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

[redacted]
Docket No. 3533-22
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 24 March 2023. 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 a qualified mental health provider. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

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

You enlisted in the U.S. Navy and entered active duty on 12 April 1988. On 26 August 1988 you reported for duty on board the [redacted] in [redacted].

On 30 September 1988, you completed a thirty-six hour Navy Alcohol and Drug Safety Action Program (NADSAP). On 8 December 1989, you signed a "Page 13" counseling sheet where you acknowledged the Navy's policy regarding driving under the influence of alcohol or drugs.

On 7 September 1990, you underwent a psychiatric evaluation while you were in the brig following multiple charges of unauthorized absence (UA). The Medical Officer (MO) diagnosed you with an alcohol use disorder and life circumstance problems. The MO determined you to be responsible for your actions and fit for full duty, and the MO recommended outpatient alcohol counseling with a consideration for inpatient treatment, if your drinking persisted.

On 25 September 1990, you were convicted at a Summary Court-Martial (SCM) of no less than five separate UA specifications, and two separate specifications of failing to obey a lawful order. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), forfeitures of pay, and confinement for thirty days. The Convening Authority approved the SCM sentence.

On 24 October 1990, you received non-judicial punishment (NJP) for five separate UA specifications. You did not appeal your NJP.

On 7 January 1991, you began the Counseling and Assistance Center's (CAAC) Level II Treatment Program. However, you were terminated from the Level II program, on 10 January 1991, as a result of several alcohol-related incidents and the non-completion of three scheduled NADSAP classes. On only the second day of treatment, you arrived sixty minutes late and also admitted that you had been drinking while attending the program. Moreover, you indicated to CAAC staff that you did not desire to continue in the program and would rather be kicked out of the Navy. You were deemed an alcohol rehabilitation failure for your behavior and actions.

On 13 March 1991, a Navy MO determined you were dependent on alcohol and recommended you for Level III inpatient rehabilitation treatment at the VA. However, on 18 March 1991, you expressly refused your right to request alcohol rehabilitation treatment. Your written and signed treatment refusal was witnessed by a legal office representative on board the ship.

On 14 March 1991, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to the commission of a serious offense, and alcohol abuse rehabilitation failure. You waived your rights to consult with counsel, include written statements on your own behalf, and to request a hearing before an administrative separation board. Ultimately, on 24 May 1991, you were separated from the Navy for misconduct with an Other Than Honorable (OTH) discharge characterization and assigned an RE-4 reentry code.

On 9 June 1993, the Naval Discharge Review Board denied your initial application for discharge upgrade relief. On 7 December 1999, this Board denied your petition for relief. In 2017, the VA

denied you any service-connection for both asbestosis and any claimed mental health conditions. On 20 July 2020, this Board again denied your petition for relief.

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, your desire for a discharge upgrade, change to your reason for separation to Secretarial Authority, and a RE-1 reentry code. Additionally, the Board considered your contentions that: (a) you are requesting your case be reconsidered based on the "Manker/Del Toro" settlement, (b) you suffered from behavioral health problems associated with lead poisoning, and (c) your records noted the presence of PTSD on active duty and it influenced your misconduct and your self-medicating behaviors. For purposes of clemency and equity consideration, the Board considered the evidence you submitted in support of your application.

As part of the review process, the BCNR Physician Advisor, who is also a medical doctor (MD) and a Fellow of the American Psychiatric Association, reviewed your contentions and the available records and issued an AO dated 9 February 2023. The MD stated in pertinent part:

> Petitioner's in-service records did contain diagnoses of Life Circumstance Problems (romantic relationship) and Alcohol Use Disorder. There were no additional diagnosed mental health conditions, or psychological/behavioral changes indicative of additional mental health conditions. Throughout his disciplinary actions, counselings, and administrative processing, there were no concerns noted which would have warranted additional referral to mental health resources for other mental health conditions. Petitioner provided evidence he was diagnosed post-discharge with PTSD and other mental health conditions attributed to stressors both prior to enlistment (witnessed death of sister), as well as during his military service (confinement and alleged maltreatment at the hands of his LPO). However, clarifying information made available did not provide sufficient markers to establish an in-service onset and development of mental health symptoms for any conditions other than Substance Use Disorder nor to identify a nexus between a mental health condition and his misconduct. Additionally, in reviewing Petitioner's in-service and post-discharge clinical evidence, greater weight was given to clinical evaluations regarding his in-service mental health condition contemporary to his military service as having greater probative value than mental health evaluations rendered over twenty-five years after discharge. Regarding his contention of lead toxicity, neither his in-service medical records nor post-discharge VA health records contained evidence of a diagnosis of lead toxicity. There was no clinical evidence he suffered from the pathognomonic symptoms of lead toxicity of chronic and progressive abnormalities in blood pressure, brain, kidney, and reproductive health to include headaches, stomach cramps, constipation, fatigue, irritability, or muscle joint pain.

The MD concluded, "based on the available evidence, it is my considered medical opinion that there is insufficient evidence that Petitioner incurred a medical or mental health condition during his military service, other than his diagnosed substance use disorder, or that Petitioner's in-service misconduct was attributable to a medical or mental health condition."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. In accordance with the Kurta, Hagel, 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 nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, even under the liberal consideration standard the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your serious 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 intentional, and demonstrated you were unfit for further service. The Board also concluded 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. 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. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. Accordingly, the Board determined that there was no impropriety or inequity in your discharge and corresponding narrative reason for separation, and the Board concluded that your serious misconduct clearly merited your receipt of an OTH with a narrative reason of "misconduct – commission of a serious offense." While the Board carefully considered the evidence you submitted in mitigation, even in light of the Wilkie Memo and reviewing the record 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. 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,

3/27/2023

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