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

[redacted]
Docket No. 8629-23
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 limitations 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 27 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 service 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)/mental health condition (MHC) (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 an advisory opinion (AO) from a qualified mental health professional and your response to the AO.

You enlisted in the United States Navy and commenced a period of service on 6 June 1986. On your enlistment application, you acknowledged preservice drug use (marijuana). On 2 September 1986, you began a period of absence without leave from your unit, and you remained absent until you were returned to military control on 4 November 1986. On 12 December 1986, you were found guilty at Summary Court-Martial (SCM) of violating Uniform Code of Military Justice (UCMJ) Article 86, for the 63-day period of UA. You were awarded 14 days of confinement, restriction, and reduction in rank to E-1. On 5 March 1987, you received non-judicial punishment (NJP) for violation of UCMJ Article 112(a), for wrongful use of a controlled substance

(marijuana). You did not appeal this NJP. On 9 March 1987, you received Drug and Alcohol Screening wherein you admitted to using marijuana 1-3 times a week.

On 13 March 1987, you were notified that you were being processed for an administrative discharge by reason of misconduct due to drug abuse and commission of a serious offense. You waived your right to consult with qualified counsel and your right to present your case at an administrative separation board. On 10 April 1987, you were discharged from the Navy for misconduct due to drug abuse with an Other Than Honorable (OTH) characterization of service and assigned an RE- 4 reentry code.

You previously submitted a petition to the Naval Discharge Review Board and were denied relief on 7 December 1994. Your original petition for relief was submitted to this Board on 27 March 2023, and assigned case number NR20230002767. Due to an administrative error, your response to the advisory opinion was not received prior to review by the Board. Your rebuttal was submitted and your petition was reopened for de novo review, this time assigned case number NR20230008629.

The Board carefully considered all potentially mitigating and/or extenuating 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: (a) your desire to upgrade your characterization of service, (b) your contention that you were suffering from symptoms of severe anxiety and panic attacks during your time in service, (c) the impact that your mental health had on your conduct, and (d) your assertion that you committed a single-instance use of marijuana to self-medicate after being deprived of treatment opportunities. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

In your request for relief, you contend that you were separated following a single-instance use of marijuana in 1987, and that you suffered from symptoms of severe anxiety and panic during the relevant time period. You assert that mental health treatment was never made available to you, which resulted in your self-management through marijuana after suffering panic attacks. 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 19 October 2023. The Ph.D. noted in pertinent part:

> Petitioner contended he began to experience symptoms of anxiety and depression when he was unable to postpones his enlistment for enrollment in an Ivy League university. He claimed he experienced his first panic attack when leaving for boot camp. He stated that his mental health symptoms contributed to his decision to use "marijuana for the first - and only - time." He provided evidence of character and post-service accomplishment.
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> There is no evidence the Petitioner was diagnosed with a mental health condition during military service. He has provided no post-service medical evidence in support of his claims. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct, particularly given the poor reliability of the Petitioner's report due to

> contradictory statements regarding his marijuana use. Additional records (e.g., in-service or post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may contribute to an alternate opinion.

The Ph.D. concluded, "it is my clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to a mental health condition."

On 26 November 2023, you provided a response to the advisory opinion in which you highlight that the Board is required to give this case liberal consideration under current policy. You argue that it is unreasonable to expect medical evidence from 30 years ago, especially because mental health issues were less understood and more infrequently diagnosed than they are today. You explain that your mental health issues were undiagnosed and untreated while in service, and were not diagnosed until after your discharge. You further explain that your mental health condition has negatively impacted you in many ways, affecting your behaviors and choices. Specifically, you assert that you spoke to a Chaplain, a Captain, and a psychologist about your mental health concerns prior to your discharge, but were not provided any additional assistance or treatment. Finally, you highlight that your misconduct was a singular, non-violent event, which occurred over 30 years ago, was minor in severity, is now legal in the state of [redacted], and if punished today, you would have received more favorable discharge.

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about undiagnosed mental health issues and the possible adverse impact on your service. Specifically, the Board felt that your misconduct, as evidenced by your SCM conviction and NJP, outweighed these mitigating factors. The Board considered the seriousness of your misconduct and the fact that it involved both a drug offense and a period of UA that extended beyond 30 days. Further, the Board also considered the likely negative impact your conduct had on the good order and discipline of your command. The Board determined that illegal substance abuse is contrary to the Navy core values and policy, renders such Sailor unfit for duty, and poses an unnecessary risk to the safety of fellow shipmates. 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. Additionally, the Board considered the undue burden you placed on your chain of command with your long term UA and likely negative impact it had on mission accomplishment.

In making this determination, the Board concurred with the advisory opinion that there was insufficient 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. There was nothing in your official service records that indicated you sought mental health treatment, or that you raised such symptoms or concerns during your numerous disciplinary processing events. Although you assert that you were diagnosed with a mental health condition post-service, you did not provide any medical evidence in support of this claim aside from your statement, which fails to draw sufficient nexus to the underlying misconduct. The Board also highlighted that, contrary to your contention that the

marijuana use was a single-instance use, your record not only indicates pre-service marijuana use, but also documents that you disclosed in-service marijuana abuse (1-3 times a week) during your drug and alcohol screening on 9 March 1987. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. The Board determined the record clearly reflected that your active duty 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 otherwise not be held accountable for your actions. The Board concluded that your conduct constituted a significant departure from that expected of a Sailor and continues to warrant an OTH characterization.

Therefore, while the Board carefully considered the evidence you submitted in mitigation and commends you for your post-discharge accomplishments, 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,

12/8/2023

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