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

[redacted]
Docket No: 6195-22
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 16 December 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 did not 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 24 September 1996. As part of your enlistment application, on 1 December 1995, you signed and acknowledged the "Statement of Understanding - Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment

physical examination, on 9 December 1995, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 6 February 1998, a Navy Drug Screening Laboratory message indicated your urine sample tested positive for methamphetamine/amphetamine above the established testing cut-off level of 100 ng/ml. On 11 February 1998, you received non-judicial punishment (NJP) for the wrongful use of a controlled substance. You did not appeal your NJP. On the same day your command issued you a "Page 11" counseling warning (6105) documenting your illegal drug involvement, specifically your usage of methamphetamine/amphetamine. The counseling expressly advised you that processing for administrative separation for drug use is mandatory. You did not submit a rebuttal statement to the counseling.

On 23 February 1998, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. On the same day your separation physical examination and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You specifically stated, "I am in good health" on your medical history. On 25 February 1998, you waived your rights to consult with counsel regarding your administrative separation, to include written rebuttal statements, and to request a hearing before an administrative separation board.

On 14 April 1998, the suspended portion of the February NJP was vacated and enforced due to continuing misconduct. On 14 April 1998, you received NJP for the wrongful distribution of a controlled substance containing methamphetamine. You did not appeal your NJP. On the same day, your command issued you a 6105 documenting your illegal drug involvement. The counseling advised you that processing for administrative separation for drug use is mandatory. You did not submit a rebuttal statement to the counseling. Ultimately, on 17 April 1998, you were discharged from the Marine Corps for misconduct with an under Other Than Honorable (OTH) conditions characterization of service 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 for a discharge upgrade and contentions that: (a) you own your responsibility in making your own choices, but your mistake in following a senior Marine has haunted you your whole life, (b) the senior Marine told you the only way to succeed was to go harder and farther than anyone else would, (c) slowly performance enhancers were introduced, starting at steroids and then moving on to methamphetamine, and (d) you now mentor young men through the local schools and am trying to pay it forward. For purposes of clemency and equity 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 26 October 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. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. There is no evidence he was unaware of his misconduct or not responsible for his behavior. He has provided no medical evidence in support of his claims. Substance use is incompatible with military readiness and discipline and considered amenable to treatment, depending on the individual's willingness to engage in treatment. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct, particularly given pre-service substance use that appears to have continued during service. Additional records (e.g., post-service mental health records describing the Petitioner's 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 insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence his misconduct may be attributed to a mental health condition."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. 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 concurred with the AO and concluded that there was no convincing evidence that you suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or 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, the Board observed that you did not submit any clinical documentation or treatment records to support your mental health claims despite a request from BCNR on 25 August 2022 to specifically provide additional documentary material. 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 clearly reflected that your misconduct was willful and intentional 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 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 declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. Lastly, 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 receipt of an OTH, and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge. Even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting an upgraded characterization of service as a matter of clemency or equity. 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,

1/4/2023

[redacted]