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

[redacted]
Docket No: 1546-22
Ref: Signature Date

[redacted]

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 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 15 April 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) furnished by qualified mental health provider and your response to the AO.

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 enlisted in the Marine Corps and commenced active duty in April 1989. Your pre-enlistment physical examination on 20 October 1988 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. As part of your pre-enlistment

application, on 20 October 1988, you acknowledged and signed a "Statement of Understanding – Marine Corps Policy Concerning Illegal Use of Drugs." You also admitted pre-service marijuana use on your enlistment application.

From the time you enlisted and into calendar year 1991 you received no less than five "Page 11" counseling warnings (Page 11) for various deficiencies. Your very first Page 11 warning in 1989 was for illegal drug use confirmed by a urinalysis test upon your arrival at initial recruit training (boot camp). The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation or judicial proceedings. You did not make a Page 11 rebuttal statement.

The other noted deficiencies in your Page 11 entries documented: (a) the possession of alcohol in the barracks, (b) poor attention to detail and an inability to get assigned work done in a timely manner, (c) frequent involvement with civilian authorities, and (d) the poor performance of administrative duties and attitude towards the USMC and superiors. Each Page 11 expressly warned you that any further deficiencies in performance and/or conduct may result in additional disciplinary action and/or administrative separation. You did not submit rebuttal statements to any of your Page 11 entries.

In early January 1992, a medical screening recommended you for Level II drug abuse rehabilitation treatment and that you be placed on urinalysis surveillance. On or about 6 January 1992 you received non-judicial punishment (NJP) for the wrongful use of a controlled substance (marijuana). You did not appeal your NJP.

On 10 January 1992, your command notified you that were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with counsel and waived your rights to submit a written statement to the Separation Authority and to request an administrative separation board. On 3 February 1992, the Staff Judge Advocate for the Separation Authority determined that your separation was legally and factually sufficient. On 3 February 1992, the Separation Authority approved and directed your separation for misconduct due to drug abuse with an other than honorable conditions (OTH) characterization of service. Ultimately, you were discharged from the Marine Corps for misconduct with an OTH discharge and assigned an RE-4 reentry code.

On 11 September 2021, the VA granted you a service-connection for PTSD with a 70% disability rating. 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 9 March 2022. The Ph.D. initially observed that on active duty you were diagnosed with substance abuse. The Ph.D. noted that throughout your disciplinary proceedings you did not raise concerns of another mental health condition warranting a referral for an evaluation. The Ph.D. noted that although the VA granted you a post-service service-connection for PTSD, there was insufficient information to establish a nexus with your misconduct given your pre-service substance abuse. The Ph.D. concluded by opining that there was insufficient

evidence your misconduct could be attributed to PSTD. You subsequently provided a rebuttal statement providing context to the facts of your case and reiterating your arguments for relief.

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: (a) you were released from active duty a wounded soldier, (b) there was a lack of education from the government about psychological distress that can occur and its long-term effects, (c) it was not until the COVID-19 Pandemic that it occurred to you that you were suffering from PTSD from the Gulf war, (d) it is hard for you to put into words what you go through on a day-to-day basis – some days are good, most are not and you deserve this injustice to be corrected, (e) instead of offering you counseling or even asking if something was wrong you were discarded by the Marine Corps like trash, (f) you deserve justice and you lost everything because of this injustice, and (g) for thirty years your wounds have bled and humiliation and darkness have ruled your life and you deserve light. However, given the totality of the circumstances, the Board determined that your request did not merit relief.

First and foremost, the Board determined that much of the relief you have requested is not within the Board's purview to grant, and each such request is denied at this time. The BCNR is not empowered to: (a) appoint a military or civilian attorney to address your civilian legal matters, (b) increase a disability award adjudicated by the VA, (c) restore lost benefits that are administered by the VA such as the GI Bill, and (d) issue you an ID card with full on-base privileges. Secondly, regarding your military awards, the Board noted that have you not exhausted your administrative remedies and must first seek an award determination from Headquarters, Marine Corps, Military Awards Branch (MMMA-3) prior to seeking relief from BCNR.

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 PTSD and/or its related symptoms and your misconduct, and the Board determined that there was insufficient evidence to support the argument that any such mental health condition the misconduct that formed the basis of your discharge. As a result, the Board concluded that your first four UA periods were not due to mental health-related conditions or symptoms whatsoever. Moreover, even if the Board assumed that you 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 greatly outweighed any positive aspects of your military record. The Board 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 appropriate when the basis for separation is 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 generally will not summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. Additionally, the Board noted that VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only. Such VA eligibility determinations, disability ratings, and/or discharge classifications are not binding on the Department of the Navy and have no bearing on previous active duty service discharge characterizations.

Lastly, the Board noted that marijuana use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. The Board carefully considered any matters submitted regarding your character, post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that given the totality of the circumstances your request does not merit relief. Accordingly, 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 serious misconduct clearly merited your receipt of an OTH.

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,

4/27/2022

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Executive Director

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