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

[redacted]
Docket No: 2519-21
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 reconsideration application on 17 September 2021. The names and votes of the panel members will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations, and policies, to include the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (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 two Advisory Opinions (AO) from the same qualified mental health provider, copies of which were previously provided to you. You were provided an opportunity to submit rebuttals to both of the AOs, and you did do so each time.

You enlisted in the Navy on 2 June 2006 at the age of twenty-six (26). Your pre-enlistment physical examination on 13 June 2005 and self-reported medical history noted no neurologic or psychiatric conditions or symptoms.

On 5 March 2007 you commenced a period of unauthorized absence (UA) that terminated after forty-nine (49) days with your surrender to military authorities on 23 April 2007. Following your return to military control, you voluntarily submitted a written request for an administrative discharge in lieu of trial by court-martial for your lengthy UA. Prior to submitting this voluntary

discharge request you would have conferred with a qualified military lawyer, at which time you were advised of your rights and warned of the probable adverse consequences of accepting such a discharge. As a result of this course of action, you were spared the stigma of a court-martial conviction for your UA, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge. Ultimately, on 26 July 2007 you were separated from the Navy with an other than honorable conditions (OTH) discharge and assigned an RE-4 reentry code.

Unfortunately, the administrative separation in lieu of trial by court-martial documents are not in your record. However, the Board relied on a presumption of regularity to support the official actions of public officials, and given the narrative reason for separation and corresponding separation and reentry codes as stated on your Certificate of Release or Discharge from Active Duty (DD Form 214), the Board presumed that you were properly processed and discharged from the Navy for your long-term UA. In blocks 25 through 28 of your DD Form 214 it states "MILPERSMAN 1910-106," "KFS," "RE-4," and "In Lieu of Trial by Court Martial," respectively. Such DD Form 214 notations collectively refer to a discharge involving a written request for an administrative separation in lieu of trial by court-martial.

On 3 May 2012 the Naval Discharge Review Board (NDRB) denied you relief. The NDRB determined your discharge was proper as issued and no change was warranted. While the NDRB recognized that serving in the military was challenging, the NDRB noted that you willingly went absent without leave to address your marital and family issues. The NDRB also found your discharge characterization was equitable as well.

On 14 November 2016 the NDRB denied you relief a second time. You contended that you went UA out of stress and concern for your son's health safety, and that such reasons were mitigating circumstances for your misconduct. However, the NDRB determined that your family situations were not mitigating factors in your misconduct. The NDRB found the characterization of your discharge was equitable and consistent with the characterization of discharge given others in similar circumstances.

On 16 April 2020 the Board denied you relief for your previous petition. You had contended, to include, but not limited to, that your UA was an isolated incident, your infant son was in danger, your post-service conduct warranted an upgrade, the NDRB failed to address all of your issues, and you served during war time and your departure was due to parenthood obligations. The Board concluded that there was insufficient evidence of probable material error or injustice warranting corrective action.

As part of the Board review process for your current petition, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an initial AO dated 19 July 2021. The Ph.D. initially observed that your in-service records did not contain evidence of a diagnosis of a mental health condition, although it did contain evidence of psychological/behavioral changes, which may have indicated a mental health condition. The Ph.D. observed that a post-service diagnostic impression noted your mental health symptoms on active duty were situational and not severe enough to influence your daily

functioning based on your reported symptoms. The Ph.D. concluded by opining that the available objective evidence failed to establish you suffered from a mental health condition on active duty or that your in-service misconduct could be mitigated by a mental health condition.

You submitted an AO rebuttal on 10 August 2021. You contentions included, but were not limited to claims that: (a) the evidence supported that you were depressed because of a reasonable fear for your son's safety; (b) but for your depression you would not have made the decision to go absent without leave; (c) your in-service depression, although not clinically diagnosed, should sufficiently mitigate your isolated incident of misconduct; (d) the hardship the discharge creates outweighs the Navy's need to punish the alleged misconduct; and (e) your UA was for a legitimate reason.

Following your AO rebuttal, the Ph.D. issued a second AO dated 31 August 2021. The Ph.D. noted that there still remained a lack of objective evidence your misconduct arose from a mental health condition, and also noted that your mental health symptoms during service were considered situational and not severe enough to influence your daily functioning. The Ph.D. stated that while it was common for parents to resort to atypical measures when they felt their issues and/or child's issues are not being adequately addressed, the Ph.D. concluded that a resort to use measures atypical to usual conduct did not constitute a mental health condition. You submitted a second AO rebuttal on 8 September 2021.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Hagel, Kurta, and Wilkie Memos. These included, but were not limited to your contentions as outlined in both of your AO rebuttals that: (a) at the time of your discharge you were under extreme stress and anxiety because you had credible information your infant son was in danger; (b) you made your command aware of your concerns but no remedy was offered; (c) you had sought guidance from your chain of command, a chaplain, and a psychiatrist; (d) you had sought help from your chain of command before going absent; (e) an upgrade is warranted based on your post-service conduct; (f) you seek an RE-1 code for the opportunity to serve again; and (g) you have met the burden to demonstrate the existence of probable material error or injustice. However, given the totality of the circumstances, the Board determined that your request does not merit relief.

In accordance with the Hagel, Kurta, and Wilkie Memos, 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 nearly thirteen months of service. However, the Board concluded that there was no nexus between any depression, anxiety, and/or mental health-related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions or symptoms were related to or mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms. Moreover, the Board concluded that even assuming arguendo that your UA was somehow attributable to any mental health conditions, the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was willful and demonstrated you

were unfit for further service. The Board also determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should otherwise not be held accountable for your actions.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade and determined that Sailors should receive no higher discharge characterization than is due. The Board determined that characterization under OTH conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. Lastly, absent a material error or injustice, the Board generally will not summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational or employment opportunities. The Board carefully considered any matters submitted regarding your post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that given the totality of the circumstances your request does not merit relief. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard for mental health issues, the Board concluded that your serious misconduct clearly merited your receipt of an OTH.

Finally, despite the fact that your discharge request in lieu of trial by court-martial records were not in your service record, the Board relies on a presumption of regularity to support the official actions of public officers. In the absence of substantial evidence to rebut the presumption, to include evidence submitted by the Petitioner, the Board presumes that you were properly processed for separation and discharged from the Navy. In the end, the Board concluded that you received the correct discharge characterization based on your circumstances, and that such OTH characterization was in accordance with all Department of the Navy directives and policy at the time of your discharge.

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,

10/3/2021

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Executive Director

Signed by: [redacted]