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

[redacted]
Docket No. 1176-24
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. A three-member panel of the Board, sitting in executive session, considered your application on 25 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 25 August 2017 guidance as well as the 4 April 2024 guidance from the Under Secretary of Defense for Personnel and Readiness relating to the consideration of cases involving both liberal consideration discharge relief and fitness determinations (collectively the "Clarifying Guidance"). The Board also reviewed the 14 June 2024 advisory opinion (AO) from a Licensed Clinical Psychologist. Although you were provided an opportunity to respond to the AO, you chose not to do so.

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 enlisted in the Navy and commenced active duty on 8 May 1984. While you were in the Navy, it became known that you failed to reveal pre-service involvement with civil authorities. On 21 February 1985, Navy Personnel Command granted a waiver in your favor so that you would remain in service. In 1985, you also tested positive for use of cannabinoids and were issued a Page 13 counseling warning.

On 1 May 1986, you commenced a period of unauthorized absence until 21 May 1986. During your unauthorized absence, you missed ship's movement on 13 May 1986. On 4 June 1986, you received nonjudicial punishment for unauthorized absence and missing ship's movement. In 1986, you tested positive for use of cocaine. Consequently, you were notified of the initiation of administrative separation processing and you invoked your right to administrative board (ADB). On 17 July 1986, the ADB determined you committed misconduct and recommended you be discharged with a General (Under Honorable Conditions) (GEN) characterization of service. On 24 September 1986, the Separation Authority directed that you be discharged with a GEN characterization of service. On 2 October 1986, you were so discharged.

In your petition, you request to receive a service disability discharge. In support of your request, you contend that you had undiagnosed mental health conditions while you were on active duty. You provided post-service documentation from the Department of Veterans' Affairs (VA) that shows, in 2006, you were granted VA service connected disabilities due to PTSD at 70% plus individual employability.

In order to assist it in reviewing your petition, the Board obtained the 14 June 2024 AO. The AO stated in pertinent part:

> Petitioner was appropriately referred for psychological evaluation and properly evaluated during his enlistment. His substance use disorder diagnosis 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. Post-service, the Petitioner has been granted service connection for PTSD. It is possible that his UA could be attributed to avoidance following a traumatic precipitant. Unfortunately, there is insufficient evidence to attribute his substance use to PTSD, as it occurred prior to the incident. 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 all of his misconduct to PTSD."

The Board carefully reviewed your petition and the material that you provided in support of your petition, and disagreed with your rationale for relief. In keeping with the letter and spirit of the Clarifying Guidance, 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, in order to qualify for military disability benefits through the Disability Evaluation System (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.

In reviewing your record, the Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the disability evaluation system at the time of your discharge. Despite its application of special and liberal consideration, the Board observed no evidence that you had any unfitting condition while on active duty. In its application of the Clarifying Guidance, the Board acknowledged that you had a condition or experience that may excuse or mitigate your discharge, which, at least for the sake of argument, occurred, or was worsened, during your naval service. Next, the Board analyzed whether your condition actually excused or mitigated your discharge. On this point, the Board observed that you were able to exercise your right to an ADB and be granted a GEN characterization of service despite your serious misconduct. This demonstrates that you were already granted clemency by your command, by the administrative board, or both. Further, even assuming that you had been referred into the DES while you were in service, administrative processing due to misconduct takes precedence over disability processing.

Further, even if you were deserving of further clemency, such clemency would not have an impact on whether there is sufficient evidence that you had an unfitting condition while you were on active duty. On this point, the Board observed that there is no evidence in your service records, and you did not provide any, demonstrating that, while you were in service, you had an unfitting condition within the meaning of the DES. The Board noted that there is no indication that anyone in your chain of command observed that you were unfit to perform your duties due to any medical conditions. Rather, it is clear that you were discharged due to several instances of serious misconduct, including the use of illegal drugs and missing ship's movement. Any of those conditions could have resulted in the assignment of a discharge under Other Than Honorable conditions. In fact, the Board observed that the AO described that while you were in service you were in fact evaluated by a mental health practitioner and, notwithstanding that mental health evaluation, there is no evidence that any medical provider determined that you had any conditions that warranted referral to a medical board for a determination of fitness for duty. As mentioned, to be eligible for a service disability retirement, a service member must have conditions that have been medically determined to be unfitting at the time of service. In your case, the proximate reason for your discharge was your misconduct. Therefore, in its review and liberal consideration of all of the evidence and its careful application of the Clarifying Guidance, 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,

8/13/2024

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