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

[redacted]
Docket No. 5934-22
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 26 October 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 naval record, and applicable statutes, regulations, and policies, to include the Kurta Memo. The Board also considered the 22 September 2023 advisory opinion (AO) from a qualified medical professional and your response to the AO.

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.

A review of your record shows that you entered active duty with the Marine Corps and commenced a period of active duty on 3 June 2002. As described in the AO, on 27 April 2006, you were sent to Sick Call by your command after an altercation with a shipmate during a video game, and you were referred you for a mental health evaluation. On 4 May 2006, you underwent a mental health evaluation. According to the provider, you reported you were playing a video game and lost, and that you "quickly became so angry" and "knocked off the other person's glasses and hurt his eye." You reported you were "unaware of where the anger came from" and that, until the incident, you had a clean record. On evaluation by a psychologist, you reported your depression and hopelessness worsened while you were in Iraq and experienced mood

swings from happy to mean "really quickly." The psychologist explained that your mental status examination did not reveal any evidence of anxiety, psychotic or organic disorders and your mood was "depressed and frequently irritable. Affect was blunted." You were diagnosed with Dysthymic Disorder (Depressive Neurosis), which can be described as a low grade chronic depression. Additionally, the psychologist considered Major Depressive Disorder as a "rule out" diagnostic consideration. The psychologist also commented that he did not have enough evidence to support a diagnosis of Intermittent Explosive Disorder. The psychologist assessed your judgment as "adequate for medical/legal purposes," which was indicative of responsible for your actions and you were released without limitations. You were directed to follow-up with the mental health clinic as needed, and the psychologist noted that there was "[n]o psychological reason to retain him in the military. Follow-up with the VA Medical Center near his home of record. Probably would benefit from anti-depressant meds."

On 2 June 2006, you were released from active duty at the completion of your required active service and assigned an Honorable characterization of service with an RE-1A reentry code, which meant that you were eligible for reenlistment in the Marine Corps. You provided documentation that, post-service, you were awarded a 100% disability rating due to post-traumatic stress disorder (PTSD) effective 21 July 2013 by the Department of Veterans' Affairs (VA).

In your petition, request to have your Honorable discharge changed to a disability retirement. In support of your petition, you contend that while you were on active duty you were referred by your command for a medical evaluation in May 2006, one month prior to your discharge, and that you were diagnosed with Dysthymic Disorder (Persistent Depressive Disorder) after returning from deployments. You provided a written statement, medical records, as well as documentation from the VA relating to your 100% disability finding.

In order to assist it in reviewing your petition, the Board obtained the 22 September 2023 AO, which was considered unfavorable to your petition. The AO found as follows:

> Petitioner was diagnosed with Dysthymic Disorder one month before his end of obligated service and was returned to full duty with indications by the evaluating psychologist he was physically qualified for separation with recommended follow-up through the VA. Review of the available objective clinical and non-clinical evidence documented Petitioner successfully executed the full range of responsibilities of his rate and rank up through the end of his obligated military service. His proficiency and conduct marks consistently reflected his ability to adequately perform the range of duties commensurate with his rate and rank. He had no record of disciplinary or misconduct proceedings. There was no objective clinical or non-clinical evidence Petitioner was unfit for service/discharge.
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> Though Petitioner has presented post-discharge evidence of service-connected PTSD with Bipolar Disorder, this was not diagnosed until 2015, fully nine years post-service. VA clinical evaluations 2008-2013 documented mild-moderate depressive symptoms and alcohol dependence, with specific documentation initially of no combat trauma or signs/symptoms of PTSD, Bipolar Disorder. There

was no indication in the reviewed VA clinical records of any mental health conditions that would have rendered him unfit for duty during his military service.

The AO concluded, "in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner's contention that at the time of his discharge he was unfit for continued military service and should have been medically retired."

The Board reviewed your petition and the material that you provided in support, and disagreed with your rationale for relief. In keeping with the letter and spirit of the Kurta Memo, 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. In reaching its decision, the Board observed that your assertion that you should have received a medical retirement would have required that you be processed through the Disability Evaluation System (DES) while you were on active duty. In order to qualify for military disability benefits through the DES with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or the member or to the welfare or safety of other members; the member's disability imposes unreasonable requirements on the military to maintain or protect the member; or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting.

The Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the DES at the time of your separation. At the outset, the Board substantially concurred with the findings of the AO. Further, in its comprehensive review of the entirety of your request, the Board determined that, even assuming that your mental health conditions arose during your service, they did not amount to unfitting conditions within the meaning of the DES. In reaching its findings, the Board observed that, even assuming, *arguendo*, you were diagnosed with mental health conditions such as PTSD while you were on active duty, there is no evidence that any medical provider considered your conditions to warrant referral to a medical board for a determination of fitness for duty within the DES. Service members routinely serve in the naval services with PTSD diagnoses, and such a diagnosis is not necessarily an unfitting condition. In fact, the contemporaneous medical documentation reveals that the treating psychologist released you from care and specifically commented that there was no reason for you to remain on active duty for treatment. In addition, there is no indication that your unit found you to be unfit to perform your duties, and, as noted in the AO, your "proficiency and conduct marks consistently reflected his ability to adequately perform the range of duties commensurate with his rate and rank" and you "had no record of disciplinary or misconduct proceedings." Further, upon your release from active duty, you were assigned an RE-1A reentry code, which meant that you were qualified to reenlist, and is evidence that you were not considered unfit to continue service in the Marine Corps.

The Board was not persuaded by your reliance on findings by the VA, because the VA does not make determinations as to fitness for service as contemplated within the service disability evaluation system. Rather, eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based without a

requirement that unfitness for military duty be demonstrated. In sum, in its review and liberal consideration of all the evidence, the Board did not observe any error or injustice in your naval records. 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,

11/22/2023

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Executive Director

Signed by: [redacted]