



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

YTC
Docket No. 7479-20
Ref: Signature Date

MR AARON HASSAY
C/O JOSH SCHNELL
CORDATIS LLP
1011 ARLINGTON BLVD
SUITE 375
ARLINGTON VA 22209

Dear Mr. Hassay:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, and the Order of the U.S. Court of Federal Claims (No. 19-594C, filed 16 October 2020 and reissued 23 October 2020), remanding your case to the Board for Correction of Naval Records (Board) for reconsideration of your previously denied applications consistent with the Court's order. After careful and conscientious consideration of relevant portions of your naval and medical records, your application, and the above reference Order of the Court of Federal Claims (CoFC), the Board continues to find the evidence 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 pursuant to the CoFC Order on 27 May 2021. The names and votes of the panel members will be furnished upon request. Your allegations of error or 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; each of your previous applications to the Board (Docket Nos. 1097-16 and 10601-16) and the material submitted in support of each; relevant portions of your naval record; the above-referenced Opinion and Order of the CoFC, along with the associated Amended Complaint that you filed with the Court; and applicable statutes, regulations and policies. In accordance with the Court's Order, the latter of these policies included the 3 September 2014 guidance from Secretary of Defense titled "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder" (Hagel Memo); the 25 August 2017 guidance from the Under Secretary of Defense for Personnel and Readiness (USD (P&R)) titled "Clarifying Guidance to Military Discharge Review Boards and Board for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment" (Kurta Memo); and the 25 July 2018 guidance from the USD (P&R) titled "Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determination" (Wilkie Memo). Documentary material considered by the Board also included an advisory opinion (AO) provided to the Board by the Senior Medical Advisor of the

Secretary of the Navy's Council of Review Boards (CORB), dated 21 February 2021; the endorsement of that AO from the Director, CORB, dated 23 February 2021; and your rebuttal submission to the AO, which included a letter to your attorney from Dr. William Foote, M.D., dated 28 April 2021, your letter dated 2 May 2021, and several post-service medical records.

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

You requested a change to your record to reflect a military disability retirement due to unfitness for mental health issues (to include PTSD) and/or spinal/musculoskeletal issues. You previously petitioned the Board for correction to your record on two occasions requesting the same relief (Docket Nos. 1097-16 and 10601-19), but both applications were denied. You subsequently filed suit in the U.S. CoFC, alleging that the Board's previous denials of your requests were arbitrary, capricious, and contrary to law. You have asserted that while serving in the U.S. Navy Reserve (USNR) onboard the USS SIDES (FFG 14), you were subjected to military sexual trauma (MST) (sexual assault), physical assault by your Command Master Chief, physical threats from fellow servicemembers, verbal abuse, and harassment. You have also asserted that you developed PTSD and other mental health conditions as a result of these incidents onboard the USS SIDES, which rendered you unfit for continued service and have resulted in ongoing mental health struggles, poverty, and chronic homelessness. As a result, you contend that you are entitled to military disability retirement.

In its Order filed on 16 October 2020 and reissued on 23 October 2020, the CoFC concurred with your contention that the Board's previous decisions to deny your request for military disability retirement were arbitrary, capricious, and contrary to law, and remanded your case to the Board for reconsideration. The Court found that the Board failed to address whether your continued service represented "a dedicated medical risk" in accordance with SECNAVINST 1850.4E, enclosure 3, §3302(b)(1), and did not consider Department of Defense (DoD) guidance pertaining to the review of cases in which servicemembers request changes in their discharge status based upon service-connected PTSD conditions and/or MST experiences (i.e. Hagel and Kurta Memos). Accordingly, the Court remanded the matter to the Board for reconsideration of your claims that the Navy should have referred you to a Medical Evaluation Board (MEB) in August of 1999 when you were examined by Dr. Killian, or in 2000 when you requested mental health counseling; and that you were unable to reasonably perform the duties of your office, grade, rank, or rating as early as 1998 or as late as the time of your discharge. The Court also specifically directed the Board to do the following in conducting its review of your case: (1) decide whether and when your continuation on Active Reserve status presented "a decided medical risk" to your health or the welfare of other members; (2) evaluate and consider all medical and other evidence you present, giving appropriate weight to the letters from the mental health professionals who have treated you in the years following your discharge; and (3) apply the relevant DoD guidance concerning service members with PTSD or mental health conditions or who have experienced a MST, in considering your claims and the relevant medical and other evidence (i.e., the Hagel, Kurta, and Wilkie Memos). The Board has fully complied with the Court's Order.

On 26 May 1994, you signed an eight-year enlistment contract in the USNR, beginning in the paygrade of E-1 and serving in the Sea and Air Mariner (SAM) Program. Your Report of Medical History, dated 26 May 1994, reflects that you were in good health at the time of your enlistment.

Following your initial training period, you were assigned to USS COPELAND (FFG 25) from November 1994 through the summer of 1995. In October 1995, you were reassigned to the USS SIDES. As discussed above, you assert that beginning in 1996 you were subjected to physical assaults, threats, harassment, abuse and unwanted sexual advances/sexual assault from various members of the USS SIDES active duty crew, to include a physical assault perpetrated by your Command Master Chief. In the transcript of your hearing before the Board of Veterans Appeals, dated 27 January 2016, you provided a detailed accounting of the events that transpired onboard the USS SIDES. Specifically, you asserted that a Seaman “tried to get sexual with (you) in berthing on the USS SIDES, 1996,” that you defended yourself and ran into the galley and openly complained, and that the Seaman was then no longer part of the ship’s company but that you were not told why he was gone. Additionally, you stated that another enlisted Sailor threatened you with a firearm in 1997, and that a different Sailor “stuck a knife at (your) throat.” You further reported ongoing physical and verbal conflict onboard the ship, and state that you “went into a dog fight every month . . . on this ship to get threatened.” You asserted that your Command Master Chief physically assaulted you, and in August 1998 you tried to transfer into the Army.

In 1998, the San Diego Military Entrance Processing Station (MEPS) conducted a physical evaluation in conjunction with your request to transfer to the Army. You were permanently medically disqualified (3P) during the physical due to “Spine, Other Musculoskeletal/Psych,” and did not transfer into the Army.¹ On 13 August 1999, you were seen by Dr. Killian, a Navy physician, who documented mental health concerns in your record, to include a history of depression, disturbed sleep, decreased interests, increased guilt over a recent relationship, decreased concentration, decreased appetite, and stress of breaking up with a girlfriend. The August 1999 notes in your medical records reflect a referral and follow-up for a mental health consultation. In-service medical records from 15 June 2000 indicate that you reported multiple stressors, and that you had stopped taking prescribed medication due to side effects. The medical notes also reflect that you reported feeling stress and physical symptoms resulting from worry.

Throughout your USNR service, you maintained performance marks of 3.00 or higher, and advanced to the paygrade of E-4 (BM3). Your final available evaluation report for the period of service from 16 June 2000 through 15 June 2001 notes that you helped maintain unit readiness, had become an expert in the assembling and operation of the Military Sealift Operation Center Van, maintained excellent physical condition and consistently received excellent marks on Physical Readiness Tests. Your record does not contain an evaluation report for your last 11 months of service from 16 June 2001 through the date of your discharge in May 2002. On 25 May 2002, you were honorably discharged from the USNR upon the expiration of your enlistment. You were assigned a reentry (RE) code of RE-1, with a recommendation for reenlistment.

In August 2002, three months after your discharge from the USNR, you were hospitalized for Depressive Disorder. Based on records provided in support of your application, you earned an

¹ On 19 July 2016, approximately 14 years after your discharge from the Navy, the Office of the Inspector General (OIG) provided you a letter stating that it conducted a thorough review and determined the Navy should have completed a DD Form 368 (Request for Conditional Release) to transfer you to the Army, and the Army should have completed section IV of the DD Form 368 notifying the Navy of your medical disqualifications. The OIG letter further stated that it could not determine if the Army completed the form and provided it to the Navy. Additionally, the Department of the Army, Headquarters Recruiting Command, provided you a letter dated 1 August 2016, which cited record retention practices and noted there was no way for US Army Recruiting Command to validate any portion of your processing in 1998.

annual income of \$20,429 in 2003, but in 2004 you were no longer employed or earning income. In 2005, the Social Security Administration determined that you qualified for Social Security Disability Insurance for affective (mood) and anxiety disorders. In 2013, you were referred to the County Veterans Service Office for assessment of PTSD by a San Francisco County Veterans Service Officer. On 4 September 2013, a Clinical Psychologist, Dr. C. Louie, drafted a letter detailing your self-report of feeling harassed and ostracized onboard the USS SIDES due to being a reservist, and your reported assault by your Command Master Chief. Dr. Louie noted that over the four-year period of your service on board the USS SIDES, you became depressed, isolated, and fearful of being trapped on a ship with people who would attack you physically and verbally. He found that you met the diagnostic criteria for chronic PTSD, and that you would likely benefit from individual therapy to reduce the distressing symptoms. You subsequently began to receive care from Dr. W. Foote, MD, for PTSD and Attention Deficit Hyperactivity Disorder. In a letter dated 26 May 2015, Dr. Foote stated that you had been under his care for two years for symptoms of anxiety, hyper-vigilance, sleep disorder, and depressed mood,” and that you suffered from chronic PTSD which was directly related to your military experience.”² Specifically, he opined that your weekend deployments as a reservist “caused multiple traumas which led to [your] PTSD.” On 11 April 2017, following a favorable decision by the Board of Veterans Appeals, the Department of Veterans Affairs (VA) awarded you a 100 percent service-connected disability rating for anxiety disorder and schizoaffective disorder, effective 9 September 2012 (the date your service-connected disability met the percentage requirements for consideration of total benefits because of unemployability).

According to your contentions in your application as well as information reflected in the supporting documents you provided (to include medical records), you experienced mental illness, poverty, and chronic homelessness in the years following your discharge from the USNR. In a second communication, dated 9 January 2017, Dr. Foote noted that he had been a Naval Officer in the medical corps with a specialty of psychiatry and that he was concerned that you and your problems had been overlooked while you were in the Navy.³ He opined that had you been administrative discharged when you were asking for some form of help due to emotional stress in 1999, you may have had a more positive and productive life. Dr. Foote contended that you should not have been retained in the USNR given your symptoms and inability to adapt to military life. Dr. Foote opined that by maintaining your status in the USNR, your PTSD condition and symptoms worsened.

As part of its review process, the Board requested an AO from the Navy office having expertise and purview over fitness for duty determinations. In response to this request, the Senior Medical Advisor for the CORB issued an AO dated 21 February 2021. The AO noted that a multidisciplinary medical-psychiatric and administrative team considered Petitioner’s application and determined that the evidence provided was insufficient to establish that you should have received a medical retirement. This AO was endorsed by the CORB Director by memorandum dated 23 February 2021. The AO reviewed your in-service medical records, to include both the 1999 and 2000 medical notes, all of your post-service August 2002 hospital evaluation and diagnosis of depressive disorder, and the letters from mental health professionals who have treated you in the years since your discharge.⁴ The AO also considered the determination by Social Security Administration in 2005, as well as

² The 26 May 2015 letter from Dr. Foote was drafted after the Department of Veterans Affairs had rejected Petitioner’s claim for benefits related to his mental illness and lower back disorder in September 2014.

³ The 9 January 2017 letter from Dr. Foote was drafted after Petitioner’s first request to the Board for a medical retirement was denied on 16 November 2016 (Docket No. 1097-16).

⁴ A complete list of the evidence considered by the multidisciplinary medical-psychiatric and administrative team which considered your application is included in the AO, which was previously provided to you for comment.

subsequent medical opinions and treatment records provided, and the VA disability rating determination that your psychiatric conditions were service connected, but noted that eligibility for VA compensation and pension benefits does not require an establishment of unfitness for continued service at separation, and distinguished the VA disability determination from fitness determination that is being requested in your present application.

The AO also noted the Court's directive regarding the application of the Hagel, Kurta, and Wilkie Memos, but noted that the liberal consideration guidance of these policies does not apply to Physical Evaluation Board (PEB) decision making, which was the basis for the CORB AO. The AO acknowledged your compelling account of the traumatic events that you experienced while serving onboard the USS SIDES, followed by your need for mental health consultations while you were in the USNR. Nonetheless, the AO noted that your enlistment was characterized by an absence of any objective evidence of significant duty performance decrement or inability to perform your duties. Even in consideration of the insight provided by Dr. Foote and the otherwise respected medical and mental health professionals, the AO found that the evidence did not establish that you were unfit for either a spinal condition (reflected in the Army's 1998 determination) or for a mental health condition.⁵ The AO was provided to you, and you submitted rebuttal information in response to its conclusions for the Board's consideration.

The Board considered your rebuttal information, which included a personal statement from you and a 28 April 2021 letter from Dr. Foote in which he reiterated his conclusion that your experience in the USNR was "literally a major cause" for your mental deterioration in the years following your discharge. In your personal statement, you provide background information about your struggles while you were in the Navy and detail the challenges you faced following your discharge. You asked the Board to consider whether you were assigned to an "Instrumentality of War" and whether that service could cause a combat-related injury or illness for which you have received a service-connected disability rating. You also raised questions regarding the absence of transitional counseling regarding VA support or a discharge physical, and stated that you were in a psychiatric hospital receiving medication in the months following your discharge and "every month after that."⁶ To support your personal statement and in rebuttal to the AO, you provide the Board with medical documentation from the August 2002 hospital evaluation, followed by treatment records from 2004 through 2014, which establish ongoing medical care for mental illness and mental health concerns. Dr. Foote's rebuttal letter states that he finds it unconscionable that you were not referred for full psychiatric evaluation to determine your fitness for duty in 1998 when you were denied transfer to the Army, or in 1999 or 2000 when you sought treatment from the Navy for your mental illness, or immediately prior to your discharge. Dr. Foote also stated that with the diagnoses that were presented in your in-service medical records, he does not understand why you were not referred for psychiatric evaluation which would have stated that you were not fit for duty and that you could have eventually been a harm to yourself or others due to inattention and distractibility. Dr. Foote concluded that remaining in the military created serious harm for you, and that your medical records show clearly that you were not fit for duty and no one in the Navy was listening or seeing beyond what they wanted to see, which he contends is a typical reaction when non-psychiatrists make decisions concerning a person's welfare while on duty.

⁵ PEB-related decision-making is reliant on the preponderance of evidence as opposed to the 'at least as likely as not' VA standard pertaining to establishing service connection.

⁶ The Board found that most of your questions posed in your rebuttal letter to the AO were rhetorical in nature. Accordingly, the Board did not address each one individually, but did consider the message as whole and the purported facts that the rhetorical questions presented.

The Board first considered whether the Navy should have referred you to the Disability Evaluation System (DES) at any time during your USNR service, to include in 1998, 1999, 2000 or prior to your discharge in 2002, for mental health conditions or spine/musculoskeletal reasons. In accordance with SECNAVINST 1850.4E,⁷ leadership, to include line commanders, commanding officers of Military Treatment Facilities (MTF), and individual medical and dental officers, are charged with promptly identifying those members presenting for medical care whose physical or mental fitness for continued naval service is questionable. The Board noted Dr. Foote's assertion, as a prior medical officer in the U.S. Navy practicing in the specialty of psychiatry, that he felt that your in-service medical records showed clearly that you were not fit for duty. Even in consideration of Dr. Foote's assertions, the Board found that there was insufficient evidence to establish that you should have been referred to the DES at any time during your USNR service. More importantly, even if your referral to an MEB was appropriate at any time, the Board found that you unquestionably would have been found fit for continued service at the time by a PEB. With due respect to Dr. Foote's expertise and experience, the Board found that each of his letters were written specifically to achieve a particular end result for you. His 2015 letter was written after you had been denied VA benefits to support your appeal to the Board for Veterans Appeals. His 2017 letter was provided after your first application to this Board for a medical retirement had been denied to support your request for reconsideration. His 2021 letter was written at the request of your attorney specifically to support this current application and to refute the findings of the AO. The Board found Dr. Foote's input to be the product of a well-intentioned medical provider seeking to achieve a favorable result for his patient, but unsupported with regard to his conclusions regarding your fitness for duty in the USNR or whether you should have been referred to the DES. His insistence that he would not have allowed you to return to duty knowing what was in your records simply lacks credibility and is clearly influenced by what he knows of your current condition, as there was nothing in your record at the time reflecting the trauma that you experienced onboard the USS SIDES or anything else which would have caused a reasonable provider to reach such a conclusion – there would be very few Sailors fit for duty under the standard claimed by Dr. Foote. Having found Dr. Foote's opinion to lack credibility, the Board found the AO provided by the multidisciplinary team that included medical and mental health providers which would be called upon to determine your fitness for duty if your case came to the PEB today and which did not have the same bias as Dr. Foote has for you to be far more persuasive. The evidence certainly supports your receipt of VA disability benefits for service-connected mental health disorders, which may have deteriorated over the years, but it does not support Dr. Foote's contention that you were unfit for duty while in the USNR or that you should have been referred to the DES at any time during your USNR service.

Even if you were suffering from mental health conditions during your USNR service, there is no evidence that you were unfit for your duties at any time. Based on your satisfactory performance evaluations and your advancement in rank, your fitness for duty does not appear to ever have been in question. Your record reflects that you performed your duties at or above the standard expected of you, which suggests that any mental health conditions that you may have been experiencing at the time did not adversely affect your fitness for duty. Additionally, your record is devoid of any disciplinary actions, which not only suggests that any mental health conditions were not affecting your fitness for duty, but also calls into question Dr. Foote's comment that you were unable to adapt to naval service. Finally, your medical records reveal no medical conditions that would be

⁷ SECNAVINST 1850.4E, Department of the Navy (DON) Disability Evaluation Manual, dtd 30 April 2002, was promulgated immediately prior to your discharge from the USNR in May 2002. SECNAVINST 1850.4D provided consistent referral guidance consistent with that contained in SECNAVINST 1850.4E prior to 30 April 2002.

automatically disqualifying for continued service in the U.S. Navy absent some deterioration in your duty performance or inability to perform your duties. The Board does not question or doubt your contentions regarding your experiences onboard the USS SIDES, nor does it doubt that you developed PTSD and/or other mental health conditions as a result of these experiences, which have continued to adversely affect your life since that time. That, however, is what the VA disability compensation that you receive is intended to address. Medical retirements are not awarded based upon service-connected disabilities that may become worse over time; they are awarded to service members who are determined to be unable to continue their service due to medical conditions that render them unfit for duty. There was no evidence that you were ever unfit for duty, and you were honorably discharged upon the completion of your enlistment.

The Board considered whether you should have been referred to the DES in 1998 when the Army found you to be medically unqualified for transfer and subsequent enlistment due to an unspecified “Spine, Other Musculoskeletal/Psych” in your record. This record provided insufficient evidence for the Board to make any determination regarding whether it should have triggered referral to an MEB. The Board believed it likely based upon your communication with the OIG that your transfer request was not processed correctly, and that correct processing may have provided information that is more actionable. However, considering your performance in the USNR subsequent to your rejection by the Army and the findings of the AO, the Board is confident that you would found unfit for continued duty by the PEB even if the Navy had been aware of the Army’s determination at the time.⁸ Additionally, the Board found that an Army accession determination bares very little relevance to a Navy retention determination. In this regard, the Board noted that Department of Defense Instruction 6430.03, *Medical Standards for Military Service*, is broken into two volumes, one for military retention standards, and one for military accession standards. The list of medical conditions, which may have disqualified you for accession into the Army is far more extensive than the list of conditions which have disqualified you from retention in the Navy. For example, when you presented to Dr. Killian in 1999, you revealed a “history of bipolar disorder.” In accordance with DODI 6130.30, Volume 1, paragraph 5.28, your “history of bipolar disorder” would have disqualified you from accession into the Army. However, in accordance with the same paragraph of Volume 2, your mere “history of bipolar disorder” would not trigger, by itself, a MEB. Rather, a condition of bipolar disorder would be considered disqualifying only on a “case-by-case basis if, despite appropriate treatment, [it]: (1) require[d] persistent duty modifications to reduce psychological stressors or enhance safety; or (2) [i]mpair[ed] function so as to preclude satisfactory performance of required military duties of [your] office, grade, rank, or rating.” The Board cannot know from the limited record whether this particular medical history contributed to your rejection by the Army. Regardless, the point is that medical accession standards are far more restrictive than medical retention standards. You never presented with any medical condition that would be considered as automatically disqualifying for retention, and you certainly never demonstrated any functional impairment precluding your ability to satisfactorily perform your duties. Accordingly, even if the Navy was aware that the Army had rejected your transfer request in 1998, this would not and should not have triggered your referral to the DES in the absence of some evidence that your

⁸ The Board also noted that the Court commented in its remand Order that you “assert in passing that (you) should have been found eligible for a medical retirement as a result of spinal disability . . . Because the argument is not developed at all, the Court will not address it.” The Board determined that even in consideration of the additional submissions you provided to the Board following the remand Order, you did not establish that you suffered a spine/musculoskeletal condition or disability that impacted your fitness for duty and established entitlement to a military disability determination or military disability retirement.

condition(s) required persistent duty modifications or impaired your ability to satisfactorily perform your required military duties.

The Board also considered whether your 13 August 1999 medical evaluation by Dr. Killian should have triggered referral to the DES. The Board noted that you reported a history of depression/bipolar disorder, described symptoms to include disturbed sleep and loss of interest, as well as relationship stressors due to a breakup from your girlfriend. The medical notes from August 1999 document life stressors, but do not document service-connected stressors or traumatic experiences such as those you described onboard the USS SIDES. While the Board does not question these experiences, it did note that the mental health struggles you reported to Dr. Killian in 1999 appeared to be related primarily to "life stress." The Board also noted, as discussed above, that your reported history of depression/bipolar disorder is not medically disqualifying for retention in the Navy in accordance with DODI 6130.03, Volume 2, and that you never demonstrated any functional impairment as a result of any medical condition that you may have had. As a result, the Board concluded that your mental health concerns as reported to Dr. Killian and your mental health diagnosis as documented in 1999 were not likely to call into question your fitness for duty. The Board concluded that Dr. Killian acted appropriately when he appears to have engaged with you for a contract for safety until you could go to a mental health appointment the following Thursday, especially considering that you did not report any suicidal ideations at the time. The Board noted that no medical records for the follow up are available, and that it is unclear if the onus was on you to engage with the mental health clinic.

With regard to your 10 June 2000 Report of Medical Examination, the Board considered that you indicated engagement with Navy counselors one year prior, and that you were dealing with stressful relationships but did not appear depressed. You did not report any physical diagnosis or condition, to include spine/musculoskeletal concerns, but you did disclose that you had been treated for a mental condition. It also appears that you did not respond to the question about whether you had ever been rejected for military service due to a mental or physical condition, indicating that you did not disclose the 1998 Army determination during this medical appointment. Based on the 2000 Report of Medical Evaluation, the Board found that you again reported personal stressors, rather than occupational concerns or Service-related decline. As stated previously, the Board does not question the validity of your documented mental health issues or the mental health diagnoses in your record. However, the Board noted that under SECNAVINST 1850.4, for a determination of unfitness, it must be established that the medical disease or condition underlying the diagnosis actually interfered significantly with your ability to carry out the duties of your office, grade, rank or rating. The Board found that your 2000 medical record does not establish that your mental health diagnosis or conditions, or your spine/musculoskeletal issues, were significantly interfering or calling into question your ability to carry out your duties.

The Board evaluated whether you should have been referred to the DES for a determination of fitness prior to your discharge in May 2002. Although the Board noted that your records do not include a performance evaluation covering your final 11 months of service, the Board relied on your final two evaluations in the USNR. First, your evaluation from 16 June 1999 to 15 June 2000 reflects that you received an Individual Trait Average of 3.86, and noted that you regularly performed General Military Training lectures, participated in Firearms Simulator Training utilizing the M-16, and were a member of a Navy Baseball team. Additionally you received a "Must Promote" recommendation and a recommendation for retention. Your evaluation for the period of 16 June 2000 to 15 June 2001 rated you as Promotable and recommended you for retention. Further, you were noted as maintaining excellent physical condition and becoming an expert in the assembling and operation of

the Military Sealift Operation Center van. In May 2002, you received an honorable discharge in the rank of E-4, with a reentry code RE-1. By all accounts, you were a high performing Sailor and entirely fit for duty, and the Navy would have welcomed your continued service if you had chosen to reenlist. Based on your performance evaluations, recommendations for retention, honorable discharge, and recommendation for reentry, the Board concluded that your documented mental health conditions and the spine/musculoskeletal concerns identified by the Army in 1998 do not appear to have significantly impacted your ability to carry out the duties of your office nor do they appear to have rendered your fitness for continued service questionable. Accordingly, the Board concluded that there was no basis upon which to refer you to the DES prior to your discharge.

In accordance with the Court's Order, the Board considered whether and when your continued service represented "a decided medical risk" to your health or the welfare of other members in accordance with SECNAVINST 1850.4E, enclosure 3, §3302(b)(1). As a preliminary matter in this regard, the Board found no evidence your continued service ever represented a risk to the welfare of other members of the Navy. The Board also notes that the provision of SECNAVINST 1850.4E which the Court cites and specifically directed it to consider is one of only several factors that a PEB "may" consider in determining whether the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his/her office, grade, rank, or rating during a remaining period of Reserve obligation. The only evidence presented to this Board that your medical condition represented a decided medical risk to your health was the opinion provided by your current mental health provider, Dr. Foote, years after the fact. As previously discussed, the Board discounted the credibility of Dr. Foote's opinion in this regard because it was clearly biased and not supported by the objective evidence. Based upon the totality of the circumstances, the Board could not identify any time during your service in the USNR when your continued service presented a decided risk to your health. If anything, your continued service would have been beneficial to your health, as you would have been eligible to receive medical care for the mental health condition for which you were briefly hospitalized several months after your discharge from the USNR if you had chosen to reenlist. At the very least, there was never any reason for any Navy officials or medical providers to believe that your continued service in the USNR presented a risk to your health, or to refer you to the DES. Having made this determination, however, the Board also believes that it is irrelevant with regard to the ultimate question in this case, because even if it is true, in hindsight, that your continued service presented a risk to your health, you never would have been found unfit for duty under the circumstances. This conclusion is supported by the fact that you clearly were able to reasonably perform your duties for the remaining period of your USNR obligation. It was also supported by the findings of the AO, which represent the collective opinion of the same organization, which would make a determination of your fitness for duty if your case was presented to the PEB with the same facts today.

In accordance with the Court's Order, the Board considered your application in accordance with the guidance provided by the Hagel, Kurta, and Wilkie Memos. In this regard, the Board notes that the Court misapplied this guidance, as neither the Hagel Memo nor the Kurta Memo is applicable to your application. As the CoFC itself determined in the case of *Doyon v. United States* on 13 January 2021, the Hagel and Kurta Memos would apply only if you were challenging the characterization of your discharge from the Navy. As its title suggests, the Hagel Memo applies to applications for discharge characterization upgrades. Your petition, however, makes no such request, as you were honorably discharged upon the completion of your enlistment. The Navy cannot characterize your service any more honorably than it already has. The Kurta Memo, on the other hand, applies to any application seeking discharge relief, including requests to change a narrative reason for separation,

reenlistment codes, and service characterization upgrades. Your petition, however, does not request such relief, as it seeks a determination that you were unfit for duty and therefore should have been medically retired. The Court in *Doyon* found that such a request cannot be characterized as a challenge to the “narrative reason for separation,” so your application does not seek discharge relief. In deference to the Court, however, the Board attempted to apply the guidance of the Hagel and Kurta Memos to the extent possible. As previously discussed, the Board did not question the validity of your reported MST and other traumatic experiences onboard the USS SIDES. It also did not question the validity of your PTSD condition or other claimed mental health conditions, or that they developed as a result of your experience onboard the USS SIDES. If you were seeking an upgrade to your characterization of service, the Board would undoubtedly be inclined to grant you relief. Unfortunately, however, your traumatic experiences and mental health conditions are irrelevant to the question of whether you were unfit for duty during your USNR service. PTSD is not a disqualifying medical condition, which would trigger a referral to the DES, even if it was recognized at the time. The objective evidence in your case clearly shows that your ability to satisfactorily perform the duties of your grade, rank, and rate was not impaired by any mental health condition during your USNR service. Accordingly, your mental health conditions do not provide any basis for the relief that you seek.

With regard to the Wilkie Memo, the Board notes that its primary purpose is to guide the Board with regard to the granting of clemency from criminal sentences. It does, however, apply to “any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.” The Board applied the guidance of the Wilkie Memo to your application in accordance with the Court’s Order to the extent practicable. In this regard, the Board found no injustice upon which to grant relief. Certainly, your experience onboard the USS SIDES was an injustice and your resulting mental health condition(s) are a tragedy. However, the record reflects that you have been granted a 100 percent service-connected disability rating from the VA as a result of your mental health condition(s), for which you receive disability compensation. That is the appropriate form of compensation and relief for your situation. There simply is no injustice in the fact that you did not receive a medical retirement as a result of your condition, because your condition never rendered you unfit for continued service. The Board also found no equitable basis for relief in your case. In determining what constitutes equity, the Board is obligated to consider not only what you should receive, but also what other similarly situated service members are entitled to receive. The Board determined that no other similarly situated service member would have been medically retired at the time even with the facts as they are now known, nor would anyone be retroactively medically retired based upon similar facts. Accordingly, the Board determined that there is no basis for relief based on equity. The Board truly regrets the experience you endured during your service onboard the USS SIDES and the long-term effect that it has had upon your mental health, and is gratified to know that you have been granted the disability compensation from the VA, which you are fully entitled to and deserving. It also notes that despite the trauma that you suffered onboard the USS SIDES, you continued to serve the Navy with honor and did not fail to reasonably perform the duties of your office, grade, rank or rating. That, however, is the point. Medical retirements are intended only for those service members unable to continue providing such honorable and effective service due to a disqualifying medical condition. The Board regrettably found no basis to grant you the medical retirement that you were never qualified to receive.

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 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,

6/1/2021

X 

Bradley J. Goode

Deputy Director

Signed by: GOODE.BRADLEY.J.1139935450