



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. 1397-25
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 application on 13 June 2025. 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 Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You originally enlisted in the U.S. Navy and began a period of active duty service on 29 September 2005. Your pre-enlistment physical examination on 31 March 2005, and self-reported medical history both noted no psychiatric or neurologic issues, conditions, or symptoms.

While still in initial recruit training, on 24 October 2005, your command issued you a "Page 13"

retention warning (Page 13) documenting certain deficiencies in your performance and/or conduct, to wit: (a) your failure to adapt, (b) substandard performance, and (c) overall lack of military bearing. The Page 13 advised you that any further deficiencies in performance and/or conduct may result in disciplinary action and processing for administrative separation.

On 1 June 2006, you received non-judicial punishment (NJP) for: (a) unauthorized absence (UA), and (b) a failure to obey a lawful order or regulation. You did not appeal your NJP.

In early August 2006, the Naval Criminal Investigative Service (NCIS) conducted an investigation into the theft of cough and cold medicine from the Navy Exchange (NEX) at Naval Air Station ██████████. During investigation, you admitted that you stole some cough/cold medicine from NEX on 5 August 2006 and hid such medicine in your room. You also admitted to ingesting six (6) pills on 5 August 2006. NCIS concluded that you and another shipmate stole the medicine from the NEX and that you ingested such medicine with the intent to misuse it.

A second NCIS investigation revealed that, on 10 August 2006, someone reported that you and another Sailor overdosed on over-the-counter cold medication at BEQ 420. The NCIS report alleged that you admitted to ingesting seven (7) or eight (8) cough/cold tablets which you received from another Sailor.

On 10 October 2006, you were convicted at a Summary Court-Martial (SCM) of: (a) two (2) separate specifications of violating a lawful order prohibiting certain drug-related offenses, and (b) larceny. You pleaded not guilty to each of the orders violations but guilty to the larceny; however, the SCM Officer found you guilty of all charges and specifications. The SCM Officer sentenced you to a reduction in rank to the lowest enlisted paygrade (E-1), forfeitures of pay, and confinement for thirty (30) days.

Following your SCM conviction, your command notified you of administrative separation proceedings by reason of misconduct due to drug abuse. On 9 February 2007, the Separation Authority approved and directed your separation by reason of misconduct due to drug abuse with an under Other Than Honorable conditions (OTH) characterization of service. Ultimately, on 26 February 2007, you were separated from the Navy for misconduct with an OTH discharge characterization and were assigned an RE-4 reentry code.

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 and change your reason for separation, separation code, and reentry code. You contend that: (a) relief is appropriate because specifications 1 and 2 of Charge I at the 2006 SCM failed to state an offense, (b) the SCM violated your right to due process, (c) illegal pretrial punishment, (d) the February 2007 evaluation and counseling record contains inaccurate information about the 2006 SCM, (e) the separation authority and narrative reason for separation on the DD-214 are inaccurate, and (f) the discharge is inequitable for multiple reasons. For purposes of clemency and equity consideration, the Board considered the totality of your application; which included your DD Form 149 and the evidence you provided in support of it.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First, the Board concluded that your administrative separation was legally and factually sufficient and that no error materially prejudicial to your substantial rights was committed. The Board also determined that there was no credible or convincing evidence in the record regarding any command misconduct, improper motives, or abuses of discretion in the investigating, handling and processing of your drug-related misconduct, SCM, and subsequent administrative separation. The Board also noted that your contentions that the separation authority and narrative reason for separation were erroneous was not persuasive and without merit. The Board noted that the relevant MILPERSMAN provision governing separation by reason of misconduct due to drug abuse (1910-146) references the SECNAVINST instruction that expressly prohibits the misuse of over-the-counter drugs or pharmaceutical compounds (see discussion below). Thus, the Board concluded that your misconduct involving the intentional misuse of cough/cold medicine clearly encompassed “drug abuse” for purposes of an administrative separation. Accordingly, the Board also concluded that any proffered contentions that certain performance evaluations contained inaccurate information must fail as well for the same reasons.

The Board determined that you did not provide convincing evidence to substantiate or corroborate your evidentiary and legal/factual sufficiency contentions regarding your orders violations. The Board determined that you were found guilty of your orders violations at your SCM because you were indeed guilty and the Board was not willing to re-litigate well-settled facts that are no longer in dispute from a final conviction at an SCM occurring over eighteen (18) years ago. The appropriate time for you to have raised traditional appellate issues was immediately following your SCM.

The Board also noted that your lack of due process contentions surrounding your SCM were without merit. At all relevant times, you had the absolute right to object to a trial by SCM; which you did not. The Board further observed that, in block 11 on the SCM Record of Trial (RoT), you were expressly advised of the right to submit written matters to the Convening Authority; to include a clemency request. The language in RoT block 11 is clear on its face and does not otherwise require the Board to look beyond the four corners of the RoT document in order to determine the meaning. Interpreting the situation otherwise, that you were unaware of your right to submit post-trial matters, would lead to a speculative decision incongruent with the facts and evidence that are actually in the record.

The Board also noted the SECNAVINST 5300.28D provided, in pertinent part:

Military members determined to be using drugs, in violation of applicable provisions of the UCMJ [Uniform Code of Military Justice], and Federal, State, or local statutes, or who unlawfully engage in the trafficking of drugs or drug abuse paraphernalia, or who are diagnosed as drug dependent, shall be disciplined as appropriate and processed for administrative separation.

Paragraph 5c of the relevant SECNAVINST provided, in pertinent part:

The unlawful use by persons in the DON of controlled substance analogues (designer drugs), natural substances (e.g., fungi, excretions, chemicals (e.g., chemicals wrongfully used as inhalants), propellants, and/or a prescribed or over-the-counter drug or pharmaceutical compound, with the intent to induce intoxication, excitement, or stupefaction of the central nervous system, is prohibited and will subject the violator to punitive action under the UCMJ or adverse administrative action or both.

SECNAVINST 5300.28D defined drug abuse, in part, as:

The wrongful use of a controlled substance, prescription medication, over-the-counter medication, or intoxicating substance (other than alcohol) to an extent that it has an adverse effect on performance, conduct, discipline, or mission effectiveness, and or the user's health, behavior, family, community, or DON, or leads to unacceptable behavior as evidenced by one or more acts of drug-related misconduct.

The relevant SECNAVINST defined "wrongful" as:

Possession, use, distribution or manufacture of a controlled substance is wrongful if it is without legal justification, authorization or excuse, and includes use contrary to the directions of the manufacturer or prescribing healthcare provider, and use of any intoxicating substance not intended for human ingestion.

Accordingly, the Board determined that your conviction for your two orders violations at your SCM was legally and factually sufficient. *Even assuming arguendo* that the knowledge element of the orders offenses was not satisfied, such purported error was harmless, did not prejudice you, and did not affect your ultimate separation with an OTH characterization. Moreover, the Board determined that your criminal misuse of the cough/cold medication would have been covered by another UCMJ punitive article for contingency of proof purposes, as either a novel Article 134 offense, or as a potential state law violation using the Assimilative Crimes Act. Either way, the Board determined your criminal misuse of the cough/cold medicine was not in question and in no way would such misuse and abuse have gone unpunished under the UCMJ. Lastly, the Board further concluded that your larceny offense alone (that you pleaded guilty to) amounted to the commission of a serious offense for administrative separation purposes and more than warranted your OTH discharge characterization, had that been the sole basis for your administrative separation, given the previous misconduct documented in your service record.

The Board did not believe that your record was otherwise so meritorious to deserve an 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 drug abuse 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 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.

As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your serious misconduct and disregard for good order and discipline clearly merited your discharge. 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 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,

7/1/2025

