regarding the sufficiency of the evidence and burden of proof about such urinalysis results were moot, especially given your drug use admissions.

The Board observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average in conduct was approximately 2.80. Navy regulations in place at the time of your discharge recommended a minimum trait average of 3.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your serious misconduct which further justified your OTH characterization of discharge and RE-4 reentry code.

The Board also 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 noted that 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 determined that there was no impropriety or inequity in your discharge, and the Board concluded that your serious misconduct clearly merited your receipt of an OTH, and that such discharge was in accordance with all Department of the Navy directives and policy at the time of your discharge. While the Board carefully considered any matters submitted regarding your character, post-service conduct, and personal/professional accomplishments, 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. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Lastly, and although it did not factor in the Board's ultimate decision in the case at bar, the Board noted that a fraudulent enlistment occurs when there has been deliberate material misrepresentation, including the omission or concealment of facts which, if known at the time, would have reasonably been expected to preclude, postpone, or otherwise affect a Sailor's eligibility for enlistment. The Board determined that you had a legal, moral, and ethical obligation to remain truthful on your enlistment paperwork. The Board concluded that had you properly and fully disclosed the extent of your pre-service polysubstance abuse history you would likely have been disqualified from enlisting in the Navy.

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,

2/2/2023

[REDACTED]

Executive Director

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