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

[redacted]
Docket No. 2962-23
Ref: Signature Date

[redacted]

Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 Board waived the statute of limitation 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 29 September 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 the 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 to 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). The Board also considered the advisory opinion (AO) of a qualified mental health provider. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

The Board determined that your personal appearance, with or without counsel, would not materially add to the understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on evidence of record.

You enlisted in the Marine Corps with a pre-service history of marijuana use and a moral waiver, and began a period of active duty on 20 August 1990. You participated in Operations Provide Comfort and Desert Storm in July 1991. On 7 September 1993, you were administratively counseled for lack of initiative and lack of desire to seek self-improvement.

On 8 December 1993, you tested positive for marijuana metabolites as part of a command urinalysis. On 13 December 1993, you were subject to NJP for violating the Uniform Code of Military Justice under Article 112a due to the wrongful use of the controlled substance, marijuana. You were also administratively counseled for frequent involvement with military or civil authorities.

On 29 December 1993, a medical officer provided you with an evaluation for substance dependence or abuse. The notes of this evaluation specified that you disclosed you had used cannabis just prior to the positive urinalysis. Additionally, he documented that you appeared to meet the diagnostic criteria for: alcohol dependence, based on six of nine criteria; cannabis dependence, based on four of nine criteria; LSD (hallucinogen) dependence, based on six of nine criteria; and, abuse of poly-psychoactive substances in that you had used hash, downers, cocaine powder, cocaine-crack, mescaline, heroin, peyote, morphine, and mushrooms. This report of evaluation included diagnoses of both drug and alcohol dependence. As a result, you were notified on 9 February 1994 of processing for administrative separation by reason of misconduct due to drug abuse. You elected to waive consultation with legal counsel, your right to make a statement, and your right to a hearing before an administrative board. Following approval of your recommended separation by Commanding General, [redacted], you were discharged under Other Than Honorable (OTH) conditions on 7 March 1994.

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 to upgrade your discharge and change your narrative reason for separation and reentry code. You contend that you "did not knowingly and intentionally ingest marijuana," that the government failed to show your drug use was both knowing and intentional, you believe this failure rendered your separation for "alleged" drug use legally insufficient, your underlying post-traumatic stress disorder (PTSD) substantially mitigates your misconduct, and, clemency factors merit relief. For purposes of clemency and equity consideration, you submitted a personal statement, an in-service medical evaluation which is also part of your official military personnel file (OMPF), a post-service mental health report and counseling record with a diagnosis of PTSD, and two character letters which primarily describe your purported traumatic experiences during boot camp to which you, at least partially, attribute your PTSD.

Because you contend that PTSD affected your discharge by contributing to your misconduct, the Board also considered the AO. The AO stated in pertinent part:

> During military service, the Petitioner was properly evaluated and diagnosed with multiple substance use disorders. Post-service, he has received a diagnosis of PTSD from a civilian provider that is temporally remote to his military service. Unfortunately, available records are not sufficiently detailed to provide a nexus with his misconduct, particularly given his pre-service substance use history and extensive substance use endorsed during service. As the Petitioner now denies using marijuana in service, it is difficult to attribute his misconduct to self-medication of unidentified mental health symptoms. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis,

symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

The AO concluded, "it is my clinical opinion there is post-service evidence from a civilian provider of a 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. Specifically, the Board determined that your misconduct, as evidenced by your NJPs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included drug offenses. 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. Further, the Board concurred with the AO in all respects. First, the Board concurred that your medical record provides clear evidence that, regardless of your reasoning at the time, you disclosed to your medical professional a history of extensive poly-substance use. Notwithstanding your dismissal of this medical record, the Board found no basis to doubt the veracity of the medical professional in documenting your reported substance use history contemporaneous with your active duty service. Likewise, the Board also concurred with the AO that it would be difficult to attribute your in-service marijuana use to self-medication for unidentified PTSD or mental health symptoms because your primary contention is the express denial of knowing or intentional use of a controlled substance. Further, the Board observed that the timeline you provide to explain your purportedly "accidental" use does not conform to the actual chronology presented within your available service records, to include the dates of your deployment versus the date that your urinalysis sample was submitted to the laboratory for testing. In this regard, the Board found that the medical record of your substance evaluation also documents your admission that you used cannabis "just prior to the positive urinalysis" and, therefore, concluded that you did, in fact, use marijuana in spite of your denial. The Board found your attempt to argue, in the alternative, self-medicating use due to undiagnosed PTSD or mental health to be unpersuasive. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos 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 the 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 is attached 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,

10/16/2023

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