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

Docket No: 5427-22
Ref: Signature Date

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 28 October 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. Although you were afforded an opportunity to submit an AO rebuttal for consideration, you chose not to 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 20 June 2000. As part of your enlistment application you disclosed pre-service marijuana usage. On 27 May 1999, 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. Your pre-enlistment medical examination, on 28 May 1999, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 23 August 2001, you were convicted at a Summary Court-Martial (SCM) of the wrongful use of a controlled substance (marijuana). You were sentenced to confinement for thirty (30) days, a reduction in rank to the lowest enlisted paygrade (E-1), and forfeitures of pay. The Convening Authority (CA) approved the SCM sentence as adjudged. Following your release from confinement, on 26 September 2001, you commenced a period of unauthorized absence (UA) that terminated after two days, on 28 September 2001, with your return to military authorities.

On 24 October 2001, you were convicted at a Special Court-Martial (SPCM) of UA, and for the wrongful possession of a controlled substance (marijuana). You were sentenced to confinement for forty-five (45) days, and a discharge from the Marine Corps with a Bad Conduct Discharge (BCD). On 15 January 2002, the CA approved the SPCM sentence as adjudged, except suspended any confinement in excess of thirty (30) days.

On review, the U.S. Navy-Marine Corps Court of Criminal Appeals affirmed the SPCM findings and sentence on 11 July 2002. Upon the completion of appellate review in your case, on 29 October 2002, you were discharged from the Marine Corps with a BCD.

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, your desire for a discharge upgrade and contentions that: (a) you suffered from PTSD on active duty, and (b) you need counseling and therapy due to your condition. 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 13 September 2022. The Ph.D. stated in pertinent part:

> There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Post-service, he has received a diagnosis of PTSD from a civilian provider that has been attributed to military service. Unfortunately, his personal statement and available records are not sufficiently detailed to provide a nexus with his misconduct. Additional records

(e.g., complete post-service mental health records describing the Petitioner's mental health diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD."

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. In accordance with the Kurta, Hagel, 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 punitive discharge. As a result, the Board concluded that your SCM and SPCM misconduct was not due to mental health-related conditions or symptoms. Even if the Board assumed that your cumulative misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your drug-related 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. Moreover, the Board concluded that your drug abuse was not a form of self-medication, but more likely the continuation of your pre-service marijuana usage, even with viewing such misconduct under the lens of the liberal consideration standard. The Board further 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 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 generally will not summarily upgrade a discharge solely for the purpose of facilitating veterans benefits, medical care, or enhancing educational or employment opportunities. The Board determined that illegal drug use by a Marine is contrary to Marine Corps core values and policy, renders such Marines unfit for duty, and poses an unnecessary risk to the safety of their fellow Marines. 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. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard for mental health conditions, 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 a serious misconduct, and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. 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 upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. Accordingly, given the totality of the circumstances, the Board determined that 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,

11/1/2022