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

[redacted]
Docket No. 8444-22
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 28 April 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 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, with history of a pre-service conviction for possession of marijuana, and began a period of active duty on 29 August 1985. You received emergency medical treatment, in January 1986, after being assaulted, during which you were choked but did not experience a loss of consciousness.

On 10 April 1986, you were subject to nonjudicial punishment (NJP) for a violation Article 116 of the Uniform Code of Military Justice (UCMJ) for riot or breach of peace due to fighting outside the barracks, for which you were also administratively counseled and warned of the potential for separation if your misconduct continued. In June 1986, you were disenrolled from a training program due to poor academic performance. In September 1986, you received your second NJP after you violated Article 86 by a 1 hour unauthorized absence (UA), Article 92 for failure to obey a lawful order or regulation, Article 128 for assault, Article 134 for false pretenses, and Article 134 for communicating a threat. Your later reports to medical personnel reflect that this incident occurred because your emotions "erupted" and you got into a fight with a superior who had tried to hit you. In December 1986, you were subject to a third NJP for violations of Article 108 due to damaging military property, Article 111 due to reckless driving, and Article 134 for further false pretenses.

From 24 - 28 September 1987, you received emergency medical treatment after you were involved in a fight during a mugging which resulted in injuries to your face and head, to include eye pain, numbness to the right side of your face, and multiple lacerations. You were then subject to a fourth NJP, in October 1987, for violations of Article 92, failure to obey a lawful order by not remaining at your quarters, and Article 134 for incapacitation for the proper performance of his duties as a result of wrongful previous overindulgence in intoxicating liquor. The restricted barracks supervisor then referred you for a psychiatric evaluation due to temper outbursts and inability to get along with others. On 3 November 1987, you were diagnosed with alcohol abuse, rule out dependence, and borderline Personality Disorder (PD). You were found psychiatrically fit for duty but unsuitable for service with the assessment that, although you needed to be evaluated by the Counseling and Assistance Center for alcohol abuse treatment, your difficulties preceded your alcohol use and appeared to be the result of your underlying PD. The medical note also referenced that you had reportedly been seen by a civilian provider approximately a year prior following medical referral for anger outbursts.

You absented yourself without authority from 2 December 1987 through 6 February 1988, terminated by your voluntary surrender. You were tried by Special Court-Martial (SPCM) and, consistent with the terms of your pre-trial agreement, pleaded guilty to violations of Article 86 for your period of UA, Article 91 for disrespectful language, and Article 112a for wrongful use of cocaine. Your sentence included a Bad Conduct Discharge and two months of confinement.

During your confinement, you were admitted from the brig as a psychiatric inpatient, from 4 - 11 March 1988, due to antagonism toward other prisoners and "intolerance of the situation of being incarcerated." The medical noted elaborated that you had "reluctantly presented a letter … from a [civilian] psychiatrist that [you] had seen while on UA" with a diagnosis of bipolar disorder in mixed state, but the military medical provider found no evidence of bipolar disorder and prescribed medication for residual attention deficit / hyperactivity disorder (ADHD). While hospitalized, your mood and irritability improved with the ADHD medication, but you were found to have no unfitting medical condition with a recommendation that you had the capacity to distinguish right from wrong.

A court memorandum from 9 June 1988 reflects that the convening authority suspended your BCD for a period of one year. While on appellate leave pending final action on the findings and sentence of your SPCM, on 17 October 1988, you received a letter from Transient Personnel Unit informing you that the convening authority had suspended your BCD and ordering your

return to your unit. However, upon return to your unit, on 21 November 1988, you were notified of administrative board procedure by reason of misconduct due to pattern of misconduct and drug abuse. You consulted with legal counsel and requested a hearing before an administrative board. A letter from your civilian psychiatrist, dated 13 December 1988, advised that you tended to "genetically" be bipolar and could become extremely depressed to the point of drinking excessively. Your psychiatrist recommended your retention on the basis that that you had requested assistance with your alcohol use during service, but had not received help, and had addressed your drinking problem with success during your appellate leave.

During your administrative separation hearing, which convened on 20 December 1988, the Government asserted that the suspension of your BCD had been due to inadvertent administrative error, to which your counsel objected, as there was no evidence to support that the suspension had been in error. However, the Government also reiterated that your separation processing had been initiated due to the Navy's zero tolerance policy for drug use. The administrative board's findings substantiated your misconduct due to drug abuse and recommended separation under Other Than Honorable (OTH) conditions on that basis. On 17 January 1989, in his concurring recommendation for your administrative discharge, your commanding officer stated that your discharge had inadvertently been suspended due to administrative error. Commander, Navy Personnel Command, (CNPC) approved your discharge under OTH conditions and, on 29 March 1989, you were so discharged.

Your previous applications to the Board were considered in Docket No. 2574-09 and 5464-19 with relevant contentions asserting that you had not received appropriate treatment for your traumatic brain injury (TBI), for which you provided evidence of post-discharge diagnosis. Additionally, on 12 May 2020, the Department of Veterans Affairs (VA) determined that you have service-connected post-traumatic stress disorder (PTSD). This Board denied both of your previous applications after determining your discharge was proper as issued.

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 to "Honorable," change your narrative reason for separation to "Convenience of the Government" or "Expiration of Term of Service," change your reentry code to "RE-1," and your request for restoration of lost benefits, restitution of VA fees, and restitution of fines and withheld tax returns. You assert that the real source of your struggles during military service was TBI. You present evidence of post-discharge diagnoses of TBI, PTSD, and other mental health disorders, to include prescription of mood stabilizers for bipolar disorder, in support of your argument that psychiatrists are "not in agreement with what was plaguing" you and, arguendo, your in-service diagnosis of personality disorder (PD) was erroneous. You believe the behaviors you exhibited during service and in committing your misconduct are associated with your TBI, which you state resulted in intermittent Explosive Disorder, including aggressive behavior, temper outbursts, inability to get along with others, social isolation, lack of control, and other erratic behavior, to include violent behavior, verbal outbursts, and reactions grossly out of proportion with the situation. You already suffers the stigma of a federal conviction from you court-martial, which you believe essentially punished you for having a TBI, and contend it is unfair that you continue to be punished by an unfavorable characterization of service. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

Because you also contend that PTSD, TBI, and/or another mental health condition affected your discharge, the Board also considered the AO. The AO stated in pertinent part:

> Petitioner was appropriately referred for psychological evaluation during his enlistment and properly evaluated on multiple occasions, including during an inpatient hospitalization. In-service, he was diagnosed with Borderline Personality Disorder, Alcohol Abuse and Dependence, and Attention Deficit/Hyperactivity Disorder. These diagnoses were based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluations performed by the mental health clinician. While there is evidence in his service medical record of treatment of head injury, there is no evidence of diagnoses of TBI or residual symptoms that did not resolve over time. Post-service, the Petitioner has provided evidence of additional head injuries and radiologic evidence of brain imaging that appears to have traumatic origins that is temporally remote to military service. Given the extended period of time between the Petitioner's post-discharge evidence and his military service, it is difficult to attribute these findings to his military service or his military misconduct.
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> Post-service, the VA has granted service connection for PTSD. Unfortunately, there is insufficient information regarding this diagnosis, including symptoms, to attribute his misconduct to this diagnosis. His misconduct appears to be consistent with his in-service diagnoses, rather than evidence of TBI or PTSD. There is insufficient evidence of error in the in-service diagnosis, particularly given discrepancies between the Petitioner's report and the service medical record. Additionally, while in service, the Petitioner was evaluated and deemed aware of his misconduct and responsible for his actions.

The AO concluded, "it is my considered clinical opinion there is insufficient evidence of TBI that may be attributed to military service. There is post-service evidence of a diagnosis of PTSD from the VA that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to TBI, PTSD, or a mental health condition other than his in-service diagnoses of personality and alcohol use disorder."

In response to the AO, you submitted additional arguments regarding the circumstances of your case. After reviewing the new 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 NJPs and SPCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included 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. Further, the Board concurred with the AO that your in-service misconduct is consistent with your in-service PD diagnosis and noted further that you were screened for bipolar disorder, in response to the letter from your civilian provider, but found to have no evidence of bipolar disorder by military medical authorities. The Board similarly noted that your post-discharge diagnosis of antisocial personality traits appears consistent with your in-service diagnosis of PD which, as noted in your mental health records, did not render you

incapable of distinguishing right from wrong. The Board found, therefore and consistent with your in-service mental health evaluations, that you were responsible for your actions at the time of your misconduct, to include violent or dangerous offenses of fighting, assault, reckless driving, and damage to military property in addition to other offenses which were either less serious or did not pose a threat of harm to people or property. Although the Board found that the evidence in your record indicates that your BCD was suspended as a matter of fact, regardless of subsequent assertions of error, the Board found no error or injustice in your being subject to processing for administrative separation. The Board considered you were afforded all the required due process, including an administrative separation board hearing with representation by legal counsel, the administrative separation board recommendation was limited to your cocaine use, and your case was acted upon by CNPC as the final decision authority. 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 Wilkie Memo and reviewing the record 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. 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,

5/9/2023

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Executive Director
Signed by: [redacted]