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

[redacted]
Docket No. 6746-24
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 20 December 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 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.

You enlisted in the Marine Corps with an acknowledged pre-service history of experimental marijuana use and use of protein supplements and vitamins for muscle building and commenced a period of active duty on 22 October 2012. Following your civil apprehension for domestic violence in February 2015, you received a mental health evaluation from a military psychologist. You reported feeling depressed since your father had passed away and claimed your symptoms were exacerbated due to ongoing conflict with your new spouse. You were diagnosed with Adjustment Disorder with depressed mood. On 3 March 2015, you were convicted for misdemeanor domestic violence pursuant to a guilty plea; which resulted in a sentence that required you to participate in a 52- week domestic violence batterers program. During that period, both a civil protective order (CPO) and military protective order (MPO) were in place;

prohibiting certain contact with your spouse. Follow-up mental health appointments resulted in no change in your diagnosis. On 9 April 2015, you were subject to nonjudicial punishment (NJP) for violation of Article 92 of the Uniform Code of Military Justice (UCMJ) due to failure to obey the MPO and CPO by making physical contact with your spouse and text messaging her on multiple occasions. You also received an evaluation from a military psychiatrist in April 2015 which resulted in a diagnosis of Unspecified Drug Dependence based upon your consumption of testosterone supplements. Although you were recommended for inpatient substance abuse rehabilitation for your substance use disorder, you refused treatment based on your belief it was unnecessary.

You were notified of administrative separation processing based on misconduct due to commission of a serious offense. You elected to waive your right to a hearing before an administrative separation board. You were medically screened in June 2015 and found physically qualified for separation with no evidence of post-traumatic stress disorder. Your commanding officer recommended your discharge under Other Than Honorable (OTH) conditions. After legal review of this recommendation was completed, your separation was approved and you were so discharged on 15 June 2015.

You previously applied to the Naval Discharge Review Board (NDRB) claiming that you suffered from a mental health condition during your military service and had been a good Marine during your service; to include having held a billet as the chief motor pool dispatcher while in the paygrade of E-3 and having been recommended for consideration as Marine of the Quarter. The NDRB considered your request on 29 November 2022 and denied it; noting that you had not deployed in support of a contingency operation and, although you had been diagnosed with adjustment disorder (AD) and substance abuse disorder during your military service, your AD diagnosis did not explain your domestic violence misconduct or your apparent steroid use.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie, Kurta, and Hagel Memos. These included, but were not limited to, your desire to upgrade your discharge to Honorable and receive a medical evaluation board (MEB) to determine your potential eligibility for medical retirement or severance pay. You contend that your command should have dual-tracked your separation processing via a MEB and failed to consider your physical disabilities and mental health condition during your separation proceedings. You claim to have suffered abuse, hazing, harassment, and ridicule from your enlisted leader; for which you submitted supporting witness statements. You feel that these military stressors caused your marriage to collapse due to taking out your anger at how you were being treated on your spouse. You believe it was a material error to discharge you without affording you an MEB to assess your service-connected disabilities and the mitigating factor of your contended mental health condition, and that it is unfair that your OTH characterization renders you ineligible for veteran benefits other than treatment of your service-connected disabilities; rather than being granted medical retirement or severance pay. In support of your contentions and for clemency and equity consideration, you also submit documentation of the determinations made by the Department of Veterans Affairs (VA) regarding your service-connected disabilities, your psychiatric care files, the denial of your claim for disability benefits, and numerous character letters.

Because you contend that post-traumatic stress disorder (PTSD) or another mental health condition affected the circumstances of 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 and treated. His adjustment and substance use disorder diagnoses were 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 clinicians. Within a year of separation from service, he was diagnosed with a major mental health condition that the VA has attributed to military service. It is possible that symptoms identified as adjustment difficulties in service have been reconceptualized as mood disorder symptoms with the passage of time and increased understanding. However, it is difficult to attribute his misconduct to prodromal symptoms of a mood disorder, given his pre-service behavior and substance use in service.

The AO concluded, "it is my clinical opinion that there is insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is post-service evidence from the VA of a mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD or another mental health condition, other than substance use disorder."

In response to the AO, you provided rebuttal evidence in support of your case. After a review of the rebuttal 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 NJP and civil conviction, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Additionally, the Board concurred with the clinical opinion that there is insufficient evidence of a diagnosis of PTSD that may be attributed to military service and, although there is post-service evidenced from the VA of a mental health condition which may be attributed to military service, there is insufficient evidence to attribute your domestic violence and your violation of lawful orders to either PTSD or another mental health condition, other than your substance use disorder. Whereas you had a pre-service history of both substance use and supplement use and were diagnosed during your military service with a substance use disorder, you continue to maintain in your rebuttal to the AO that your substance abuse was not a contributing factor to your misconduct. The Board disagreed and observed that your abuse of hormonal testosterone supplements was, more likely than not, a contributing factor to your anger, emotional instability, and resulting domestic violence than the conditions reflected in your post-service diagnoses. Additionally, the Board found no discernable reason that your contended mental health condition would have prevented you from obeying a no contact order, which required affirmative action on your part to violate. Therefore, the Board 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.

With respect to your request that you should have received review by an MEB, the Board determined you provided insufficient evidence to support such proceedings. 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 DES at the time of your discharge. The Board observed that there was no evidence that you had any unfitting condition while on active duty. On this point, the Board found insufficient 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. There is no indication in any available documents that anyone in your chain of command observed that you were unfit to perform your duties due to any medical or mental health conditions. Further, none of your military medical providers referred you to a MEB. In fact, the Board noted you were deemed medically fit for separation prior to your discharge. Finally, the Board noted the VA does not make determinations as to fitness for service as contemplated within the service DES. Rather, eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based without a requirement that unfitness for military duty be demonstrated.

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 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[1]. 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,

1/17/2025

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[1] In light of the severity of your offenses of domestic violence and violation of no contact orders, the Board found your evidence of post-discharge character wholly inadequate to outweigh your misconduct.