



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. 7438-24

Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to 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 application on its merits. A three-member panel of the Board, sitting in executive session, considered your reconsideration application on 11 October 2024. 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 U.S. Navy and began a period of active duty service on 2 December 1977. On 12 February 1979, you provided a voluntary statement to the Naval Investigative Service (NIS) regarding your suspected trafficking in narcotics. In your voluntary NIS statement, you admitted to once in while using both marijuana and hashish, as well as to distributing both marijuana and phencyclidine (aka "PCP" or "angel dust") no less than two (2) separate times. You specifically admitted, in part:

I do not consider myself to be a drug dealer. I would call myself to be a casual user of marijuana and hashish once in a while. I would transfer drugs to others only as

a matter of sharing, and not for profit or for a particular dealer. I admit transferring drugs to ██████ of ██████████ in November 1978, but I did so because he asked me if I knew where he could find drugs and I thought I was helping him out by doing so. In one case, I went to ██████████ and copped (bought) two hits of what I thought was ██████ from a white dude about 5'8", 145, lbs, clean shaven, and that's all I could notice. I heard around the ship that this guy was dealing it. I gave him ten bucks per hit and later gave the hits to ██████ for \$20. Also, I bought some marijuana from this guy which I gave to ██████ later on. ██████ paid me \$25 for the grass. I was doing this to be a nice guy – to share and not to traffic in drugs. This is all that I know.

On 2 March 1979, you received non-judicial punishment (NJP) for the violation of a lawful general regulation by wrongfully selling marijuana on 16 November 1978 and wrongfully selling PCP/angel dust on 17 November 1978. You did not appeal your NJP.

On 2 March 1979, your command notified you of administrative separation proceedings by reason of misconduct due to drug abuse involving the sale of illicit substances. You elected your rights to submit statements and to request a hearing before an administrative separation board. However, on 4 March 1979, you submitted a "conditional waiver" to receive a General (Under Honorable Conditions) discharge characterization in exchange for waiving your administrative separation board. However, the Chief of Naval Personnel (CNP) denied your conditional waiver request on 6 April 1979. On 9 April 1979, you re-executed your administrative separation rights form, but this time you formally waived in writing your right to request a hearing before an administrative separation board.

Your commanding officer (CO) recommended your immediate discharge. The CO stated in his recommendation to the Separation Authority, in part:

[Petitioner] was identified as a supplier of illicit substances by the Naval Investigative Service. In the incidents for which he went to mast, he sold an illegal substance to an NIS Informant on two separate occasions while embarked in ██████████ ██████████. The introduction of illegal substances aboard ship and their subsequent sale is intolerable. [Petitioner's] constant shirking of responsibilities is a significant negative influence on the morale, enthusiasm and productivity of his work center. He lacks respect for authority and is in need of continuous supervision. He was very unreceptive during a 30 day period of drug abuse counseling. In light of present regulations and this command's vigorous drug education program, his actions render him unfit for continued naval service. [Petitioner] is strongly recommended for an immediate administrative discharge due to drug abuse.

Ultimately, on 19 June 1979, you were separated from the Navy for misconduct with an under Other Than Honorable conditions (OTH) discharge characterization.

On 19 April 1981, this Board denied your initial discharge upgrade application. On 16 February 2011, and again during fiscal year 2015, this Board again denied both of your petitions. On 9 September 2020, this Board again denied your petition. You had contended, in part, that you

have paid your debt to the Department of Defense by not being able to use your veterans' benefits. On 22 February 2023, this Board again denied your fifth petition for discharge upgrade relief. You had contended, in part, that you have suffered enough for 46 years without being allowed to use your Department of Veterans Affairs (VA) benefits.

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 contentions that: (a) you feel that you have suffered for 46 years without being allowed to use your VA benefits is enough punishment, (b) you have presented evidence that you have atoned for your misconduct and further evidence that other similarly situated service members have received relief from this Board, (c) your participation in anti-drug advocacy through the Weed and Seed program is sufficient to mitigate your misconduct as a young man, (d) marijuana is now legalized in a majority of states for both recreational and medicinal use, (e) you have paid for your misdeeds and your discharge characterization has stigmatized you by rendering you unemployable in many job markets, and (f) after over forty years, you should no longer be stigmatized by a negative characterization of service. For purposes of clemency and equity consideration, the Board considered the totality of 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 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. The Board determined that illegal drug use and distribution is contrary to Navy core values and policy, renders such service members unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. The Board noted that marijuana use is still against Department of Defense regulations and its use in any form is still not permitted for recreational use while serving in the military. The Board also noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. 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.

The Board determined that any contentions involving potential due process irregularities regarding your administrative separation processing were not persuasive. The Board noted that following your receipt of proper notice on 2 March 1979, you initially executed your rights in connection with your administrative separation on 4 March 1979 and elected to request an administrative separation board. On the same day, you also submitted a conditional waiver request. Following CNP's denial of your conditional waiver request, you re-executed another

rights form and you elected to submit a personal statement on your own behalf, but expressly waived in writing your right to have your case heard by an administrative separation board.

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 calculated from your available performance evaluations during your enlistment was approximately 2.933 (out of a possible 4.0) in conduct. 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 drug-related misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your serious misconduct and failure to conform to basic military standards of good order and discipline, all of which further justified your OTH characterization.

The Board determined that your argument regarding a presidential pardon for federal marijuana possession convictions was also not persuasive. The Board noted that on October 6, 2022, President Biden issued a presidential proclamation pardoning federal convictions for simple marijuana possession offenses in violation of the Controlled Substances Act, or in violation of D.C. Code 48–904.01(d)(1). The Board noted neither code provision applied to your case as your drug-related offenses were charged as violations of the Uniform Code of Military Justice at NJP, and that your drug offenses involved the wrongful distribution, not possession, of marijuana as well as PCP. Additionally, the Board also easily distinguished the Board cases you submitted involving single specification marijuana usage, and the case at bar involving both your admission of poly-substance drug abuse to NIS, as well as your multiple instances of drug distribution on board naval facilities/installations.

Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans or VA benefits, or enhancing educational or employment opportunities.

As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your drug-related misconduct and disregard for good order and discipline clearly merited your discharge. While the Board carefully considered the evidence you submitted in mitigation and commends you on your post-discharge rehabilitation, 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 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.

In the absence of sufficient new evidence for reconsideration, the decision of the Board is final, and your only recourse would be to seek relief, at no cost to the Board, from a court of appropriate jurisdiction.

Sincerely,

10/30/2024

