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

[redacted]
Docket No. 7152-24
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 (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 23 January 2025. 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, applicable statutes, regulations, and policies, to include the Kurta Memo 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 (Vazirani Memo) (collectively the "Clarifying Guidance"). In addition, the Board considered the 12 November 2024 Advisory Opinion (AO) from a Licensed Clinical Psychologist. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

A review of your record shows that you enlisted in the United States Navy and began active duty on 12 September 1989. In 1991, you were stationed on the USS Missouri during Operation Desert Storm. On 24 July 1991, you were formally counseled for writing checks with insufficient funds. That same year, you were placed on limited duty due to a herniated disc. In 1992, you underwent treatment for alcohol abuse. On 23 March 1993, you were formally counseled for physical readiness test failure. On 4 June 1993, you were counseled for UA (unauthorized absence). On 23 September 1993, you commenced another period of UA until you were apprehended on 19 June 1994. Upon your return, you submitted a request for separation in lieu of trial (SILT) by court martial. Your request was approved, and you were so

discharged with an Other than Honorable (OTH) characterization of service on 12 August 1994. Your Certificate of Release or Discharge from Active Duty (DD Form 214) states "Separation in lieu of trial by court-martial" as the narrative reason for separation.

For this petition, you request a discharge upgrade, change your narrative reason for separation and separation code to "Secretarial Authority," and to change your reentry code to reflect eligibility for service. You argue you suffered from Post Traumatic Stress Disorder (PTSD) and other mental health conditions, to include Traumatic Brain Injury (TBI), during active duty service and these conditions mitigate your misconduct. Specifically, you stated that after returning from duty about the [redacted] you started heavily drinking and ultimately went UA. You further contend that your misconduct was due to non-violent issues, excessive drinking, insufficient funds, and that, under the Wilkie and Kurta Memos, liberal consideration is warranted. For the purpose of clemency and equity consideration, you submitted evidence of treatment for Major Depressive Disorder, PTSD, Alcohol Dependence, and Cannabis Dependence, from August to September 2019 as well as a June 2022 letter from a Department of Veterans Affairs (VA) psychologist.

Based on your assertions that you incurred a mental health concern (MHC) during your military service, which might have mitigated your discharge character of service, a qualified mental health professional reviewed your request for correction to your record and provided the Board with an AO. The AO stated in pertinent part:

> There is no evidence that the Petitioner received a diagnosis of a mental health condition during military service. Temporally remote to his military service, a VA clinician has opined that diagnoses of PTSD and TBI are attributed to combat exposure and contributed to his misconduct. Unfortunately, the sole evidence of TBI is the expressed "understanding" of the VA clinician. There is insufficient information regarding the TBI diagnosis to attribute his misconduct to this diagnosis. It is also difficult to attribute his extended UA solely to PTSD or other mental health concerns, given the length of time the Petitioner was away. 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 that there is post-service evidence from a VA clinician of diagnoses of PTSD, TBI, and other mental health concerns that may be attributed to military service. There is insufficient evidence to attribute his misconduct solely to PTSD, TBI, or another mental health condition."

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 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. As an initial matter, in its application of the Clarifying Guidance, the Board acknowledged that you have asserted that you had a condition or experience that may excuse or mitigate your discharge, which, at least for the sake of analysis, 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, even assuming that you had a condition, the Board determined that such condition would not excuse or mitigate your discharge. In making this finding, the Board concurred with the AO, which found that there was insufficient evidence to attribute your misconduct to a medical condition. Further, the Board also noted that the misconduct that led to your request to be discharged in lieu of trial by court-martial was substantial and determined that you already received a large measure of clemency when the convening authority agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and possible punitive discharge. Thus, the Board determined your assigned characterization of service remains appropriate and is supported by your record of misconduct[1].

Next, the Board analyzed whether your condition mitigated your discharge with respect to the award of a service disability discharge. The Board determined that the record evidence demonstrates that, even if you had a condition, 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 within the disability evaluation system. In addition, there is no indication that any leader in your chain of command prepared any non-medical assessment describing your inability to perform the duties of your rate. Further, even assuming, arguendo, that you had TBI or a mental health diagnoses while you were on active duty, it would not necessarily result in the award of a service disability discharge. Service members routinely remain on active duty with diagnoses of TBI or mental health conditions without those conditions considered to be unfitting. A diagnosis alone is not the standard for the award of a service disability retirement. Rather, 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 illegal use of cocaine. Thus, even assuming that you were found to have TBI or a mental health condition during your service, discharges based on misconduct take precedence over disability evaluation processing. In sum, 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

[1] Based on this finding, the Board also determined your assigned reentry code remains appropriate.

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,

2/27/2025

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