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

[redacted]
Docket No: 1354-22
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 you did not file your application in a timely manner, the statute of limitation was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 9 September 2022. 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 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 the Kurta Memo, the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). Additionally, the Board also considered an advisory opinion (AO) and the response to your AO rebuttal furnished by qualified mental health provider. You submitted both an AO rebuttal for consideration, as well as a response to the AO drafter's surrebuttal.

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 Marine Corps and entered active duty on 9 October 2001. Your pre-enlistment physical examination, on 23 September 2000, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. As part of your enlistment application you signed and acknowledged the Statement of Understanding - Marine Corps Policy Concerning Illegal Use of Drugs. Your last reenlistment occurred on 12 December 2018.

During a previous enlistment, on 26 March 2014, your command issued you a "Page 11" counseling warning (Page 11) for violating the lawful order prohibiting hazing and for assaulting one of your Marine Corps colleagues. The Page 11 expressly warned you that a failure to take corrective action may result in judicial proceedings and/or administrative separation. You submitted a Page 11 rebuttal statement.

You provided a urine sample, on 21 February 2019, as part of a random urinalysis test. A Navy Drug Screening Laboratory message indicated such urine sample tested positive for dextroamphetamine (DAMP) well above the Department of Defense (DoD) testing cut-off level for the DAMP metabolite. The Department of Defense administrative testing cut-off level for amphetamine/d-methamphetamine (DAMP) is 500 ng/ml. Your urine sample tested positive at 1455 ng/ml, nearly three times the cut-off level for the drug confirmation test.

On 18 March 2019, a Senior Medical Officer (SMO) reviewed your medical records for evidence of any prescribed drugs that could cause a positive test result. The SMO determined there was no indication of a current prescription medication prescribed that could cause a positive urinalysis test result in your case.

On 14 August 2019, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with military counsel and elected your right to request an administrative separation board (Adsep Board).

On 7 October 2019, an Adsep Board convened in your case. At the Adsep Board you were represented by counsel. Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined by a preponderance of the evidence that you committed the misconduct as charged. Subsequent to the misconduct finding, the Adsep Board members unanimously recommended that you be separated from the Marine Corps with an Honorable characterization of service.

In the interim, you underwent medical evaluations for both traumatic brain injury (TBI) and PTSD. On both 27 January 2020 and 12 February 2020, you were evaluated at Camp Lejeune Mental Health Clinic by a Medical Officer after a referral by your chain of command for a non-emergency command-directed evaluation (CDE). During these evaluations it was determined that, although you were diagnosed with PTSD and TBI, you did not have a mental health condition that would explain the use of a controlled substance without the ability to recall use of the substance. In a 26 March 2020 memo, the Naval Medical Center [redacted] Mental Health Department Head and a staff clinical psychologist addressed your mental health. They determined that despite having PTSD and TBI, you did not have a mental health condition that

would explain your misconduct, and neither of them determined that your mental health diagnoses created mitigating circumstances which would preclude your discharge.

On 28 May 2020, the Commandant of the Marine Corps approved and directed your separation with an Honorable characterization of service. Ultimately, on 28 June 2020, you were separated from the Marine Corps for misconduct due to drug abuse with an Honorable discharge characterization and assigned an RE-4B 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 Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire to set aside your administrative separation, be awarded lost entitlements including back pay, be retired, have derogatory materials related to your separation removed from your record, and have a Special Selection Board convened to consider your promotion to E-7. In addition, the Board considered your contentions that: (a) the USMC violated the MARCORSEPMAN at your Adsep Board, (b) the preponderance of the evidence standard should be raised to a clear and convincing standard, (c) scientific studies suggest that your urine sample could have resulted in a false positive urinalysis due to taking cyclobenzaprine, (d) you suffered from PTSD, TBI, and major depressive disorder, (e) it is more likely than not in the aggregate that your mental health and medical issues along with your life stressors could have created a situation where an accidental ingestion may have occurred without you being fully aware of what happened, (f) the Government failed to carry its burden of proof at your Adsep Board and engaged in improper "burden shifting" to violate your due process, (g) there is nothing in your service record suggesting any drug misuse in almost nineteen years of service, (h) the Adsep Board having made no rational relation between alleged wrongdoing and facts based on evidence and testimony and rendering a finding of guilt is complicit of the same due process failures as the Government, (i) a failure to fully examine your prescribed medication history resulted in exculpatory evidence not being provided to the Adsep Board thus preventing the Adsep Board members from making a fully informed decision, and (h) the totality of the circumstances reveals that the Government erred in its decision to separate you. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 10 March 2022. The Ph.D. stated in pertinent part:

> Petitioner's OMPF did contain evidence of diagnoses of mental health conditions (PTSD and MDD), as well as TBI. Petitioner did not present with significant concentration problems or issues with long/short term memory during mental health sessions. Furthermore, evaluations completed during his military service noted his PTSD and TBI did not explain his misconduct. Although Petitioner had been prescribed Cyclobenzaprine, at the time of his urinalysis he did not have an active prescription for the drug. Additionally, Cyclobenzaprine use can show up on a urine drug screen, but not for amphetamines. Typically, if it causes a false positive test, it will show a result of Tricyclic Antidepressant.

The Ph.D. concluded, "[b]ased on the available evidence, it is my considered clinical opinion, although Petitioner carried a PTSD and TBI diagnosis in-service, the preponderance of available evidence failed to establish his in-service misconduct could be mitigated by these mental health conditions.

In response to the AO, you submitted rebuttal evidence with arguments against aspects of the opinion.

The Ph.D. drafted a response to your AO rebuttal submission. The Ph.D. stated in pertinent part:

> Though there was no new or material clinical evidence presented in support of his application, Petitioner presented the argument that his "combined mental and/or medical health issues, along with his personal life stressors" may explain his lack of memory of a possible accidental drug ingestion. Additionally, Petitioner contended that his prescribed medication, Cyclobenzaprine, was similar in chemical make-up to Amitriptyline (a tricyclic antidepressant) and that tricyclic antidepressants can trigger false positive results for amphetamines on urine drug testing in a small number of cases.
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> Clinical records revealed that Petitioner's mental health conditions were evaluated by competent mental health experts specifically for mitigation of his drug charges and possible memory lapse. It was determined that Petitioner's mental health conditions did not "explain" his misconduct, nor mitigate the circumstances for discharge from the service. Additionally, at no time during his evaluation and treatment for his mental health conditions was Petitioner's condition deemed disabling to the point of finding him unfit for service, not responsible for his actions, or meeting the criteria for initiation of medical evaluation board/referral to the Physical Evaluation Board.
>
> Petitioner referenced studies stating that in a small percentage of cases, Tricyclic Antidepressants can cause a false positive reading of d-amphetamines. He then speculated that his prescribed medication Cyclobenzaprine is "similar in its chemical make-up as Amitriptyline" and that this similarity may explain a false positive Urinalysis. The Navy Drug Screening Labs utilize both an initial screening drug test, followed by repeated testing with more sensitive tests to confirm any initial positive specimens before reporting any specimen out as positive result. There was no objective evidence presented to support the contention of a false positive urine drug test occurred during Petitioner's drug testing process.

The Ph.D. concluded, "I have reviewed Petitioner's AO rebuttal. In-service records document diagnoses of PTSD and TBI, as well as mental health evaluations stating these diagnoses were not attributable for Petitioner's controlled substance use or isolated memory lapse. Additionally, there were no clinical indications the diagnosis of Major Depression could be attributable to Petitioner's drug use misconduct."

In response to the surrebuttal AO, you provided additional arguments. The Board reviewed and considered your second rebuttal response dated 27 August 2022.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your positive drug test, outweighed these mitigating factors. First, the Board determined that your legal arguments in favor of relief were either unsupported by relevant legal authority, lacked merit, involved erroneous interpretations of military regulations, or were simply not persuasive. The Board was also not convinced by your attorney's contention that the Marine Corps should strictly adhere to its own regulations regarding the burden of proof on the one hand, but then consciously disregard its regulations and policy to carve out a higher standard of proof to suit your needs. The Board determined that such an unprecedented departure from well-settled Marine Corps policy to carve-out a new burden of proof would be ill-advised at best.

The Board determined any suggestion that the Government either did not meet its burden of proof at your Adsep Board, and/or improperly shifted the burden of proof to you was unsupported by the evidence. As your counsel correctly cited in his brief, the standard of proof is a preponderance of the evidence as to all matters before the Adsep Board.

At the Adsep Board the Government presented evidence of your positive urinalysis test for the DAMP metabolite at 1455 ng/ml. The Board unequivocally determined that the positive urinalysis result alone more than meets the Government's evidentiary burden at non-judicial punishment or an Adsep Board. Accordingly, the Board agreed with the Adsep Board's finding of misconduct. How the Adsep Board members as the trier of fact ultimately reached their decision was determined not be of consequence with the Board's decision in your case.[1] The Board determined the drug message alone was sufficient to meet the Government's burden of proof under the preponderance of the evidence standard.

The Board also determined that the Government did not engage in improper burden shifting in your case. The Board noted that the wrongful use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception shall be upon the person claiming its benefit.[2] If such an issued is raised by the evidence presented, then the burden of proof is upon the Government to show your use was wrongful. The Board also noted that knowledge of the presence of the controlled substance may be inferred from the presence of the metabolite in your body or from other circumstantial evidence, and that this permissive inference may be legally

[1] MARCORSEPMAN (MCO 1900.16 CH2) states that, "the board will rely upon its own judgment and experience in determining the weight and credibility to be given material or testimony received in evidence."

[2] This is entirely consistent with the MARCORSEPMAN which states that, "After the presentation of the government's case, certain justifiable inferences which are adverse to the respondent may be drawn from the evidence by the board, the convening authority, and the separation authority. In this latter instance, the burden of going forward with evidence to avoid the adverse effect of these justifiable inferences may then shift to the respondent."

sufficient to satisfy the government's burden of proof as to knowledge. The Board concluded that you did not present sufficient evidence to rebut the permissive inferences of knowledge and wrongfulness.

Even assuming, arguendo, that additional evidence was needed to satisfy the burden of proof, the Board noted that other factors buttressed the Government's case. First, the Board noted that no evidence was introduced at the Adsep Board challenging the reliability of the on-site collection and chain of custody, a very common area to explore in urinalysis cases. Second, the limited summarized Adsep Board record indicated that you and your son's medications were stored in two separate locations thus drastically reducing the probability of accidental or unknowing ingestion. Third, your testimony at the Adsep Board that you had no noticeable difference in feeling or behavior before taking the urinalysis was not credible. The Board determined given the level of the DAMP metabolite in your system on the day of the urinalysis, you would have most likely physically experienced the effects of a powerful stimulant - in stark contrast to the pharmacological effects of taking cyclobenzaprine. Fourth, a SMO's drug test verification confirmed that you had no current prescription medications that could cause a positive test result. Fifth, no credible evidence has been introduced to question the reliability or accuracy of your particular urinalysis test on 21 February 2019. The Board determined that no matter how many medical articles or journals your attorney cited or discussions about "double bonds," any suggestion that cyclobenzaprine, a muscle relaxant, would test positive for a stimulant on your DoD drug test was not a reasonable argument nor was it supported by the evidence.

The Board noted that the DoD employs state-of-the-art urinalysis testing technology designed to avoid the very situation you argue occurred in your case. The Board further noted that if your urine sample initially tests positive on the immunoassay screening, the urine sample is tested again at the Navy Drug Screening Laboratory. If the second immunoassay screening is still positive, the positive test result is confirmed using gas chromatography/mass spectrometry (GC/MS) subject to a minimum DoD cut-off level established, in part, to avoid false positive tests. The Board further noted that your attorney could not cite a credible medical article, journal, or publication suggesting that a false positive test for amphetamines could occur using GC/MS testing technology with an individual taking cyclobenzaprine given established DoD cut-off levels. Accordingly, the Board determined the preponderance of the evidence does not support a finding of a false positive urinalysis test result in your case.

In accordance with the Hagel, Kurta, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced and their possible adverse impact on your service. However, the Board concluded that there was no convincing evidence of any nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board

determined the record reflected that your misconduct was intentional and willful and demonstrated you were unfit for further service. The Board also determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not be held accountable for your actions.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. 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 in your last enlistment greatly outweighed any positive aspects of your military record. The Board determined that the basis for your separation was the commission of an act or acts constituting a significant departure from the conduct expected of a Marine. Moreover, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. The Board determined that illegal drug use by a Marine is contrary to USMC core values and policy, renders such Marines unfit for duty, and poses an unnecessary risk to the safety of their fellow Marines. As a result, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. Even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an error or injustice exists to warrant setting aside your administrative separation or granting clemency in your case. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Lastly, the Board concluded given that the core findings of misconduct and discharge were not overturned and/or set aside, that any requests for restoration of entitlements and back pay, constructive service for retirement, removal of derogatory information, and the convening of a Special Selection Board would be denied as well.

While not impacting the ultimate decision in your case, the Board noted that you did not have a current prescription for cyclobenzaprine at the time of your February 2019 urinalysis. The Department of the Navy places expiration dates on prescriptions to mark the date on which it would no longer be proper to take the medicine as a valid prescription. Once the expiration date passes it would be incumbent for a patient to meet with their military health care provider to request an updated prescription. Contrary to your attorney's contention regarding his "take as needed" argument, such an interpretation would lead to absolutely absurd results if service members could retain prescriptions for weeks, months, or even years past expiration dates and later claim they were still legally permitted to take such medicine upon a positive urinalysis for such drugs.

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,

9/13/2022

[redacted]

Executive Director
Signed by: [redacted]