

DEPARTMENT OF THE NAVY
SECRETARY OF THE NAVY
COUNCIL OF REVIEW BOARDS
720 KENNON ST SE RM 309 (NDRB)
WASHINGTON NYD DC 20374-5023

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December 16, 2010
ND09-02565/JDM

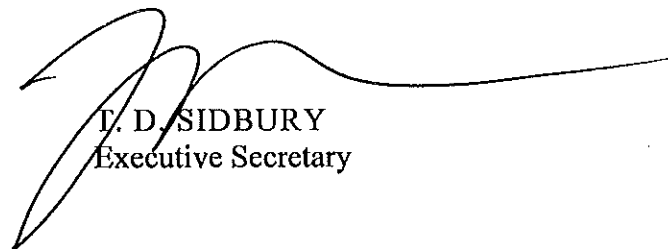
THOMAS M BURDEN
3890 QUAY ST
WHEAT RIDGE CO 80033

NOTICE OF DECISION THAT DISCHARGE IS PROPER AS ISSUED

The review authority has carefully examined all available official records in connection with your application for discharge review.

The final decision is that the discharge is proper as issued and that no change is warranted.

Enclosure (1) is a copy of the Record of Review of Discharge. The original has been made a part of the official service personnel record.



T. D. SIDBURY
Executive Secretary

Encl: (1) Copy of Review of Discharge for Docket No. ND09-02565

LAW FIRM OF PUCKETT & FARAJ PC
HAYTHAM FARAJ
2181 JAMIESON AVE SUITE 1505
ALEXANDRIA VA 22314

**DEPARTMENT OF THE NAVY
NAVAL DISCHARGE REVIEW BOARD (NDRB)
DISCHARGE REVIEW DECISIONAL DOCUMENT**

APPLICANT'S ISSUES

1. Applicant contends his discharge was inequitable due to recruiter and career counselor misrepresentation during his accession into and enlistment in the Navy.
2. Applicant contends his post-service achievements are representative of his true character.

DECISION

Date: 20101129 PERSONAL APPEARANCE HEARING Location: WASHINGTON D.C. Representation: Civilian Counsel

**By a vote of 5-0 the Characterization shall remain UNDER OTHER THAN HONORABLE CONDITIONS.
By a vote of 5-0 the Narrative Reason shall remain MISCONDUCT.**

DISCUSSION

The NDRB, under its responsibility to examine the propriety and equity of an Applicant's discharge, is authorized to change the character of service and the reason for discharge if such change is warranted. In reviewing discharges, the Board presumes regularity in the conduct of governmental affairs unless there is substantial credible evidence to rebut the presumption, to include evidence submitted by the Applicant. The Applicant identified two decisional issues for the Board's consideration. The Board completed a thorough review of the circumstances that led to his discharge and the discharge process to ensure his discharge met the pertinent standards of equity and propriety. The Applicant's record of service did not reflect any negative NAVPERS 1070/613 (Page 13) counselings or warnings but did include one nonjudicial punishment (NJP) for violations of the Uniform Code of Military Justice (UCMJ): Article 86 (Absence without leave, 34 days, 4 Nov to 8 Dec 2002); Article 87 (Missing ship's movement, 2 specifications, 4 Nov and 18 Nov 2002); and Article 112a (Wrongful use, possession, etc. of controlled substance, marijuana, confirmed by NAVDRUGLAB msg 121643ZDec02, 121 ng/ml). The record also reflected the Applicant had a pre-service waiver for a non-misdemeanor offense, possession of marijuana, and admitted to marijuana use approximately ten times prior to entering the Navy. Based on the Article 112a violation, processing for administrative separation is mandatory per the U.S. Navy Military Personnel Manual (MILPERSMAN), Section 1910. This usually results in an unfavorable characterization of discharge or, at a minimum, a punitive discharge and possible confinement if adjudicated and awarded as part of a sentence by a special or general court-martial. The command did not pursue a punitive discharge but opted instead for the more lenient administrative discharge. When notified of administrative separation processing on 15 January 2003 using the administrative board procedure, the Applicant waived his rights to consult with a qualified counsel, submit a written statement, and request an administrative separation board.

Issue 1: (Decisional) (Equity) RELIEF NOT WARRANTED. The Applicant contends his discharge was inequitable due to recruiter and career counselor misrepresentation during his accession into and enlistment in the Navy. The NDRB is not an investigative body, and allegations of recruiter misconduct should be made to the Naval Inspector General's Office. Notwithstanding, the Board reviewed the Applicant's enlistment accession, which detailed that he enlisted for four years in the Seaman Apprentice program, was offered preference in duty station geographic location, for which he chose the west coast/southern California and, upon honorable completion of his four-year enlistment, could use a \$40,000 college fund contribution in addition to the GI Bill benefits he would also receive. The Applicant stated the U.S. Navy Recruiter told him he could join the Navy, report to his first command, and then decide which rating to "strike" for once he got a feel for the opportunities available and his personal preferences. It is normal for some new accession personnel to enter the Navy under the Seaman Apprentice program and choose a rating path after entry to the fleet. Although the Applicant had received an AFQT score of 87, which would normally qualify him for many selective ratings, any number of factors to include personnel retention rates, school seat availability, job specialty rating manning level requirements, or the Applicant's pre-service misdemeanor drug possession waiver may have affected his ability to pre-qualify for those ratings. Nevertheless, after careful review of the evidence, the Board found no credible evidence to support the Applicant's claim of recruiter malfeasance or misrepresentation.

The Applicant also claims that the command Career Counselor misrepresented the pass rate of the gas turbine mechanic test in which he showed interest in completing. The Applicant claimed the counselor told him the test passing rate was 100%, yet when he took the test, for which he admittedly did not prepare, he missed the selection cutoff score by one-half percentage point

and the overall passing rate proved to be 77%. In reviewing the Applicant's written statement and testimony from the hearing proceedings, the Board found no merit to the claim that the Career Counselor was in any way intentionally misleading or guilty of wrongdoing. The Career Counselor's job is to promote retention within the Navy and assist Sailors in making wise, educated decisions regarding career choices available to them. There is no motivation to mislead or otherwise not discharge their duties to the utmost of their ability.

The Board did note that conditions aboard the ship that the Applicant was assigned to were likely not as he had envisioned. At the time of reporting to his command, the ship had returned from deployment and entered dry dock for extensive repair and maintenance. The work environment and living conditions for Sailors assigned to ships in dry dock can be at times chaotic and disorderly while manning levels can often be deficient. However, Sailors are still expected to maintain the Navy standards of discipline and conduct no matter the conditions they are exposed to. After reviewing all the facts and circumstances, to include evidence submitted and statements made by the Applicant, the Board determined this issue to be without merit. Based on the Applicant's own statements acknowledging his youthful immaturity at the time of enlistment, which included "irrational decision making" and feeling "armed with a sense of entitlement and blind to the realities of life," he quickly became disillusioned with his perception of life in the Navy and embarked upon a series of irrational decisions that resulted in his unauthorized absence for 34 days, missing two ship movements, and testing positive for illegal drug use (marijuana).

The evidence of record does not demonstrate the Applicant was not responsible for his conduct or he should not be held accountable for his actions. When a Sailor's service has been honest and faithful, it is appropriate to characterize that service under Honorable conditions. An Under Other Than Honorable Conditions discharge is warranted when a service member commits or omits an act that constitutes a significant departure from the conduct expected of a Sailor. The Applicant's conduct, which forms the primary basis for determining the character of service, reflects the Applicant failed to meet the requirements of conduct expected of all Sailors, regardless of his grade or length of service, and falls far short of what is required for an upgrade.

Issue 2: (Decisional) (Equity) RELIEF NOT WARRANTED. The Applicant contends his post-service achievements are representative of his true character. The Applicant provided documentation that included: a personal letter to the Board; certificate of appreciation; meritorious promotion certificate to E-3; college transcripts; verification of leadership in collegiate extracurricular activities; letter of reference from his employer; personal letters of reference; and a family letter to the board. Completion of these items alone does not guarantee an upgrade from an unfavorable discharge as each discharge is reviewed by the Board on a case-by-case basis. There is no law or regulation that provides an unfavorable discharge may be upgraded based solely on the passage of time or good conduct in the civilian life subsequent to leaving the service. Though his post-service accomplishments are significant, the seriousness of his conduct while in service, to include intentional illegal drug use of marijuana, UA for 34 days, and missing two ship movements, remains factual and could have been punished by confinement up to one year and a Bad Conduct or Dishonorable discharge if adjudicated at trial by special or general court-martial. Relief denied.

Summary: After a thorough review of the available evidence, to include evidence submitted by the Applicant and the administrative hearing testimony, the Applicant's summary of service, service record entries and administrative separation process, the Board found the discharge was proper and equitable. Therefore, the awarded characterization of service shall remain UNDER OTHER THAN HONORABLE CONDITIONS and the narrative reason for separation shall remain MISCONDUCT.

The Applicant is directed to the Addendum, specifically the paragraphs titled *Additional Reviews, Automatic Upgrades, and Post-Service Conduct*.

BURDEN, Thomas M., XXX-XX-2069, ex-SA, USN

CURRENT DISCHARGE AND APPLICANT'S REQUEST

Application Received: 20090917

Characterization of Service Received: (per DD 214) UNDER OTHER THAN HONORABLE CONDITIONS

Narrative Reason for Discharge: (per DD 214) MISCONDUCT

Authority for Discharge: (per DD 214) MILPERSMAN 1910-146 [DRUG ABUSE]

Applicant's Request: Characterization change to: GENERAL (UNDER HONORABLE CONDITIONS)

Narrative Reason change to: NONE REQUESTED

SUMMARY OF SERVICE

Prior Service:

Inactive: USNR (DEP) 20010924 - 20011008 COG Active: NONE

Period of Service Under Review:

Date of Current Enlistment: 20011009

Age at Enlistment: 18

Period of Enlistment: 4 Years NO Extension

Date of Discharge: 20030307

Highest Rank/Rate: SN

Length of Service: 01 Year(s) 03 Month(s) 24 Day(s)

Education Level: 12

AFQT: 87

Evaluation Marks: Performance: 3.0 (1)

Behavior: 3.0 (1)

OTA: 3.33 (1)

Awards and Decorations (per DD 214): NDSM

Period of CONF: NONE

NJP: 1

- 20030109: Article 86 (Unauthorized absence from unit 20021104-20021208, 34 days)

Article 87 (Missing ship movement, 20021104 and 20021118)

Article 112a (Wrongful use of controlled substance, marijuana 121 ng/ml, NAVDRUGLAB 20021212)

Awarded: RIR FOP RESTR EPD Suspended: NONE

SCM: NONE

SPCM: NONE

CC: NONE

Retention Warning Counseling: NONE

TYPES OF DOCUMENTS SUBMITTED/REVIEWED

Related to Military Service:

DD 214:

Service/Medical Record:

Other Records:

Related to Post-Service Period:

Employment:

Finances:

Education/Training:

Health/Medical Records:

Rehabilitation/Treatment:

Criminal Records:

Personal Documentation:

Community Service:

References:

Department of VA letter:

Other Documentation:

Additional Statements:

From Applicant:

From/To Representation:

From/To Congress member:

PERTINENT REGULATION/LAW

A. The Naval Military Personnel Manual, (NAVPERS 15560C), re-issued October 2002, effective 22 August 2002 until 28 April 2005, Article 1910-146, SEPARATION BY REASON OF MISCONDUCT - DRUG ABUSE.

B. Secretary of the Navy Instruction 5420.174D of 22 December 2004, Naval Discharge Review Board (NDRB) Procedures and Standards, Part II, Para 211, Regularity of Government Affairs, Part V, Para 502, Propriety and Para 503, Equity.

Key: NFIR - Not found in record
SPCM - Special court-martial
CONF - Confinement

UA - Unauthorized absence
FOP - Forfeiture of pay
CC - Civilian conviction

NJP - Nonjudicial punishment
RIR - Reduction in rank
CCU - Correctional Custody Unit

SCM - Summary court-martial
EPD - Extra duties
BW - Confinement on bread and water

ADDENDUM: Information for the Applicant

Complaint Procedures: If you believe the decision in your case is unclear, not responsive to the issues you raised, or does not otherwise comport with the decisional document requirements of DoD Instruction 1332.28, you may submit a complaint in accordance with Enclosure (5) of that Instruction to the Joint Service Review Activity, OUSD (P&R) PI-LP, The Pentagon, Washington, DC 20301-4000. You should read Enclosure (5) of the Instruction before submitting such a complaint. The complaint procedure does not permit a challenge of the merits of the decision; it is designed solely to ensure that the decisional documents meet applicable requirements for clarity and responsiveness. You may view DoD Instruction 1332.28 and other Decisional Documents by going online at "<http://Boards.law.af.mil>."

Additional Reviews: After a document review has been conducted, former members are eligible for a personal appearance hearing, provided the application is received at the NDRB within 15 years of the Applicant's date of discharge. The Applicant can provide documentation to support any claims of post-service accomplishments or any additional evidence related to this discharge. Representation at a personal appearance hearing is recommended but not required. There are veterans organizations such as the American Legion and the Disabled American Veterans that are willing to provide guidance to former service members in their efforts to obtain a discharge upgrade. If a former member has been discharged for more than 15 years, has already been granted a personal appearance hearing or has otherwise exhausted their opportunities before the NDRB, the Applicant may petition the Board for Correction of Naval Records (BCNR), 2 Navy Annex, Washington, DC 20370-5100 for further review.

Service Benefits: The U.S. Department of Veterans Affairs (VA) determines eligibility for post-service benefits, not the NDRB. There is no requirement or law that grants recharacterization solely on the issue of obtaining veterans benefits and this issue does not serve to provide a foundation upon which the Board can grant relief.

Employment/Educational Opportunities: The NDRB has no authority to upgrade a discharge for the sole purpose of enhancing employment or educational opportunities. Regulations limit the NDRB's review to a determination of the propriety and equity of the discharge.

Reenlistment/RE-code: Since the NDRB has no jurisdiction over reenlistment, reentry, or reinstatement into the Navy, Marine Corps, or any other of the Armed Forces, the NDRB is not authorized to change a reenlistment code. Only the BCNR can make changes to reenlistment codes. Additionally, the NDRB has no authority to upgrade a discharge for the sole purpose of enhancing reenlistment opportunities. An unfavorable "RE" code is, in itself, not a bar to reenlistment. A request for a waiver can be submitted during the processing of a formal application for reenlistment through a recruiter.

Medical Conditions and Misconduct: DoD disability regulations do not preclude a disciplinary separation. Appropriate regulations stipulate that separations for misconduct take precedence over potential separations for other reasons. Whenever a member is being processed through the Physical Evaluation Board, and is processed subsequently for an administrative involuntary separation or is referred to a court martial for misconduct, the disability evaluation is suspended pending the outcome of the non-disability proceedings. If the action includes either a punitive or administrative discharge for misconduct or for any basis wherein an Other Than Honorable discharge is authorized, the medical board report is filed in the member's terminated health record. Additionally, the NDRB does not have the authority to change a narrative reason for separation to one indicating a medical disability or other medical related reasons. Only the BCNR can grant this type of narrative reason change.

Automatic Upgrades - There is no law or regulation that provides for an unfavorable discharge to be upgraded based solely on the passage of time or good conduct subsequent to leaving naval service.

Post-Service Conduct: The NDRB is authorized to consider post-service factors in the recharacterization of a discharge. Outstanding post-service conduct, to the extent such matters provide a basis for a more thorough understanding of the Applicant's performance and conduct during the period of service under review, is considered during Board reviews. Documentation to support a post-service conduct upgrade includes, but is not limited to: a verifiable continuous employment record; marriage and children's birth certificates (if applicable); character witness statements; documentation of community or church service; certification of non-involvement with civil authorities; evidence of financial stability or letters of good standing from banks, credit card companies, or other financial institutions; attendance at or completion of higher education (official transcripts); and documentation of a drug-free lifestyle. The Applicant is advised that completion of these items alone does not guarantee the upgrade of an unfavorable discharge, as each discharge is reviewed by the Board on a case-by-case basis to determine if post-service accomplishments help demonstrate in-service misconduct was an aberration and not indicative of the member's overall character.

Issues Concerning Bad-Conduct Discharges (BCD): Because relevant and material facts stated in a court-martial specification are presumed by the NDRB to be established facts, issues relating to the Applicant's innocence of charges for which he was found guilty cannot form a basis for relief. With respect to a discharge adjudged by a special court-martial, the action of the NDRB is restricted to upgrades based on clemency. Clemency is an act of leniency that reduces the severity of the punishment imposed. The NDRB does not have the jurisdictional authority to review a discharge or dismissal resulting from a general court-martial.

Board Membership: The names and votes of the members of the NDRB Board are recorded on the original of this document and may be obtained from the service records by writing to:

Secretary of the Navy Council of Review Boards
Attn: Naval Discharge Review Board
720 Kennon Street SE Rm 309
Washington Navy Yard DC 20374-5023