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

[redacted]
Docket No. 10471-23
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 19 July 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 both an advisory opinion (AO) furnished by qualified mental health provider, as well as your AO rebuttal submission.

You originally enlisted in the U.S. Marine Corps and began a period of active duty service on 8 September 1971. Your pre-enlistment physical examination, on 11 May 1971, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms, or any mental health history or counseling.

On 27 October 1971, while you were still in your initial training pipeline, you received non-judicial punishment (NJP) for insubordinate conduct. You did not appeal your NJP.

On 26 July 1972, you commenced an unauthorized absence (UA) that terminated on 1 August 1972. On 2 August 1972, you received NJP for your six-day UA. You did not appeal your NJP.

On 24 February 1974, you were arrested by civilian authorities for marijuana possession. On 25 February 1974, you commenced a UA that terminated on 27 February 1974. On 4 April 1974, you received NJP for UA. You did not appeal your NJP.

On 15 April 1974, you commenced another UA that terminated on 17 April 1974. On 19 April 1974, you received NJP for: (a) willful disobedience of a superior commissioned officer, (b) UA, and (c) being found in an unclean uniform at a personnel inspection. You did not appeal your NJP.

On 25 April 1974, you received NJP for UA. You did not appeal your NJP. On 18 May 1974, you commenced another UA. Your UA terminated after on 20 May 1974. On 20 May 1974, you received NJP for your two-day UA. You did not appeal your NJP.

On or about 24 May 1974, your command issued you a "Page 11" counseling warning (Page 11) documenting your frequent Uniform Code of Military Justice violations. The Page 11 advised you that you have sixty (60) days to show improvement or you would be submitted/processed for an undesirable discharge for unfitness. On 24 June 1974 the Court placed you on a drug diversion program for your civilian marijuana possession offense.

On 29 July 1974, contrary to your pleas, you were found guilty at a Special Court-Martial (SPCM) of three (3) separate insubordinate conduct specifications. You were sentenced to a reduction in rank to E-2, confinement at hard labor for seventy-five (75) days, and forfeitures of pay. The Convening Authority (CA) approved the SPCM sentence as adjudged, except suspended any forfeitures of pay. On 30 August 1974, the General Court-Martial Convening Authority determined that the SPCM findings and sentence as approved by the CA were legally and factually sufficient.

On 9 October 1974, your command prepared a memorandum for the record (Memo) documenting your behavior while serving your confinement at the [redacted] Correctional Facility. The Memo specifically stated:

> [Petitioner] received five (05) Disciplinary Reports for negative performance while in [redacted] Correctional Facility. Three were for giving a "black power" salute during a military formation. After receiving warning on two of these incidents he received fourteen days disciplinary separation on reduced rations suspended for thirty days on the last incident. Additionally, he received a warning for intentional violation of the correctional postal security regulations and an undisclosed punishment for disrespect to a Non-commissioned officer.

> [Petitioner's] behavior was described as that of a "manipulator" and attitude and motivation for improvement was "marginal." It was doubtful if the SNM would remain out of trouble with military authorities.

On 21 October 1974, you commenced another UA. Your UA terminated on 22 October 1974. On 30 October 1974, you received NJP for two separate UA specifications. You did not appeal your NJP.

On 7 November 1974, you received NJP for insubordinate conduct. You did not appeal your NJP. On 25 November 1974, your command vacated and enforced the suspended portion of your punishment from your 30 October 1974 NJP due to continuing misconduct. On 25 November 1974, your command issued you a Page 11 documenting your frequent UCMJ violations. The Page 11 advised you that you have sixty (60) days to show improvement or you would be submitted/processed for an undesirable discharge for unfitness.

On 17 December 1974, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to frequent involvement of a discreditable nature with military authorities. You elected to consult with counsel and to request a hearing before an administrative separation board (Adsep Board). In the interim, on 20 January 1975, you commenced another UA that terminated on 21 January 1975.

On 13 February 1975, an Adsep Board convened in your case. At the Adsep Board, you were represented by counsel and provided sworn testimony on your own behalf. Following the presentation of evidence and witness testimony, the Adsep Board members recommended that you be separated with an undesirable discharge by reason of unfitness.

In the interim, on 19 March 1975, you commenced a UA that terminated on 26 March 1975. On 16 April 1975, you commenced another UA that terminated on 25 April 1975.

On 16 April 1975, the Staff Judge Advocate to the Separation Authority (SA) determined your administrative separation was legally and factually sufficient. On 17 April 1975, the SA approved and directed your undesirable discharge by reason of unfitness.

On 28 April 1975, your separation physical examination noted no neurologic or psychiatric conditions of symptoms. Ultimately, on 30 April 1975, you were discharged from the Marine Corps for unfitness with an under conditions Other Than Honorable (OTH) characterization of service and were assigned an RE-4 reentry code.

On 25 January 1979, the Naval Discharge Review Board (NDRB) denied your initial discharge upgrade application. You did not raise any traumatic brain jury (TBI), neurologic, or mental health contentions with your NDRB application. On 22 October 2008, this Board denied your discharge upgrade petition. You had contended that you were the victim of racial discrimination and unfair treatment that contributed to your acts of indiscipline. You again did not proffer any TBI, neurologic, or mental health contentions with your 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) you suffered a TBI as a member of the Marine Corps boxing team, and you were knocked out on two official sanctioned matches during your [redacted] deployment, (b) you began experiencing a number of TBI symptoms shortly after such as lack of impulse control, depression, memory loss, and uncontrollable anger, (c) the TBI you suffered on active duty and your symptoms caused your misconduct, and should excuse the misconduct leading to your discharge, (d) your repeated punishment for relatively minor disciplinary offenses was racially discriminatory, (e) you have suffered enough and deserve a discharge upgrade, and (f) under the Kurta Memo the Board can change the discharge characterization and narrative reason to acknowledge certain mitigating factors. 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, a licensed clinical psychologist (Ph.D.) reviewed your contentions and the available records, and issued an AO dated 2 June 2024. The Ph.D. stated in pertinent part:

> Petitioner contends that he sustained multiple concussions, and thus TBI from his time on the [redacted] Team in 1973. He submitted various peer-reviewed articles on TBI in support of his claim. A review of his entire medical record does note an entry dated March 5, 1973: "Contusion of right lung following a boxing match (February 1974)." This is the only mention of any medical issues sustained while boxing as contained in his entire service record. Furthermore, his active duty service record contains a VA Statement of Claim dated September 19, 1993, in which he claimed a foot injury from service, but no mention of a TBI. In a 2008 petition, he made no mention of a TBI or any symptoms thereof. There is no evidence that the Petitioner was diagnosed with a TBI while in military service. Additional records (e.g., all post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is insufficient evidence of TBI that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a TBI."

Following a review of your AO rebuttal submission, the Ph.D. made a slight change to their original AO findings and conclusions. The Ph.D. determined that it was possible that some of your milder incidents of misconduct could have been caused by TBI (e.g., initial UA periods). However, the Ph.D. determined no nexus can exist between TBI and migraines, and your continued UA periods, disrespect, and marijuana possession. The Ph.D. also determined that while TBI can be the cause of some confusion and forgetfulness, TBI cannot be said to cause repetitive misconduct and/or illegal activity. The Ph.D. concluded by opining that there was post-service evidence of a mental health condition, and that it was possible that some of your misconduct was mitigated by TBI symptoms.

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, notwithstanding the AO, the Board concluded that there was no convincing evidence of any nexus between any TBI, mental health conditions and/or related symptoms and your cumulative misconduct and determined that there was insufficient evidence to support the argument that any such TBI or mental health conditions mitigated the cumulative and repetitive misconduct that formed the basis of your discharge. As a result, the Board concluded that your willful and persistent misconduct was not due to any mental health-related conditions or symptoms. Moreover, even if the Board assumed that your misconduct was somehow attributable to a TBI or any mental health conditions, the Board concluded that the severity of your aggregate 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 also 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 also noted that VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only. Such VA eligibility determinations are not binding on the Department of the Navy and have no bearing on previous active duty service discharge characterizations. The Board also noted that the VA is not an investigatory agency and will generally base their diagnoses and treatment regimens on the input received by the patient without making any detailed inquiry into the truth or veracity of the patient's representations.

The Board noted the preponderance of the evidence does not support a finding that you suffered a TBI while on active duty that was purportedly related to your boxing activities. The Board also determined that you did not provide any credible and/or convincing evidence to substantiate your claims of racially disparate treatment and discrimination. In fact, the Board noted the only evidence in the record regarding racial discrimination alleged that you were prejudiced towards white Marines. The Board observed in the first endorsement to your CO's administrative separation recommendation, the commanding officer of [redacted] Battalion on 23 December 1974 stated the following:

> [Petitioner] has become over the past year, a serious threat to good order, discipline and functioning of his section, his Company, and this Battalion. He has shown repeated disrespect to and disregard of the officers and Staff NCOs for whom he works. He is disruptive, and in my opinion, is leading some of the younger Marine into his ways. He is strongly prejudiced towards the whites in his Company, and is openly hostile to anyone in authority and particulary [sic] to his Company Commander. His attitude, mannerism, and lack of performance cannot be tolerated in the Marine Corps, and particularly in the current situation that the entire Division is experiencing with a lack of superiors and the continued influx of large numbers of young, impressionable, easily led Marines.

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. The Board determined that an OTH characterization 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 cumulative 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,

7/23/2024

[redacted]