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

[redacted]
Docket No. 3775-24
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.

A three-member panel of the Board, sitting in executive session, considered your application on 10 October 2024. The names and votes of the members of the panel 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 clarifying guidance from the Kurta 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 3 September 2024 advisory opinion (AO) from a Licensed Clinical Psychologist as well as your 13 September 2024 rebuttal.

The Board determined your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on the evidence of record.

The Board carefully considered your request to restore your "rightfully earned benefits," which it interpreted as an implied request to correct your record to reflect you were medically separated and awarded severance pay.

The Board, having reviewed all the facts of record pertaining to your allegations of error and injustice, found as follows:

Before applying to this Board, you exhausted all administrative remedies available under existing law and regulation within the Department of the Navy. On 20 June 2018, you were formally counseled after being late for and/or missing Physical Training (PT) on two occasions. Although given an opportunity, you elected not to make a statement.

On 8 August 2018, you were formally counseled after you did not attend the morning Fitness Enhancement Program session. In your remarks, you stated you had been diagnosed with sleep apnea and prescribed a CPAP Machine, but the issues were still ongoing and you are "doing what [you] can to wake up on time."

On 7 September 2018, you were again formally counseled in writing after you failed to report for quarters. Although given an opportunity, you elected not to make a statement.

On 23 April 2019, you were formally counseled, in writing, for violating Articles 90, 91, and 92 of the Uniform Code of Military Justice (UCMJ) when you failed to complete your CWAY application. The summary of counseling also captures your response of "Nah I didn't, I'll just forgo this month" followed by "to be honest I really think I'm done done" finally restating "let me rephrase, I really know I'm done done." Although given an opportunity, you elected not to make a statement.

In a memorandum dated 9 July 2019, the Senior Enlisted Leader (SEL) memorialized verbal counseling provided to you on the 9th. The SEL's memorandum also noted you had been "verbally counseled multiple times by NCOICs, SELS, and other operational leaders about [your] apparent lack of commitment to mission completion and multiple unexplained absences from the work center." The SEL noted the verbal counseling appeared to have "little effect on [your] ability to either prioritize mission or communicate the appropriate reasons for being absent."

On 4 October 2022, you were formally counseled regarding your failure to muster at the appropriate time. Although given an opportunity, you elected not to make a statement.

On 15 December 2022, you were formally counseled after using profanity and acting unprofessionally when speaking to a Chief Petty Officer after being directed to either go to the Emergency Room to be tested for COVID or use a home test kit. The counseling further noted that you did not follow the direct order to wear a mask when you returned to work. You availed yourself of the opportunity to submit a statement and, in your statement, expressed that your intent was not to be disrespectful. You further explained that your profanity "was used as an amplifier of the situation and was not directed towards the HMC and not meant as a disrespectful statement." Additionally, you explained the circumstances that led to the perception you were not wearing your mask.

On 11 January 2023, a Command Disciplinary Review Board (DRB) considered alleged violations of the UCMJ, Article 91 (Insubordinate conduct towards warrant officer, noncommissioned officer, or petty officer) and Article 92 (Failure to obey order or regulation). The DRB, noting you presented yourself to the DRB "as the one in the right" and included two witnesses that supported your side of event, forwarded the charges to Executive Officer's Inquiry.

On 15 February 2023, you were formally counseled after wearing a wrinkled uniform to the 14 February 2023 uniform inspection. Although given an opportunity, you elected not to make a statement.

After the Executive Officer (XO) forwarded the charges to Captain's Mast based on the "department chain of command statements, lack of accountability, constant accounts of misconduct, and [your] responses," Commanding Officer (CO), [redacted] ([redacted]), notified you of his intent to impose nonjudicial punishment (NJP) for violations of Articles 91 and 92, UCMJ. However, on 22 February 2023, you elected to demand trial by court-martial.

On 3 March 2023, a Physical Evaluation Board (PEB) convened and found you unfit for continued service and recommended separation from active duty with a 0% disability rating due to a ganglion cyst on your right wrist.

On 23 March 2023, CO, [redacted], notified you that he was processing you for administrative separation by reason of misconduct due to commission of a serious offense. The CO cited three bases: disrespect toward superior commissioned officer, insubordinate conduct, and failure to obey order/regulation. You elected an administrative discharge board (ADB).

On 27 June 2023, an ADB determined the preponderance of the evidence supported separation by reason of misconduct due to commission of a serious offense and recommended separation with an honorable characterization of service. In your sworn statement to the ADB, you raised the issue of hostile work environment at [redacted] and contended that part of the hostility was most likely due to your reluctance to get the COVID-19 vaccine. Additionally, you admitted to "tanking" your most recent evaluation because you wanted to ensure you had "no incentive" to reenlist. Further, you explained that in late 2018, while still a second class petty officer, you planned to get out of the Navy because you did not see a way to retirement at the time. However, in late 2019, when you were advanced to first class petty officer, you decided to reenlist at your 16.5 year mark so you could "slide into retirement without asking for a CWAY quota." You also explained to the ADB that when your waiver requesting eligibility for the Chief Petty Officer board was denied in June 2022, "it was at this point where [you] decided that [you] did not want to reenlist at [your] 16.5 mark because of how the Navy handled COVID." Lastly, you emphasized to the ADB that an administrative separation by reason of misconduct would be detrimental to your family because you would not receive medical separation pay. As the sole breadwinner, you explained to the ADB that you take care of your stepson who

has special needs and had just undergone surgery to fuse his spine together and the medical separation pay would allow your family "to shed all of [your] revolving debt and save for future surgeries."

On 7 July 2023, you submitted, through counsel, a Letter of Deficiency (LOD), requesting the ADB recommendation be denied and modified to a finding of retention to allow you to separate under the PEB process. You alleged you were not able to have a "full and fair defense" because of your command's climate. Specifically, you stated the best way to show your potential for further service was through testimony of those who worked with you but members of [redacted] who were contacted to testify made it clear that, while they would have liked to testify that you were a great sailor and excellent at your rate, they had "serious fears of retaliation and retribution" from the command leadership. You also raised the issue that the command took no action against the HMC who admitted, under oath, that he immediately used profanity in response to your use of profanity. Lastly, through the LOD, you emphasized that the route the Navy uses to separate you – PEB or administratively – would have a drastic impact on the benefits you would receive and, in essence, separating you under the administrative process would literally punish you by stripping you of the benefits you were entitled to under the PEB process.

By memorandum of 17 July 2023, CO, [redacted], recommended your separation by reason of misconduct in lieu of medical separation under the PEB process.

In his 17 October 2023 Action Memo to Commander, Navy Personnel Command (CNPC), Assistant Commander, NPC for Career Progression (PERS-8) recommended CNPC approve the administrative separation by reason of misconduct due to commission of a serious offense.

On 15 November 2023, CNPC, the separation authority for the administrative separation of personnel with less than 18 years of service being evaluated by the PEB, approved PERS-8's recommendation and directed your administrative separation with an honorable characterization of service.

In a message with date-time-group 172052Z NOV 23, CNPC notified your command of his determination that you should be separated for misconduct despite your medical condition and pending medical separation.

On 1 December 2023, you were discharged with an honorable characterization of service by reason of misconduct due to commission of a serious offense.

By memorandum of 12 December 2023, CO, [redacted], submitted the Report of Administrative Separation to CNPC (PERS 832).

In your request for relief, through counsel, you raise the following contentions summarized below:

(1) Does the "fateful exchange" really amount to a SERIOUS OFFENSE worthy of divesting you of over $100K?

(2) Your exemplary service and the disproportionate loss relative to the nature and circumstances of your conduct constitutes a compelling case for corrective action.

(3) While violations of Articles 89, 91, and 92 do provide for a punitive discharge, "no reasonable person or judge would contend that your conduct would warrant such a punishment." After all, your characterization of service was honorable. This highlights the "inherent irrationality of labeling your relatively mild behavior as "SERIOUS MISCONDUCT" while simultaneously characterizing your service as honorable.

(4) No reasonable person – or judge – would believe that your "illness-induced impatience and impersonal, general use of the word "f…ing" should result in a bad conduct or dishonorable discharge – especially considering the resulting loss of a major disability benefit. Therefore, if your conduct would not warrant a punitive discharge, thus, it should not have been labeled "SERIOUS MISCONDUCT" and it should not have resulted in such a severe pecuniary penalty.

(5) Your loss of over $100K in earned medical benefits, considering your extensive service and the mild nature of the incident giving rise to the loss, qualifies as a disproportionate forfeiture.

(6) As a result of you feeling ill and becoming loose with your words, the Government denied you a life-changing medical benefit *that you earned*.

(7) Conversely, the unreasonable denial of your benefit amounted to a grossly unfair windfall for the Government. Who is better equipped to "take the hit" and withstand the loss of $100K? It is manifest injustice for the Government to keep an amount of money that would be life-changing for you but trivial to the Government.

(8) CNPC's decision to separate you for misconduct despite your medical condition raises questions about the rationality and fairness of the agency's decision-making process. A decision that has the result of causing such a grave denial of an earned medical benefit should be accompanied by a greater degree of process, and at the very least, an explanation of the nature of the Government's compelling interest, a description of the rational basis for the denial of benefits, and why the proposed action is necessary to achieving the Government interest at stake. It must be incumbent upon the Government to establish why it must override the PEB's findings and deny a decorated service member with nearly two decades of honorable service the severance pay he earned as a result of the enlistment contract he signed and his fulfillment of that contract's obligation.

(9) The Kurta and Wilkie Memos provide guidelines for considering mental health conditions. Your diagnosed mental health conditions, compounded by the stress from various medical ailments and a toxic work environment, provided mitigating circumstances deserving of liberal consideration. Although no one (including yourself) contends that your conduct was fully justified or in keeping with military standards, the presence of your mental health conditions serves to mitigate and explain why you may have behaved the way you did. You suffered from severe anxiety and insomnia which was aggravated by feeling ill, the toxic work environment, and the unfair (and now prohibited) treatment you received as a result of your religious beliefs. Thus, your condition outweighed the nature of your discharge, and an adherence to the Kurta and Wilkie memos dictates that relief be granted.

(10) Per DFAS, severance pay is awarded to those who: (a) have been found unfit for duty, (b) have less than 20 years of service, and (c) have a disability rating of less than 30%. You were found to be unfit for duty, had 15 years of duty, and your disability rating percentage was 0%. You should have received $134,883 in severance pay. The loss of so great a sum based on a single instance of profanity is injustice that shocks the conscience.

As a matter of procedure and equity, your petition was reviewed by a qualified mental health provider. The AO author, in her careful and thorough review of your record and your submission, noted you had been evaluated on multiple occasions[1] throughout your military service dating back to September 2015 and spanning until October 2023. The AO opined there was insufficient evidence to attribute your misconduct to a mental health condition, particularly as you denied engaging in disobedience and there was no evidence you were unable to maintain professional behavior due to a mental health condition. Based on the available evidence, the Licensed Clinical Psychologist stated it was her clinical opinion there is in-service and post-service evidence from the Department of Veterans Affairs of a mental health condition that may be attributed to military service but there is insufficient evidence to attribute your misconduct to a mental health condition.

By memorandum of 13 September 2024, you, by and through counsel, submitted a response to the mental health AO emphasizing the AO was fundamentally flawed in both its conclusions and its reasoning. You point out that the AO dismisses your significant mental health conditions as

[1] In September 2015, you had a mental health screening in support of your application for assignment to the White House and denied having interactions, outside of a 2005 one-time visit, with mental health or emotional issues. In May 2017, you sought a mental health evaluation for sleep difficulties and no formal diagnosis was assigned. In July 2018, you self-referred to Behavioral Health for sleeping issues, intimacy problems, and anger episodes. You received no formal mental health diagnosis but "other symptoms and signs involving emotional state were noted." In August 2022, you returned to Behavioral health "to work on issues related to having anxiety and anger" and were diagnosed with Anxiety Disorder, unspecified, and Insomnia, unspecified. In April 2023, you returned to Behavioral Health for two follow-on appointments in which you "focused [your] thoughts and feelings related to having legal issues, going through the MEB and anticipating to complete that in June/July timeframe, having anxiety/PTSD type symptoms and not sleeping well. Your diagnosis remained unchanged from previous visits, and it was noted you were psychologically fit for full duty. From July to October 2023, you had four follow-up appointments in Behavioral Health that focused your "thoughts and feelings related to dealing with toxic leadership, not trusting them" and other concerns regarding your legal issues and plans for the future. Other specified depressive episodes were added to your diagnosis, and you were again noted to be psychologically fit for full duty.

consequential, despite the overwhelming evidence your anxiety, insomnia, sleep apnea, and chronic adjustment disorder directly contributed to the circumstances leading to your separation. Specifically, you provide the below summarized comments/contentions in rebuttal to the AO.

(1) The AO fails to appreciate the disproportionate and unjust nature of labeling your conduct as "serious misconduct" and stripping you of over $100K in earned benefits after 15 years of distinguished service.

(2) Your mental health conditions significantly contributed to your conduct and must be considered mitigating factors. Specifically, the AO focuses narrowly on your fit-for-duty status while ignoring the profound impact anxiety, insomnia, sleep apnea, and chronic adjustment disorder had on your behavior. The fact you were deemed "fit for duty" does not preclude your mental health conditions from significantly influencing your actions and decision-making. Further, courts have consistently recognized mental health conditions, even in those considered fit for service, must be taken into account as mitigating factors in assessing the appropriateness of disciplinary actions.

(3) U.S. *v.* Ohrt emphasized that a "service member's emotional or psychological state must be considered as a mitigating factor when determining appropriate punishment." Your well documented mental health conditions, including anxiety, adjustment disorder, and the 2018 sleep apnea diagnosis, were inextricably tied to the minor infractions cited in the AO yet the AO dismisses these diagnoses without seriously considering their impact on your conduct.

(4) The AO fails to address the more serious and relevant stressors that occurred later in your service, including a false accusation of rape and the breakdown of your marriage. According to National Institute of Mental Health, personal stressors and trauma can lead to emotional instability, irritability, and impaired judgment. These effects are particularly acute in individuals suffering from conditions like anxiety and adjustment disorder. It was only after these significant personal stressors – including the false accusation of rape – that you began to exhibit signs of mental health deterioration. Additionally, your sleep disorders likely played a role in your difficulty managing stress during the infractions in question.

(5) U.S. *v.* Massey found that when a service member is deemed fit for duty, mental health conditions can still "affect conduct in significant ways." The court emphasized the necessity of considering the impact of psychological conditions when evaluating the causes of misconduct. This precedent directly refutes the AO's contention that your fit-for-duty status somehow negates the role your mental health played in the alleged misconduct.

(6) Your diagnosed anxiety, insomnia, sleep apnea, and adjustment disorder – conditions exacerbated by personal trauma and a toxic work environment – clearly contributed to the behaviors for which you were punished.

(7) The Court of Military Appeals, in U.S. *v.* Bowie, recognized that external stressors, such as emotional trauma or personal difficulties, must be considered when determining whether misconduct rises to the level of a serious offense. In your case, your mental health struggles, exacerbated by the false accusation of rape and the collapse of your marriage, created a highly stressful environment that served as a catalyst.

(8) "Anxiety disorders can cause individuals to overreact to situations, leading to irritability and difficulty concentrating." This precisely describes your behavior during the periods of alleged misconduct. The Board must apply the liberal consideration required under KURTA and WILKIE and recognize your conduct was significantly influenced by your mental health struggles, which should mitigate any findings of misconduct.

(9) The alleged misconduct does not meet the threshold for "serious offense" and does not justify the disproportionate punishment levied against you. The AO's attempt to classify your conduct as "serious misconduct" is deeply flawed and unsupported by the facts.

After a thorough review of your submission, the Board determined there was insufficient evidence of an error or injustice warranting your requested relief.

The Board noted the contentions and arguments in your current submission, to include the arguments in rebuttal to the AO, are not new but have been presented through testimony and your personal statement at the ADB and your assigned counsel's LOD. Prior to finding the preponderance of the evidence supported two of the bases for separation and recommending separation, the ADB had heard testimony of the alleged toxic work environment and command climate. The ADB heard personally from you of your discontent with the Navy, its handling of COVID, and its treatment of you when you refused to be vaccinated. Additionally, the ADB was aware of your pending medical separation through the PEB process and the unfortunate health concerns you, individually, and your family faced. The ADB knew you were the sole breadwinner, and that the medical separation pay would make it possible for you "to shed all of [your] revolving debt and save for future surgeries." The witnesses at the ADB and the LOD highlighted your honorable service. Additionally, the Board noted that since you were being dual processed – had an approved medical separation and recommendation for administrative separation by an ADB – the decision rested with a flag-level separation authority who was specifically required to note, in writing, that separation for misconduct was appropriate despite your medical condition.

Further, the Board considered your discussion of "serious misconduct" but noted the MILPERSMAN definition and requirements are clear, and denied your numerous contentions it was error and unjust to define the "fateful exchange" as serious misconduct.

Although you solely focus on the December 2022 incident as the "fateful exchange," the Board noted that, dating back to June 2018, you had been repeatedly counseled – both verbally and in writing – for behavior inconsistent with your rate and responsibilities. When repeated counseling had little effect, faced with a first class petty officer with an admittedly poor attitude who chose to curse at and disrespect the HMC and disobey an order, the command moved forward with the logical next step to address your conduct: DRB. The Board noted the DRB minutes stated you "presented [yourself] to the board as the one in the right" when confronted with the charges. After hearing your "side" and two witnesses who supported your side of events, the DRB forwarded the charges to the XO who then forwarded them for adjudication at Captain's Mast. After you exercised your right to refuse NJP, CO, [redacted], made the decision to adjudicate your misconduct at an ADB. The recommendation of the ADB was provided to the separation authority after endorsement by your chain of command and then, because you were being dual processed for medical and misconduct reasons, CNPC made the final determination

you would be discharged by reason of misconduct despite your medical condition. After careful review of the administrative process, the Board concluded there is insufficient evidence of an error or injustice.

The Board also carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta and Wilkie Memos. The Board considered your "diagnosed mental health conditions, compounded by the stress from various medical ailments and a toxic work environment" and your "severe anxiety and insomnia which [were] aggravated by feeling ill, the toxic work environment, and the unfair (and now prohibited) treatment you received as a result of your religious beliefs." The Board also carefully considered your "mental health struggles, exacerbated by the false accusation of rape and the collapse of your marriage, [which] created a highly stressful environment that served as a catalyst." Additionally, the Board was not influenced by the AO's statements regarding "fit-for-duty" and did not disregard the impact of your contended psychological conditions when evaluating the cause of your misconduct. However, the Board substantially concurred with the AO and concluded that, even applying liberal consideration, there is insufficient evidence to attribute your misconduct to your mental health condition. Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined your repeated misconduct outweighed these mitigating factors. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

Additionally, the Board considered your contentions regarding "disproportionate forfeiture," "unfair windfall," and being equipped to "take the hit" but determined the fact you were financially impacted by your misconduct -- that was appropriately and properly considered by DRB, the XO, the CO, an ADB, the chain of command, and ultimately the CNPC -- does not make the decision to separate you for misconduct despite your medical condition unjust.

Based on the available evidence, the Board concluded there was insufficient evidence demonstrating a material error or injustice warranting your requested 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,

11/7/2024