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

[redacted]
Docket No. 292-24
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.

Because your application was submitted with new evidence not previously considered, the Board found it in the interest of justice to review your application. A three-member panel of the Board, sitting in executive session, considered your reconsideration application on 23 August 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 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (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.

You enlisted in the Marine Corps and entered active duty on or about 7 September 2000. Your pre-enlistment physical examination, on 5 April 2000, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 3 August 2001 you received non-judicial punishment (NJP) for willfully disobeying a lawful order or regulation. You did not appeal your NJP. Subsequently, your command issued you a "Page 11" counseling warning

(Page 11) documenting the following deficiencies: unauthorized absence (UA) on several occasions, falling asleep in class and not paying attention, and a general lack of motivation and slowness accomplishing the simplest of tasks. The Page 11 expressly warned you that a failure to take corrective action may result in administrative separation or limitation on further service.

However, on 2 January 2002, you commenced a period of UA that terminated on 12 January 2002. On 17 January 2002, your command issued you a Page 11 warning documenting your 10-day UA. On 18 January 2002, you received NJP for your 10-day UA. You did not appeal your NJP.

On 19 September 2002, you received NJP for failing to obey a lawful order. You did not appeal your NJP. Your command subsequently issued you a Page 11 that expressly warned you that a failure to take corrective action may result in adverse administrative action or judicial proceedings, including but not limited to administrative separation.

On 18 November 2002, you received NJP for UA and for failing to obey a lawful order. You were issued a Page 11 that expressly warned you that a failure to take corrective action may result in adverse administrative action or judicial proceedings, including but not limited to administrative separation.

Following your fourth NJP, your command initiated administrative discharge action by reason of misconduct due to a pattern of misconduct. Unfortunately, the administrative separation notification and statement of awareness/election of rights documentation is not in your service record. However, the Board relied on a presumption of regularity to support the official actions of public officers. In the absence of substantial evidence to rebut the presumption, to include evidence submitted by you, and given the narrative reason for separation and corresponding separation code as stated on your DD Form 214, the Board presumed that you were properly processed for separation and discharged from the Marine Corps for misconduct due to a pattern of misconduct after you waived your right to an administrative separation board. Ultimately, on 3 January 2003, you were discharged from the Marine Corps for misconduct with an Other Than Honorable (OTH) characterization of service and assigned an RE-4 reentry code.

On 30 August 2007, the Naval Discharge Review Board (NDRB) denied your discharge upgrade application. The NDRB determined that your discharge was proper and that no change was warranted. On 23 August 2019, the NDRB again denied your discharge upgrade application.

On 25 September 2020, this Board denied your initial petition for relief. An AO was prepared as part of the record and the Ph.D. concluded by opining that there was insufficient evidence to attribute your misconduct to a mental health condition.

On 23 September 2022, this Board again denied your discharge upgrade petition. The Ph.D. similarly concluded by opining that there was insufficient evidence to attribute your misconduct to a mental health condition.

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: (a) the PTSD you developed following being brutally assaulted by your drill instructor during boot camp directly caused the behavior leading to your discharge, (b) post-service your sole purpose has been to serve your family, friends, and your faith community, and you ask that this sacrifice be rewarded with your upgrade request, (c) you were a very young man when you began your service, and soon after suffered a heinous assault at the hands of superior that led to a spiral of understandable behavioral health symptoms that were never properly diagnosed or treated, (d) instead of getting the help you deserved, you were discharged, and (e) given your circumstances, it would be patently unjust to allow the stigma of your OTH discharge to haunt and hinder you for the rest of your life. For purposes of clemency and equity consideration, the Board considered the entirety of 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 July 2024. The Ph.D.[1] stated in pertinent part:

> The Petitioner submitted seven character references in support of his claim. He submitted VA compensation and pension paperwork noting denial for PTSD, Depression and Generalized Anxiety Disorder claims. He submitted one outpatient record from the VA indicating a consult for PTSD in June 2022. The note does not mention a rationale for, or possible cause of the PTSD diagnosis in question. The note reads, "Veteran reported no immediate medical concerns. He reported no suicidal/homicidal ideation, plan, or intent. Chart review indicates veteran last met with psychiatrist in 2019. Veteran expressed interest in reconnecting with MH services and restarting medication. Per veteran, he has not taken medication since 2019. Veteran was vague and guarded in his responses. When asked if he's experienced any symptoms lately or behavior changes, veteran responded, 'I don't know.'"
>
> Although no medical records were available for review as contained within his service record, the Petitioner did submit one active duty mental health record dated October 11, 2022 noting, "[Petitioner] has been receiving services since 17 May 01." This same note indicates a diagnosis of Occupational Problems. There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service, or that he exhibited any symptoms of a mental health condition. His statement is not sufficiently detailed to provide a nexus with his misconduct. Additional records (e.g., all active duty mental health records, 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 mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition."

[1] The Board noted that the Clinical Psychologist/Ph.D. assigned to prepare the AO for each of the Petitioner's three (3) BCNR petitions were different mental health practitioners in each case.

Following a review of your AO rebuttal submission, the Ph.D. did not change or modify their original AO. The Ph.D. noted your AO rebuttal did not submit any new or additional medical evidence for consideration.

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 cumulative misconduct far outweighed 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 noted you have now proffered two vastly different factual accounts of certain incidents underlying your mental health conditions and misconduct. Specifically, neither of your two previous petitions made any mention of any attack/assault you experienced in boot camp as a traumatic precipitant for any mental health concerns. The Board determined that your changing narrative of events in your current petition thus undermined your credibility. The Board also noted that you did not provide any credible or convincing evidence to substantiate or corroborate your current assault claims.

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 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.

In the absence of sufficient new evidence for reconsideration, the decision of the Board is final, and your only recourse would be to seek relief, at no cost to the Board, from a court of appropriate jurisdiction.

Sincerely,

8/29/2024

[redacted]