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

[redacted]
Docket No. 7817-23
Ref: Signature Date

[redacted]

Dear [redacted]

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 12 April 2024. 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, as well as your AO rebuttal submission.

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 enlisted in the U.S. Marine Corps and began a period of active duty service on 7 December 2000. On 29 August 2000, you signed and acknowledged the "Statement of Understanding – Marine Corps Policy Concerning Illegal Use of Drugs." Your pre-enlistment physical examination, on 30 August 2000, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms.

On 21 October 2002, your command issued you a "Page 11" counseling warning (Page 11) for: (a) unauthorized absence (UA) on 21 Oct 2002 when you took it upon yourself to take the entire day off without proper permission, and (b) a lack of judgment by not confirming with the platoon leadership whether or not you rated the day off before securing for the weekend. The Page 11 advised you that a failure to take corrective action may result in further judicial or adverse action to include administrative separation. You elected not to submit a Page 11 rebuttal statement.

On 10 February 2004, a Navy Drug Screening Laboratory Message indicated you tested positive for cocaine at a metabolite level 597 ng/ml. Your urine sample exceeded the established Department of Defense (DoD) testing cutoff level for cocaine of 100 ng/ml.

On 19 February 2004, you refused to undergo a substance abuse evaluation/screening prior to your discharge. The "screening note" appended to the Substance Abuse Counseling Center evaluation noted the following:

> Client was seen…following a command referral for positive UDS for cocaine on 26 January 2004 and civilian arrest for public intoxication and obstruction of justice on 22 December 2003. Client refused a medical officer evaluation. Recommend: MDAC, Administrative Separation.

On 16 April 2004, you were convicted at a Summary Court-Martial (SCM) of the wrongful use of a controlled substance (cocaine). You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), and confinement for thirty (30) days. The Convening Authority approved the SCM sentence as adjudged. On the same day, your command issued you a Page 11 advising you that processing for administrative separation was mandatory in your case.

On 16 April 2004, your command notified you of administrative separation proceedings by reason of misconduct due to drug abuse. You consulted with counsel and waived your right to present your case to an administrative separation board. On 30 April 2004, the Staff Judge Advocate for the Separation Authority determined that your administrative separation proceedings were legally and factually sufficient. Ultimately, on 12 May 2004, you were discharged from the Marine Corps for misconduct with an under Other Than Honorable conditions (OTH) characterization of service and were assigned an RE-4B reentry code.

On 6 June 2008, the Naval Discharge Review Board (NDRB) denied you any relief. The NDRB determined your discharge was proper as issued and no relief was warranted. You did not proffer any mental health contentions whatsoever with your NDRB 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 reason for separation. You contend that: (a) your OTH discharge is an injustice because there exists mitigating circumstances surrounding your offense; specifically, service-connected PTSD, (b) your OTH discharge is an injustice because it does not accurately characterize your overall Marine Corps service, (c) you have rehabilitated your life, demonstrated excellent post-service conduct, and are a contributing member of your community, such that continuing to have an OTH discharge characterization is unjust, (d) you have been sufficiently punished for your one-time use of an illicit substance, and at the time of your drug use, you were suffering from, and you continue to suffer from, substantial mental health injuries incurred during active duty, (e) despite this one-time offense, you demonstrated good quality service to the Marine Corps, including earning multiple awards, (f) post-service you have demonstrated excellent conduct and exemplary citizenship and character, (g) your circumstances are contemplated in the DoD memorandums and BCNR has granted relief to individuals under nearly identical circumstances, and (h) you have been sufficiently punished for your acknowledged shortcomings, and it is time you are given a second chance and the opportunity to move forward with your life without the shame of an OTH discharge hanging over your head. 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 15 February 2024. The Ph.D. stated in pertinent part:

> There is no evidence that he was diagnosed with a mental health condition in military service. However, the VA did grant service connection for PTSD within five years of his separation from service. It is possible that UA and excessive alcohol consumption could be attributed to unrecognized symptoms of PTSD avoidance. There is less information to attribute the Petitioner's purported one-time cocaine use to PTSD symptoms, given his refusal of evaluation in service. 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 Ph.D. concluded, "it is my clinical opinion there is post-service evidence from the VA of a diagnosis of PTSD or another mental health condition that may be attributed to military service. There is insufficient evidence to attribute all of his misconduct to PTSD."

Following a review of your AO rebuttal submission, the Ph.D. did not change or otherwise modify their original AO.

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 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 also noted that VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only. Such VA eligibility determinations are not binding on the Department of the Navy and have no bearing on previous active duty service discharge characterizations.

The Board observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average calculated from your available performance evaluations during your enlistment was approximately 3.7 in conduct. Marine Corps regulations in place at the time of your discharge recommended a minimum trait average of 4.0 in conduct (proper military behavior), for a fully Honorable characterization of service. The Board concluded that your misconduct was not minor in nature and that your conduct marks during your active duty career were a direct result of your serious misconduct and further justified your OTH characterization.

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 is contrary to Marine Corps core values and policy, renders such service members unfit for duty, and poses an unnecessary risk to the safety of their fellow Marines. The Board determined that characterization under OTH conditions is generally warranted for misconduct and 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 discharge and reentry code and concluded that your misconduct and disregard for good order in discipline clearly merited your discharge and RE-4B reentry code. While the Board carefully considered the evidence you submitted in mitigation and commends you for your post-discharge good character, 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,

4/18/2024

[redacted]