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

[redacted]
Docket No. 3192-21
Ref: Signature Date

[redacted]

Dear [redacted]

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 case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 15 July 2021. The names and votes of the members of the panel 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 this 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 SECDEF Memo of 3 Sep 14 "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder" (Hagel Memo); PDUSD Memo of 24 Feb 16 "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or TBI;" USD Memo of 25 Aug 17 "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment" (Kurta Memo); and USECDEF Memo of 25 Jul 2018 "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations" (Wilkie Memo). In addition, the Board considered the advisory opinion contained in BCNR letter Docket No: NR20210003192 of 3 Jun 2021, your response the 3 June 2021 advisory opinion, and the second advisory opinion contained in BCNR letter Docket No: NR20210003192 of 9 Jul 2021.

A review of your record shows that you entered active duty with the Marine Corps in July 1980. You suffered a stable wound to your neck and scalp that required hospitalization on 19 January 1981 until 26 January 1981. Upon your release from treatment, you were returned to full duty. On 13 February 1981, you were seen for headaches and prescribed analgesics and light duty. That same month, non-judicial punishment was imposed on you for an unauthorized absence from your appointed place of duty. On 28 August 1981, you were again treated for headaches and prescribed analgesics and light duty. After serving approximately 20 months without incident, non-judicial punishment was again imposed on you for an orders violation. Several months later, you were again punished non-judicially in July 1983 after wrongfully using cocaine and marijuana. As a result, you were notified of administrative separation processing for drug abuse. On 19 September 1983, you were discharged from the Marine Corps with an Other than Honorable characterization of service after being medically cleared. You applied to this Board for an upgrade of your characterization of service but were denied on 1 September 2010. In the following years, you were denied reconsideration based on lack of new evidence. However, on 28 August 2015, the Department of Veterans Affairs (VA) diagnosed you with an Unspecified Anxiety Disorder and assigned you a 70% disability rating. The decision document noted the VA were, more likely than not, "insane" at the time you committed your military drug misconduct for the purposed of determining VA compensation eligibility. By 2016, the VA certified you possessed a 100% disability rating.

The aforementioned BCNR advisory opinion from 3 June 2021 concluded "the preponderance of objective evidence failed to establish Petitioner was diagnosed with a mental health condition or suffered from a mental health condition at the time of his military service, or that his in-service misconduct could be attributed to a mental health condition." However, you provided medical evidence on 6 July 2021 that further supported your arguments that you suffered from a mental health condition at the time of your discharge. As a result, a second advisory opinion from 9 July 2021 determined "the preponderance of objective evidence now supports Petitioner's contention that he incurred Unspecified Anxiety Disorder during his military service following a physical assault, and his in-service misconduct may have been mitigated by his mental health condition." Based on this opinion and the evidence you provided, the Board applied liberal consideration of your case in light of applicable Department of Defense guidance in determining whether your misconduct should be mitigated to upgrade your characterization of service.

The Board carefully considered your arguments for an upgrade to an Honorable characterization of service, placement on the disability retirement list, and reinstatement to paygrade E-5. You assert that you did not receive proper medical treatment for your neck and scalp wounds from January 1981 and were likely insane at the time of your discharge as determined by the VA. Unfortunately, the Board disagreed with your rationale for relief.

Despite substantially concurring with the 9 July 2021 favorable advisory opinion in your case and liberally reviewing the circumstances of your misconduct in light of your mental health condition, the Board determined that your misconduct could not be sufficiently mitigated based on the seriousness of your misconduct. In reviewing your misconduct, the Board noted that your conduct displayed a complete disregard for military good order and discipline and your multiple offenses could have easily resulted in a punitive discharge, extensive confinement, and forfeitures had your command chosen to prosecute you at a court-martial. As a result, in addition to the seriousness of your misconduct outweighing the mitigation offered by your mental health

condition, the Board also determined that you already received sufficient mitigation in your case based on your command's decision to administratively separate vice you refer you to a court-martial. Ultimately, after weighing all the factors involved, including your relatively brief and unremarkable active duty service, the Board concluded the preponderance of the evidence did not support a change to your characterization of service despite applying liberal consideration.

Regarding your request to be reinstated to paygrade E-5, the Board determined the preponderance of the evidence did not support relief. The Board concluded that the VA's determination that you were "insane" at the time of your discharge was not a medical determination that you were not criminally responsible for your misconduct. This finding was based on the lack of any medical evidence that you suffered from a mental defect or disease at the time of your wrongful drug use that prevented you from discerning whether your actions were criminal or not. The Board was not persuaded that your Unspecified Anxiety Disorder condition prevented you from being mentally responsible for your actions. Absent medical evidence that you were actually criminally insane at the time you wrongfully used marijuana and cocaine in 1983, the Board found you were properly found guilty at your non-judicial punishment hearing on 18 July 1983 for wrongful use of controlled substances and awarded a reduction in paygrade to E-4 that was supported by the seriousness of your misconduct. Therefore, the Board determined that reinstatement to paygrade E-5 was not merited in your case. In making this determination, the Board liberally considered the circumstances of your case and again reached the conclusion that you already benefited from substantial mitigation by avoiding trial by court-martial. Therefore, they found no further mitigation of your non-judicial punishment was required since, in their opinion, no injustice exists with your non-judicial punishments, administrative discharge, or assigned characterization of service.

Finally, the Board concluded that the preponderance of the evidence does not support your placement on the disability retirement list. In order to qualify for military disability benefits through the Disability Evaluation System with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or the member or to the welfare or safety of other members; or the member's disability imposes unreasonable requirements on the military to maintain or protect the member. In your case, the Board noted that you reported your health as "good" on 19 August 1983; approximately one month prior to your discharge and the same day you were determined to be medically fit for separation. In the Board's opinion, this medical evidence directly contradicts the VA's determination that you were "insane" at the time of your misconduct. As previously noted, the Board concluded the VA's determination that you were "insane" at the time of misconduct was not based on any medical evidence of actual criminal insanity and likely made for the purpose of making you eligible for compensation. Therefore, based on your medical separation examination and your own assessment of your health just prior to your discharge, the Board determined that you were capable of continuing your active duty service at the time of your discharge. Further, the Board also concluded that you were not eligible for disability processing since you were processed for misconduct that resulted in an Other than Honorable characterization of service. Based on these findings, the Board determined your placement on the disability retirement list was not supported by the preponderance of the evidence. Accordingly, the Board found insufficient evidence of error or injustice to warrant a change to your record. While the Board empathizes with your current medical condition, they

felt compensation and treatment for your disability conditions fall outside the scope of the Department of Defense disability system and under the purview of the VA.

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,

7/20/2021

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Signed by: [redacted]