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

[redacted]
Docket No: 1842-22
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 17 June 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 a qualified mental health provider, one of which was previously provided to you. You were afforded an opportunity to submit an AO rebuttal, and you did do so.

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 entered active duty on 22 October 2002. Your pre-enlistment physical examination, on 20 July 2001, and self-reported medical history both noted

no psychiatric or neurologic conditions or symptoms. As part of your enlistment application, on 25 July 2002 you signed the "Statement of Understanding Marine Corps Policy Concerning Illegal Use of Drugs," where you acknowledged and expressly understood that the illegal distribution, possession, or use of drugs is not tolerated in the USMC.

On 29 December 2003, you commenced a period of unauthorized absence (UA) that terminated after thirty days on 28 January 2004 with your surrender to military authorities. On 8 April 2004, you received non-judicial punishment (NJP) for your thirty day UA.

On 13 April 2004, your command issued you a "Page 11" warning (Page 11) documenting your NJP for UA. The Page 11 expressly advised you that a failure to take corrective action and any further misconduct may result in judicial or adverse administrative action, including but not limited to administrative separation. However, on 18 May 2004, you received NJP for failing to obey a lawful order or regulation. You did not appeal your NJP.

On 9 December 2004, you were convicted at a Special Court-Martial (SPCM) of the wrongful use of cocaine on diverse occasions. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), confinement for sixty days, and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). On 14 February 2005, the Convening Authority approved the SPCM sentence, but mitigated the confinement portion of the sentence to ninety days of hard labor without confinement. On 17 April 2007, the Navy-Marine Corps Court of Criminal Appeals affirmed the SPCM findings and sentence and ruled that no error materially prejudicial to your substantial rights was committed. Upon the completion of appellate review in your case, on 20 August 2007, you were discharged from the Marine Corps with a BCD and assigned an RE-4B reentry code.

On 4 April 2017, the Naval Discharge Review Board determined that your discharge was proper as issued and that no change was warranted. You had contended, in part, that PTSD mitigated your drug use.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to: (a) your BCD was directly tied to unlawful orders NCOs gave you that resulted in chronic PTSD and other mental health conditions/issues, (b) you served under threat of death, serious injury, and sexual violence during two overseas deployments, (c) you were the target of racial and physical attacks, (d) you witnessed and were forced to participated in death and torture of unarmed civilians, (e) your first line NCO was court-martialed for his role in such misconduct, (f) multiple buddy letters and court-martial documents support your upgrade request, and (g) a discharge upgrade will allow you to obtain VA mental health services. For purposes of clemency consideration, the Board noted you 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 26 April 2022. The Ph.D. stated in pertinent part:

> Among available records, there is no evidence that he was diagnosed with a mental health condition in military service. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. Post-service, the VA has provided treatment for PTSD from combat but there is insufficient information regarding the depression diagnosis to attribute it to military service. Unfortunately, the Petitioner's personal statement and the VA records are not sufficiently detailed to provide a nexus with his misconduct. While his misconduct did occur after his Iraq deployment, there is no indication he was not competent or responsible for his behavior during military service. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) are required to render an alternate opinion.

The Ph.D. concluded, "[b]ased on the available evidence, it is my clinical opinion that there is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to PTSD or another mental health condition."

In response to the AO, you provided medical evidence that documents your post-discharge treatment for mental health issues and a memorandum addressing the AO.

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 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 cumulative misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. Additionally, the Board concluded that the specific drug-related misconduct you committed would not be excused by mental health conditions even with liberal consideration given that a strong stimulant such as cocaine was not a typical substance for self-medicating PTSD symptoms. The Board also concluded 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 observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average calculated from your available performance evaluations during your enlistment was 3.5 in conduct. Marine Corps regulations in place at the time of your discharge required a minimum trait average of 4.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your cumulative misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your serious misconduct.

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. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating certain VA benefits, or enhancing educational or employment opportunities. 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 and disregard for good order and discipline clearly merited your receipt of a BCD.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. You were properly convicted at a SPCM of serious misconduct, and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. The Board carefully considered all matters submitted regarding your character, post-service conduct, and personal/professional 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.

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,

6/30/2022

[redacted]

Executive Director

Signed by: [redacted]