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

[redacted]
Docket No: 1172-22
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 17 June 2022. 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 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). Additionally, the Board considered an advisory opinion (AO) furnished by qualified mental health provider. Although you were provided an opportunity to submit an AO rebuttal, you did not do so.

You enlisted in the Navy and commenced active duty on 19 April 1990. Your pre-enlistment physical examination, on 13 April 1990, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 15 July 1990, you commenced a period of unauthorized absence (UA) from Recruit Training Command [redacted] (RTC [redacted]) that terminated after 67 days on 20 September 1990 with your surrender to military authorities.

On 5 October 1990, you were convicted at a Summary Court-Martial (SCM) of your 67-day UA. You were sentenced to forfeitures of pay and restriction and extra duties for thirty days.

On 4 November 1990, you commenced a period of UA from RTC [redacted] that terminated after eleven days on 15 November 1990 with your surrender to military authorities. On 30 November 1990, you commenced a period of UA from RTC [redacted] that terminated after twenty-four days, on 24 December 1990, with your surrender to military authorities.

On 17 January 1991, you underwent a mental health evaluation. The Navy Medical Officer (NMO) determined that no psychopathology was evident. The NMO noted that you were aware of the difference between right and wrong and that you were psychiatrically responsible for your actions and their consequences. The NMO determined you were psychiatrically fit for duty.

On 24 January 1991, you were convicted at a second SCM of UA. You were sentenced to forfeitures of pay and confinement for thirty days.

On 4 March 1991, you commenced a period of UA from RTC [redacted] that terminated after 86 days, on 29 May 1991, with your arrest by civilian law enforcement authorities.

On 6 June 1991, you underwent a medical evaluation. The NMO determined that there was no reasonable cause to question whether you could adhere to the law at the time of your alleged offense and that you were capable of understanding the nature of the proceedings against you. The NMO opined that further examination by a psychiatrist was not warranted.

On 6 June 1991, you submitted a voluntary written request for an administrative discharge in lieu of trial by court-martial for your 86-day UA. Prior to submitting this voluntary discharge request you 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. You indicated you were entirely satisfied with the advice you received from counsel. You expressly admitted that you were guilty of your UA. You acknowledged if your request was approved, an other than honorable conditions (OTH) characterization of service was authorized. As a result of this course of action, you were spared the stigma of a court-martial conviction for your long-term UA, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge. Ultimately, on 14 June 1991 you were separated from the Navy with an OTH discharge characterization and assigned an RE-4 reentry code. On 27 December 2021 the VA determined that your service was Honorable for VA purposes.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to: (a) your discharge was inequitable because it was based on one isolated traumatic incident which caused and led to your discharge without proper representation, (b) you were sexually assaulted in October 1990, and (c) this incident caused and continued to cause your current disability which the VA has now documented and agreed. For purposes of clemency consideration, the Board noted you did not provide supporting documentation describing post-service accomplishments, or advocacy letters.

As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an AO dated 13 April 2022. The Ph.D. stated in pertinent part:

> There is no evidence that the Petitioner was diagnosed with a mental health condition during military service. Throughout her disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for further evaluation. Post-service, the VA has determined her military service is honorable for VA purposes but there is no evidence of a mental health diagnosis. During military service, she reported an MST that occurred in September 1990. Unfortunately, she established a pattern of UA prior to the purported MST, which makes it difficult to attribute most of her misconduct to unrecognized PTSD symptoms of avoidance in the absence of supporting medical documentation. In service, she attributed the November UA to PTSD avoidance symptoms but she attributed her other periods of UA to personal and family stressors. Additional records (e.g., post-service medical records describing the Petitioner's diagnosis, symptoms, and their specific link to her misconduct) are required to render an alternate opinion.

The Ph.D. concluded, "[b]ased on the available evidence, it is my clinical opinion that there is insufficient evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence that most of her misconduct could be attributed to PTSD."

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 service. However, the Board concluded that there was no convincing evidence of any nexus between any PTSD due to MST and/or its related symptoms and the overwhelming majority your misconduct, and the Board determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated most of the misconduct that formed the basis of your discharge. As a result, the Board concluded that three of your four UA periods were not due to mental health-related conditions or symptoms whatsoever. Moreover, even if the Board assumed that your remaining UAs were somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record reflected that your misconduct was intentional and 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 not be held accountable for your actions.

The Board also disagreed with your contention that you did not receive proper representation. The Board specifically noted that your OTH discharge request was submitted after you consulted with legal counsel, and that you were satisfied with the advice and counsel you received regarding such discharge request.

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 active duty service was otherwise so meritorious as to deserve a discharge upgrade. The Board determined that characterization under OTH conditions 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. The simple fact remains is that you left the Navy on multiple separate occasions for a total of 188 days while you were still contractually obligated to serve, and you went into a UA status each time without any legal justification or excuse. Moreover, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating VA benefits, or enhancing educational, or employment opportunities. Additionally, the Board noted that VA eligibility determinations for health care, disability compensation, and other VA-administered benefits are for internal VA purposes only. Such VA eligibility determinations, disability ratings, and/or discharge classifications are not binding on the Department of the Navy and have no bearing on previous active duty service discharge characterizations.

As a result, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. 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.

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,

[redacted]