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

[redacted]
Docket No. 3796-23
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 3 November 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.

You enlisted in the U.S. Marine Corps and began a period of active duty service on or about 15 September 2004. You disclosed pre-service marijuana usage on your enlistment application. On 8 September 2004, you signed and acknowledged the "Statement of Understanding – Marine Corps Policy Concerning Illegal Use of Drugs."

Your pre-enlistment physical examination, on 8 August 2003, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. As part of your enlistment

application, you specifically denied on your medical history of ever having: (a) nervous trouble of any sort, (b) frequent trouble sleeping, (c) receiving counseling of any type, (d) depression or excessive worry, (e) been evaluated or treated for a mental condition, (f) attempting suicide, (g) using illegal drugs or abuse prescription drugs, (h) being consulted or treated by clinics, physicians, healers, or other practitioners within the past 5 years for other than minor illnesses.

On 24 January 2005, you received non-judicial punishment (NJP) for an unauthorized absence (UA) that lasted two (2) days. You did not appeal your NJP.

On 19 April 2005, a [redacted] message indicated you tested positive for methamphetamine, cocaine, and marijuana above the testing cutoff levels for each controlled substance. On 20 April 2005, you received NJP for the wrongful use of cocaine and marijuana. You did not appeal your NJP.

On 21 April 2005, you underwent a mental health evaluation. You were diagnosed with an "Adjustment disorder with mixed emotions and disturbance of conduct; Cannabis abuse; Cocaine abuse; Rule out personality disorder NOS with passive-aggressive features." The Navy Medical Officer (MO) noted, in part:

> The results of extensive psychological testing are characteristic of individuals that are feigning a mental disorder and rarely seen in patients that are responding completely truthfully. He has tested positive for cocaine and cannabis while in training and he has shown a pattern of behavior problems that is incompatible with becoming a good Marine.

The MO opined that you had the mental capacity to understand and participate in the proceedings and were mentally responsible for your actions. The MO recommended your expeditious administrative separation by reason of drug abuse and convenience of the government due to a mental condition not amounting to a disability.

On 4 May 2005, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with counsel and waived your rights to include written rebuttal statements and to request an administrative separation board. In the interim, on 15 June 2005, you commenced another UA and did not return to military authorities prior to your discharge. Ultimately, on 22 June 2005 you were discharged *in absentia* from the Marine Corps for misconduct with an under Other Than Honorable conditions (OTH) characterization of service and assigned an RE-4 reentry code.

On 9 April 2010, the Naval Discharge Review Board (NDRB) denied your initial discharge upgrade application.

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 change to your narrative reason for separation. You contend that: (a) you had a disability that was

present but not recognized prior to and during your time in the USMC, (b) you have a history of mental health and substance abuse and have been on social security disability since your early twenties, and (c) you have been "Baker Acted" on several occasions and done numerous stints in mental facilities. For purposes of clemency and equity consideration, the Board considered the entirety of the evidence you provided in support of your application.

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 20 September 2023. As part of the Board's review, the Board considered the AO. The AO stated in pertinent part:

> During military service, the Petitioner was diagnosed with a mental health condition and substance use disorders. Post-service, he has received treatment over many years for other mental health concerns. It is possible that the mental health concerns identified in service continued to increase and may have developed into his current mental health difficulties. However, it is difficult to clearly make this determination, as when he was evaluated during an extended period of hospitalization in service, providers observing him closely considered his responses were exaggerated at the time. There is no evidence of a diagnosis of PTSD. Unfortunately, available records are not sufficiently detailed to attribute all of his misconduct to a mental health condition. While it is possible that UA could be attributed to avoidance and difficulty adjusting, there is insufficient information regarding his substance use to attribute it to anything other than his substance use disorders.

The Ph.D.'s AO concluded, "it is my clinical opinion there is insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is in-service evidence of a mental health condition (Adjustment Disorder) that may be attributed to military service. There is insufficient evidence to attribute all of his misconduct to a mental health condition, other than his substance use disorders."

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 purported 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 forming the basis of your discharge. As a result, the Board concluded that your serious misconduct was not due to 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 further determined that you had a legal, moral, and ethical obligation to remain truthful on your enlistment paperwork. Had you properly and fully disclosed your pre-

service mental health history, counseling, treatment, and symptomology, you likely would have been disqualified from enlisting. The Board determined the record clearly reflected that your lack of disclosure about your mental health history and substance abuse was intentional and willful and demonstrated you were unfit for further service. The Board also 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 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 Marine is contrary to Marine Corps values and policy, renders such Marines unfit for duty, and poses an unnecessary risk to the safety of their fellow Marines. 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. As a result, the Board determined that there was no impropriety or inequity in your upgraded discharge, and even under the liberal consideration standard, the Board concluded that your misconduct and disregard for good order in discipline clearly merited an OTH discharge characterization. Therefore, 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 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,

11/7/2023

[redacted]