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

[redacted]
Docket No. 8947-22
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 23 June 2023. 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.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will 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 U.S. Navy and entered active duty on 21 February 2002. Your pre-enlistment physical examination, on 20 December 2001, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 8 August 2002, you reported or duty on board the [redacted] in [redacted], [redacted].

On 23 January 2003, you received non-judicial punishment (NJP) for dereliction in the performance of duties, and for five separate specifications of insubordinate conduct. You did not appeal your NJP. The same day, your command issued you a "Page 13" retention warning (Page 13) documenting certain deficiencies in your performance and conduct, including dereliction of duty, insubordinate conduct, and simple assault. The Page 13 expressly warned you that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative separation. You did not submit a Page 13 rebuttal statement.

However, on 19 May 2003, you commenced a period of unauthorized absence (UA). Your UA terminated after twenty-five (25) days, on 13 June 2003, with your surrender to military authorities in [redacted], [redacted]. You were retained at [redacted] for disciplinary action.

Upon your return, a "probable cause" urinalysis was conducted on 13 June 2003 as standard operating procedure for all returning absentees. Due to an administrative oversight, a second "command directed" urinalysis was conducted on 16 June 2003. On 23 June 2003, a Navy Drug Screening Laboratory message indicated your second urine sample tested positive for the marijuana (THC) metabolite above the proscribed testing cutoff level.

On 25 July 2003, you received NJP for the wrongful use of marijuana. However, because the second urinalysis test was command directed, the positive test results could not be used for disciplinary purposes, but still could be used a basis for an administrative separation. Accordingly, the drug-related NJP was set aside and all rights, privileges, and property affected by your NJP were restored.

On 4 September 2003, you were notified of administrative separation proceedings by reason of misconduct due to the commission of a serious offense, misconduct due to a pattern of misconduct, and misconduct due to drug abuse. You were processed using "notification procedures," which meant that you were not entitled to request an administrative separation board to hear your case, but the least favorable discharge characterization you could receive was General (Under Honorable Conditions) (GEN). You waived your right to consult with counsel, but elected your rights to submit a written statement for consideration and to General Courts-Martial Convening Authority (GCMCA) review of your proposed separation.

In the interim, on 11 September 2003, you declined your right to request and receive treatment for drug abuse/dependence. The GCMCA approved and directed your discharge for misconduct with a GEN discharge characterization. Ultimately, on 29 October 2003, you were discharged from the Navy for misconduct with a GEN characterization of service and assigned an RE-4 reentry code.

On 8 February 2007, the Naval Discharge Review Board (NDRB) denied your initial application to upgrade your discharge. The NDRB determined that your discharge was proper as issued and that no relief was warranted. You did not proffer any mental health contentions with your first upgrade request. On 14 July 2014, the NDRB again denied your upgrade application. You did not proffer any mental health contentions with your second upgrade request. On 10 May 2018, this Board denied your discharge upgrade petition. You did not proffer any mental health-based contentions with your BCNR petition.

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) it has been 20 years since your discharge for a positive drug test and you believe the results were in error due to a mistake, (b) because of an incident that occurred when you were serving in the fleet it caused you to have PTSD, and the VA diagnosed you as 100% disabled due to service-related PTSD, (c) your life in the Navy was filled with hard work and a promising career which was cut short by an incident that occurred while on active duty, (d) although you did not know it at the time you were suffering from PTSD and you had all the classic symptoms, (e) you couldn't reach out for help and you made a grave mistake by self-medicating with marijuana on one occasion, (f) you take full responsibility and apologize for dishonoring the Navy and the military family in general, (g) post-service you have tried to improve your life and displayed exemplary post-service conduct, and (h) you do not wish to go through the rest of your life paying for one small mistake. For purposes of clemency and equity consideration, the Board noted you provided documentation describing post-service accomplishments and 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 2 May 2023. 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, the VA has granted service connection for a diagnosis of PTSD. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct. Additional records (e.g., complete VA mental health records, including Compensation and Pension examination, describing the Petitioner's diagnosis, symptoms, and their specific link to his military service and misconduct) may aid in rendering an alternate opinion.

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

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 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 any 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 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 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 you did not submit convincing evidence to invalidate your urinalysis test results. The Board noted that your command properly set aside your NJP based on the type of urinalysis conducted, but that the NJP set aside itself never called into question the results of your positive urinalysis. Moreover, the Board noted that your misconduct did not just encompass a single positive urinalysis. Your active duty service spanning only just over twenty months was marred by an NJP for insubordinate conduct and dereliction of duty, and you also had a long-term UA immediately prior to your positive drug test. Lastly, the Board noted that VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only are not binding on the Board.

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 GEN or under Other Than Honorable conditions (OTH) 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 Sailor. Additionally, the Board determined that illegal drug use by a Sailor is contrary to Navy core values and policy, renders such Sailors unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. 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. 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. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Wilkie Memo and reviewing the record liberally and holistically, the Board did not find evidence of an error or injustice that warrants granting you the relief you requested or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the

seriousness of your misconduct. 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,

6/27/2023

[redacted]