



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

█  
Docket No. 6971-23  
Ref: Signature Date



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 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 application on 15 September 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 to 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 began a period of active duty on 22 January 1992 with a moral waiver for a non-minor misdemeanor. An incident report, from 31 January 1993, documents an investigation by the barracks duty regarding a report of a female in your room in violation of regulations. Ultimately, although you stated that there were no females in the room, a female was discovered inside a locked locker, and you were reprimanded via verbal counseling on 12 February 1993. Subsequently, you were administratively counseled, on 29 November 1993 and 16 June 1994, respectively, for failure to follow proper leave check out procedures and for suspected cheating on an advancement exam. You were also counseled, on 7 October 1994, and assigned extra military instruction for deficiency in military bearing and personal appearance, for disobeying a lawful order to correct the rating badge on your uniform, and for responding disrespectfully.

On 28 April 1995, via naval message, your request for voluntary early separation under a reduction in force program was approved. Prior to your discharge, however, your early separation was held in abeyance due to processing for drug abuse. Specifically, a separate message from the Naval Drug Lab in June 1995 reported that your urinalysis sample had tested positive for marijuana metabolites. A preliminary inquiry was conducted into your suspected drug use and, after consulting with legal counsel, you refused nonjudicial punishment (NJP), requested court-martial, and submitted a written statement denying drug use or association with drug users. During the inquiry, the senior enlistment member who had conducted the urinalysis provided a statement in which he reported that you had asked him, approximately 2 weeks after the urinalysis test, if there was any way a person could clean out their system to avoid a positive urinalysis result. In light of your demand for trial, the Naval Drug Lab transmitted the necessary records for use at court-martial to include the initial screening and confirmation test results. Your command initially offered Summary Court-Martial (SCM) as an alternative, on 13 July 1995, and the preliminary proceedings reflect that you also objected to SCM. As a result, you were served charges on 1 August 1995 for trial by Special Court-Martial (SPCM), in response to which you submitted a request for separation in lieu of trial with the assistance and advice of your military defense counsel. In that request, you stated, "I admit that I am guilty of: violation of the UCMJ, Article 112a." You also added a handwritten statement which specified that you admitted to using marijuana as charged in the charge sheet and that you had no excuse or defense. Your request was approved, the SPCM charges were withdrawn and dismissed, and you were discharged, on 27 October 1995, with an Other Than Honorable (OTH) characterization of service.

You previously requested a documentary review, which was conducted by Naval Discharge Review Board on 30 December 1996, denying that you had ever used marijuana and asserting that various witnesses had observed mishandling of test samples and procedures. Subsequently, your previous application to the Board, Docket No. 7482-21, was considered on 24 January 2022, wherein you contended that your result was a false positive due to your use of ibuprofen.

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 to upgrade your discharge to "Honorable" with a change to your narrative reason for separation to "Secretarial Authority." In addition, you contend that you incurred a significant back injury which resulted in the daily use of ibuprofen and a false-positive result from your drug test urinalysis. In support of your argument that ibuprofen caused a false positive, you referenced a research article which was reported in a scientific journal over 30 years ago and was not included with your application. You further assert that you sought an opportunity for another test, which was denied, and that you only accepted responsibility because you could not afford a private attorney to fight the charges. For purposes of clemency and equity consideration, the Board considered the evidence you submitted in support of your application including the two character letters and several witness statements confirming your in-service injury and the conditions within your work environment which might have resulted in your use of pain medication.

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 request to be discharged in lieu of trial by court-martial, 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. 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. Further, while the Board acknowledges that you have submitted ample evidence that you incurred a workplace injury during your military service, the Board was not persuaded by your contentions regarding a false positive urinalysis. With respect to the test itself, the Board observed no evidence of irregularity other than your own statement. Rather, the Board found the validation records submitted by the Naval Drug Lab compelling with respect to the conduct of both an initial radioimmunoassay, for initial screening, as well as a re-radioimmunoassay to ensure the metabolites exceeded the cut-off level prior to running a final GC/MS confirmation test. In addition, the Board noted the certification of the results as well as the chain of custody. Notwithstanding the evidence you referenced in support of your contention, the Board found insufficient evidence to overcome the presumption of regularity with respect to the urinalysis test results. Additionally, the Board noted that the statement of the senior enlisted member regarding your inquiry after the urinalysis about whether a person could “clean out” their system, when considered in conjunction with your claimed desire for a retest, more likely than not, indicates you hoped that a subsequent negative test might serve to negate any potentially positive result. Regardless, the Board further observed that, absent frequent routine marijuana use, a retest weeks after the fact would have little if any bearing on whether you had used marijuana prior to the positive test. Finally, the Board considered that you voluntarily elected to submit a request for separation in lieu of trial wherein you expressly admitted your guilt with respect to the offense, to include a handwritten statement admitting that you had used marijuana.

Moreover, the Board found your contention regarding your claimed reason for electing to request separation in lieu of trial, rather than contest the allegations against you before a SPCM, to lack credibility. Specifically, you offered the reason that you could not afford a private attorney; however, the Department of the Navy provided a military defense counsel, at no cost to you, who was admitted to practice within the United States by the bar of the highest court of at least one of the 50 States and, therefore, was presumably qualified and competent to advise you on the evidence as well as any potential defenses so that you could make an informed decision whether to proceed to trial. The Board noted that you initially refused NJP and SCM prior to formal charges being referred to SPCM, after which a detailed military counsel reviewed the evidence related to your urinalysis. In light of these considerations, the Board reasonably concluded that, after consultation with counsel, as documented in your request for separation in lieu of trial, you decided that it was in your best interest to admit to your actual guilt and request voluntary administrative separation rather than face the potential liability of a federal conviction on your permanent criminal record.

As an additional factor relevant to its review of your contentions, the Board gave considerable weight to the detailed information contained in the incident report of 31 January 1993. Although you escaped any serious punishment beyond a verbal counseling, this incident reflects that you committed a serious integrity offense by falsely stating that there were no females in the room when, in fact, there was a female hidden inside a locked locker. The Board found this incident alone sufficient to cast doubt on the veracity of your contended false positive even without consideration of the extensive rationale addressed in the preceding paragraphs. Finally, the Board also noted that the misconduct that led to your request to be discharged in lieu of trial by

court-martial was substantial and, more likely than not, would have resulted in a punitive discharge and extensive punishment at a court-martial. Therefore, the Board determined that you already received a large measure of clemency when the convening authority agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and likely punitive discharge. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. While the Board carefully considered the evidence you submitted in mitigation, 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.

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,

10/3/2023

