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

[redacted]
Docket No. 7960-23
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 10 May 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 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 and your response to the AO.

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 Navy and began a period of active duty on 30 July 1985. At the time, you had a pre-service history of an alcohol-related conviction for driving under the influence and failure to avoid an accident, and you admitted to pre-service marijuana use. You were assigned to [redacted], on 30 August 1986, and served in combat operations for which you received personal awards in the fall of 1987. On 20 January 1989, a Naval drug lab reported

your urinalysis, from a 19 December 1988 unit sweep, as positive for marijuana use. You were administratively counseled that you were disqualified from diving duty due to your drug use, and you were transferred to a different operational unit. Unfortunately, you then had a second positive urinalysis, on 5 June 1989, again for marijuana use, and you were notified of processing for administrative separation by reason for misconduct due to drug abuse based on two positive urinalysis tests.

You elected to waive your right to consult legal counsel and to request a hearing before an administrative separation board; instead, you submitted a statement regarding your proposed separation in which you denied having used drugs during your Navy service, stating that you were "upset with the assumptions against" you. You asked that "some consideration for error or a chemical imbalance" be considered when determining your type of discharge. Similarly, the drug abuse report and medical screening for your drug use both indicated that you continued to deny all use. A recommendation for your discharge under Other Than Honorable (OTH) conditions was forwarded to Naval Personnel Command and approved. You were discharged on 12 July 1989 for drug abuse.

You previously applied to the Naval Discharge Review Board (NDRB) seeking an upgraded characterization of service on the basis of clemency. Your request was considered on 25 September 2003 and denied. Therein, you contended that you never established a history of drug use but also stated that you should have accepted responsibility for your actions. At that time, the NDRB noted the error in your discharge record regarding your branch of service being erroneously documented as the U.S. Navy Reserve (USNR) rather than active duty U.S. Navy (USN) and directed that this error be corrected. This error was corrected via a Correction to DD Form 214, Certificate of Release or Discharge from Active Duty (DD Form 215), which is documented in your service records. As such, the Board found no evidence of error with respect to your contention that your discharge record – which now includes your DD Form 215 – erroneously identifies your branch of service. To the extent that your application indicates you have had issues obtaining veteran benefits due to this initial error, the Board recommends that you provide a copy of your DD Form 215, in conjunction with your DD Form 214, as documentation of the correction.

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 your contentions that you served honorably for nearly four years and were administratively discharged just prior to the end of your obligated service, your post-discharge accomplishments warrant consideration of an upgrade on the basis of clemency, and you admit to making a lapse in judgment with respect to the events which resulted in your positive urinalyses but attribute it to suffering post-traumatic stress disorder (PTSD) due to your special warfare operational duties, during which you observed a team member drown in addition to being in a combat environment. For purposes of clemency and equity consideration, the Board considered the copies of your service records and awards you provided, your personal statement, a witness statement regarding your in-service operations, three character letters addressing your post-discharge employment and character, correspondence with the Department of Veterans Affairs (VA) and your VA

Disability Benefits Questionnaire (DBQ), and electronic mail to the Board with additional statements regarding your claims.

Because you contend that post-traumatic stress disorder (PTSD) or another mental health condition affected your discharge, the Board also considered the AO. The AO stated in pertinent part:

> The Petitioner was evaluated for mental health concerns during military service and received no diagnosis. This absence of formal diagnosis was based on observed behaviors of the Petitioner during military service, the information he chose to disclose during evaluation, and the evaluation performed.
>
> Temporally remote to his military service, he has received a diagnosis of PTSD from a VA psychologist, attributed to his military service.
>
> There is insufficient evidence to attribute his misconduct to PTSD symptoms. While marijuana use could be self-medication of undiagnosed PTSD, more weight was given to the Petitioner's in-service denial of symptoms and his pre-service history over potential behavioral indicators.
>
> 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 VA psychologist of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD."

After reviewing your rebuttal evidence, the AO remained unchanged.

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 positive urinalyses, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included two 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. In addition, the Board found that your conduct showed a complete disregard for military authority and regulations. Further, the Board concurred with the AO that there is insufficient evidence to attribute your misconduct to PTSD. The Board noted that it would be difficult to attribute your positive urinalysis to self-medication, since you denied having knowingly used marijuana during your military service and appear to continue to deny such use by repeatedly referring to a "juvenile urinalysis" and only tangentially addressing having made an "err of judgment" during your "first engagement in another country during holiday celebrations on New Year's Eve." However, the Board noted that reported date of the incident for your first positive urinalysis was 19 December 1988, significantly prior to "New Year's Eve" and, more significantly, that you had not one, but two positive urinalysis results

which were sufficiently far apart to substantiate that you used marijuana more than once during your service. You argue that you were deemed fit to continue service and reassigned to duties outside your revoked special warfare designator; however, the Board observed from the timing that, although this initial decision appeared intended to enable you to reach your end of obligated service, your second positive urinalysis in June of 1989 resulted in administrative separation proceedings prior to your end of obligated service. Additionally, to the extent you now contend that PTSD from your duties with [redacted] contributed to your in-service misconduct of marijuana use, the Board found this contention without merit and disingenuous; noting that your post-discharge choice to pursue and continue working with and among the Special Operations community contradicts the potential contention that your marijuana use might have been to self-medicate.

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 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 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,

5/29/2024

[redacted]

Executive Director

Signed by: [redacted]