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

[redacted]
Docket No. 5111-24
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 18 November 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). The Board also considered the advisory opinion (AO) furnished by a qualified mental health professional and your response to the AO.

You enlisted in the Navy and entered active duty on 27 July 2004. On 26 April 2007, you tested positive for marijuana use. On 30 April 2007, you were medically screened and admitted to using marijuana intentionally in order to obtain a discharge from the Navy. You also reported a preservice history of marijuana use starting at age 14. Ultimately, you refused treatment and were determined not to be alcohol or drug dependent.

Unfortunately, the documents pertinent to your administrative separation are not in your official military personnel file (OMPF). Notwithstanding, the Board relies on a presumption of

regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Your Certificate of Release or Discharge from Active Duty (DD Form 214), reveals that you were separated from the Navy on 16 May 2007 with an Other Than Honorable (OTH) characterization of service, your narrative reason for separation is "Misconduct Due to Drug Abuse," your separation code is "HKK," and your reenlistment code is "RE-4."

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 characterization of service, change of your basis for separation to reflect a Secretarial Authority discharge, and change reenlistment code to RE-1. You contend that: (1) your discharge constitutes an injustice because your untreated psychological conditions, to include posttraumatic stress disorder (PTSD) stemming from your experiences in a car accident and during service in the [redacted], caused you to self-medicate for your conditions with alcohol and cannabis, (2) without condoning your actions, the Board should apply liberal consideration and find that it is in the interests of justice to find that your meritorious service caused mental conditions that mitigated your one-time infraction, (3) that your remorse, the passage of time, and your commitment to treatment for your serious service-connected mental illnesses, all weigh in favor of granting relief as a matter of clemency, and (4) as a matter of fundamental fairness, it is appropriate to grant you clemency through a second chance, and that no further purpose is served by continuing to punish you. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application which included your legal brief and exhibits that contained your personal statement and medical documentation.

Based on your assertion that you suffered from a mental health condition while on active duty, a qualified mental health professional reviewed your contentions and the available records and issued an AO dated 11 September 2024. The AO noted in pertinent part:

> Petitioner was appropriately referred for psychological evaluation and properly evaluated during his enlistment. The absence of formal mental health diagnosis at his Virginia evaluation was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed by the mental health clinician.
>
> The adjustment disorder diagnosis in the [redacted] indicates a temporary mental health concern that may have resolved with the return to a location closer to his family and social supports. Temporally remote to his military service, the VA has granted service connection for PTSD.
>
> There are inconsistencies in his reported substance use history. It is difficult to attribute his substance use solely to self-medication of undiagnosed symptoms of PTSD, given a history of pre-service use that appears to have continued 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 AO concluded, "it is my clinical opinion there is post-service evidence from the VA of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct solely to self-medication of symptoms of PTSD."

In response to the AO, you submitted a letter providing additional arguments regarding the circumstances of your case. After reviewing your rebuttal evidence, the AO remained unchanged.

After thorough review, the Board concluded your potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your positive urinalysis for wrongful use of marijuana and admission of drug abuse, outweighed these mitigating factors. In making this finding, the Board considered the likely negative impact your misconduct had on the good order and discipline of your command. The Board also considered the seriousness of your misconduct and the fact it involved a drug offense. 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. 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. The Board also was not convinced by your argument of having only a one-time infraction, as your record supports, in addition to your positive urinalysis for marijuana, that you were also charged with drunk and disorderly conduct by base police in April of 2007, and that you admitted to medical providers that you intentionally smoked marijuana in order to gain your discharge from the service. The Board also noted that you admitted to extensive preservice drug abuse that was not disclosed as part of your enlistment processing. Such conduct demonstrates your inability to conform to military expectations and is not amenable to military service.

Additionally, the Board concurred with the AO and determined that, although there is post-service civilian evidence from the VA of a diagnosis of PTSD that may be attributed to your military service, there is insufficient evidence to attribute your misconduct solely to self-medication symptoms of PTSD. As the AO noted, you were appropriately referred for psychological evaluation and properly evaluated during your enlistment. The absence of formal mental health diagnosis at your Virginia evaluation was based on observed behaviors and performance during your period of service, the information you chose to disclose, and the psychological evaluation performed by the mental health clinician. The Board also agreed with the AO's observation that there are inconsistencies in your reported substance use history and, thus, it is difficult to attribute your substance use solely to self-medication of undiagnosed symptoms of PTSD. This is particularly true given your history of pre-service use that appears to have continued in service. Lastly, the Board agreed with the AO that additional records (e.g., post-service mental health records describing your diagnosis, symptoms, and their specific link to your misconduct) may aid in rendering an alternate opinion.

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, 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,

12/18/2024

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