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

[redacted]
Docket No. 9062-22
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 5 May 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.

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 originally enlisted in the U.S. Navy and entered active duty on 9 February 1987. Your pre-enlistment physical examination, on 30 January 1987, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 3 July 1987, you reported for duty on board the USS [redacted] (CV[redacted]) in [redacted].

On 9 June 1987, you received non-judicial punishment (NJP) for failing to obey a lawful order. You did not appeal your NJP. The same day your command issued you a "Page 13" retention warning (Page 13). The Page 13 warned you that any further deficiencies in your performance and/or conduct may result in disciplinary action and in processing for administrative separation.

On 31 January 1990, your command withdrew its recommendation for your advancement to MS3 (E-4) due to a decline in your performance. On 7 February 1990, you received NJP for unauthorized absence (UA), missing movement, and insubordinate conduct. You did not appeal your NJP. The same day your command issued you another Page 13 warning 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.

On 12 April 1990, you received NJP for three separate UA specifications. You did not appeal your NJP. On 14 January 1991, you extended your enlistment for another twenty-six months.

On 15 April 1991, your command issued you a Page 13 warning documenting your three previous NJPs. The Page 13 noted your UCMJ violations indicated a pattern of misconduct and specifically stated that further violations will not be tolerated. 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.

On 18 July 1991, you commenced a period of UA that terminated, after one day, on 19 July 1991. Additionally, on 29 August 1991, you received NJP for the wrongful use of cocaine and for two separate specifications of missing movement. You did not appeal your NJP. On 6 September 1991, a drug/alcohol dependency screening indicated that you were psychologically/physically dependent on alcohol and drugs. The evaluator recommended that you receive Department of Veterans Affairs (VA) rehabilitation treatment upon separation.

On 11 September 1991, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse, misconduct due to a pattern of misconduct, and misconduct due to the commission of a serious offense. You waived your rights to consult with counsel, submit statements, and to request an administrative separation board. In the interim, your separation physical examination, on 13 September 1991, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. You endorsed both "depression and excessive worry," and "nervous trouble of any sort" on your medical history, but you attributed such issues to your pending administrative separation. On 16 October 1991, you waived in writing your right to VA inpatient rehabilitation treatment and instead elected immediate separation. Ultimately, on 18 October 1991, you were discharged

from the Navy for misconduct with an under Other Than Honorable conditions (OTH) characterization of service and assigned an RE-4 reentry code.

On 17 June 2016, this Board denied your first petition for relief. On 31 August 2022, this Board again denied your 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 changes to your reason for discharge and reentry code. The Board also considered your contentions that: (a) the underlying basis of your separation was procedurally defective at the time of the discharge, (b) the adverse action was unfair at the time, (c) the discharge is inequitable now, (d) you had excellent evaluations on active duty and were never in trouble until the evening of the club incident, (e) had it been explained to you that you would not have received a DD 214 for your three years and seven months of service you would have not extended your military career, (f) you smoked marijuana on the evening in question, and that you view your military records documenting your cocaine use as erroneous, and (g) you suffered from multiple traumas during your time on board the USS [redacted] and served your country honorably. The Board noted for clemency and equity purposes, you submitted personal statements, a VA characterization of service determination, BCNR decisional letters, and 1997 federal case law.

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 17 March 2023. The Ph.D. stated in pertinent part:

> During military service, the Petitioner was diagnosed with a substance use disorder. Substance use is incompatible with military readiness and discipline and does not remove responsibility for behavior. Post-service, the VA has determined that an Adjustment Disorder diagnosis that is temporally remote to his military service is related to military service. Unfortunately, available records indicate his misconduct is not related to his mental health diagnosis, because his mental health concerns appear to have developed in response to separation proceedings and the shame associated with discharge. Additional records (e.g., complete post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in an alternate opinion.

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

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 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 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 illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. The Board also noted that marijuana use in any form is still against current Department of Defense regulations and not permitted for recreational use while serving in the military. 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 Sailor. 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 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,

5/9/2023

[redacted]

Executive Director
Signed by: [redacted]