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

Docket No. 8190-23
Ref: Signature Date

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 17 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 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 and 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 3 November 2001. Your pre-enlistment physical examination and self-reported medical history both noted no

psychological or neurological issues, symptoms, or treatment history. Your military occupational specialty was "Fixed Wing Aircraft Mechanic F/A-18."

On 13 June 2002, a Navy Drug Screening Laboratory message indicated you tested positive for Amphetamine at a level of 565 ng/ml, and Methamphetamine at a level of 3,067 ng/ml, both above the established testing cutoff of 500 ng/ml. On 8 July 2002, your substance abuse evaluation/screening indicated that you did not meet the criteria for drug dependence or abuse.

On 1 November 2002, you signed a pretrial agreement (PTA) where you voluntarily agreed to plead guilty to your wrongful use of a controlled substance in exchange for the command withdrawing your drug charge from a Special Court-Martial, and instead adjudicating your drug charge at a Summary Court-Martial (SCM). You also expressly agreed to waive any administrative discharge board that included any drug charge(s) which was/were the subject of the PTA.

On 25 November 2002, pursuant to your guilty plea, you were convicted at a SCM of the wrongful use of methamphetamines. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), confinement for twenty-nine (29) days, and forfeitures of pay. On 3 December 2002, the Convening Authority (CA) approved the SCM sentence.

On 6 January 2003, you requested that the CA suspend your separation for a period of one year. You offered that you would submit to voluntary urinalysis testing anytime your command requested it. On 7 January 2003, you refused all medical treatment at a VA facility nearest your home of record in conjunction with your separation.

On 19 August 2003, 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 pursuant to the PTA you waived your right to request a hearing before an administrative separation board. On 13 November 2003, your commanding officer recommended to the Separation Authority (SA) that you be discharged with an under Other Than Honorable conditions (OTH) characterization of service. On 19 November 2003, the Staff Judge Advocate to the SA determined your separation was legally and factually sufficient. On 21 November 2003 the SA denied your separation suspension request. Ultimately, on 12 December 2003, you were discharged from the Marine Corps for misconduct with an OTH characterization of service and were assigned an RE-4B reentry code.

On 22 December 2021, this Board denied your initial discharge upgrade petition.

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) over nine (9) years ago, the Department of Defense (DoD) issued the first of four memoranda providing guidance to the military records correction boards on how PTSD, TBI, MST and other mental health conditions should factor into their decision-making regarding military discharge upgrades, (b) the general DoD guidance is that a veteran's application should be given "liberal consideration" when it is

established that a mental health condition mitigates the misconduct that led to a less than honorable discharge, (c) your are precisely the type of veteran who was an intended beneficiary of the DoD memoranda encouraging a "benefit of the doubt" approach by records review boards, and (d) you have been diagnosed post-service with service-connected PTSD and major depression. For purposes of clemency and equity consideration, the Board considered 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 5 March 2024. The Ph.D. stated in pertinent part:

> There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. He has provided no medical evidence in support of his claims. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct, particularly given statements that the misconduct was a one-time aberration. 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 insufficient evidence of a diagnosis 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."

Following a review of your AO rebuttal submission, the Ph.D. slightly modified the AO. The Ph.D.'s revised findings noted there was post-service evidence temporally remote to your service from a civilian psychologist of both PTSD and depression diagnoses that may be service-connected. However, the Ph.D. still concluded by opining that there was insufficient evidence to attribute your misconduct to PTSD or another mental health condition.

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 further 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 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. Additionally, 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 noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. 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 discharge and concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. 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,

5/22/2024