



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. 5499-24
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.

Because your application was submitted with new evidence not previously considered, the Board found it in the interest of justice to review your application. A three-member panel of the Board, sitting in executive session on 20 September 2024, has carefully examined your current request. 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).

The summary of your active duty service, misconduct, and resulting discharge remains substantially unchanged from that addressed in either of the two previous and recent requests for review of your discharge, which were considered on 24 January 2022 and 15 September 2023 in Docket Numbers 7482-21 and 6971-23, respectively, and denied. You also sought review by the Navy Discharge Review Board (NDRB), which previously considered your contentions on 30 December 1996 and, likewise, denied your request.

In each of your previous requests for review of your discharge, you have consistently denied ever having used marijuana. In your initial application to the NDRB, you asserted that several witnesses had observed mishandling of test samples during the urinalysis procedures. In your initial application to the Board, as well as in your request for reconsideration, you contended that your urinalysis result was a false positive due to excessive use of ibuprofen for a back injury you

received during your military service. You provided two character letters for consideration of clemency with your initial request to the Board. In your first request for reconsideration, you further submitted a brief from your legal counsel which cited to a research study as purported evidence of your claimed false positive due to ibuprofen. However, although the Board's reply regarding this contention specified that you had not provided the actual research study or any confirmation that the significantly aged study had held up under peer review in relation to more recent research, you did not provide such evidence with your current application.

In your previous request for reconsideration, you clarified that you suffered an injury after falling while onboard your ship and carrying heavy helium bottles, but that you refused treatment out of concern that it would be viewed as an excuse not to work. You submitted letters supporting the nature of your duties and probable service-connection of your injury. You further claimed that you had initially refused nonjudicial punishment and requested another urinalysis test, but that your request was denied, and that you only requested separation in lieu of trial after being charged because you could not afford a private attorney. However, the Board noted that you would have been entitled to representation by qualified military defense counsel at no charge, had you chosen to contest the allegations regarding your drug use and positive urinalysis. The Board found your secondary reason more plausible in that you state you did not want to risk a federal conviction for drug use and, therefore, requested separation to escape trial by court-martial, which was approved. Thus, in that regard, you received the benefit of your bargain, a decision which the Board observed was made after consultation with military defense counsel.

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" and change your narrative reason for separation to "Secretarial Authority" as well as you continued contention that your urinalysis results were due to a false positive. You also argue that your discharge was unduly harsh in contrast to your overall service and your post-service accomplishments. For purposes of clemency and equity consideration, you submitted additional documents pertaining to your employment as a special needs educator, with letters of support regarding your performance as an educator, and witness statements affirming your duties.

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. With respect to your claimed injury, the Board found sufficiently credible evidence that your military duties involved carrying heavy objects which reasonably could have resulted in the injury from which you contend to have been self-medicating. However, whether or not such injury occurred or required medication was not a critical factor in the Board's decision to again deny relief. Rather, and in spite of your otherwise favorable post-discharge character evidence, the Board found your continued contention that your urinalysis resulted from a false positive, rather than accepting responsibility for your reasonably substantiated misconduct, to be unpersuasive. The Board noted that remorse and

acceptance of responsibility are significant factors for consideration of a potential grant on the basis of clemency, as outlined in the policy guidance in the Wilke Memo. Although you claim to have intended to contest the positive urinalysis, and you initially refused nonjudicial punishment, the Board considered that you requested separation in lieu of trial, in which you admitted that the government had sufficient evidence to provide the elements of the charged offense, rather than seeking to exonerate yourself. Even now, when challenged to substantiate the dubious claim that your false positive resulted from excessive use of over-the-counter ibuprofen, you disregard that issue and, instead, reiterate that you were injured.

In light of your continued claim of false positive, without compelling evidence in support of that claim, 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,

10/28/2024

