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

[redacted]
Docket No: 4141-22
Ref: Signature Date

[redacted]

Dear [redacted]

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 2 September 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) from a qualified mental health provider. Although you were provided 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 Navy and entered active duty on 22 November 1978. Your pre-enlistment

physical examination, on 26 August 1978, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 1 February 1981, you received non-judicial punishment (NJP) for unauthorized absence (UA) lasting two days. You did not appeal your NJP. On 19 March 1981, you received NJP for UA lasting six days. You did not appeal your second NJP.

On 9 July 1981, you commenced a period of UA that terminated after 185 days on 10 January 1982. On 5 March 1982, you were convicted at a Special Court-Martial (SPCM) of your 185-day UA. You received as punishment confinement at hard labor for three months, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Navy with a Bad Conduct Discharge (BCD). On 6 April 1982, the Convening Authority approved your SPCM sentence.

In the interim, on 24 May 1982, you commenced a period of UA that terminated after two days with your surrender on 26 May 1982. On 30 June 1982, you commenced another period of UA that terminated after eighteen days with your surrender on 18 July 1982. On 27 July 1982, you underwent a special psychiatric evaluation. The Medical Officer (MO) did not find any evidence of any psychiatric disability. The MO also determined that there was no psychiatric contraindication to any appropriate administrative handling of you.

On 3 August 1982, you received NJP for a UA lasting two days. You did not appeal your NJP. Between 10 September 1982 and 24 June 1983, you commenced another four separate UA periods totaling 73 days.

On 1 July 1983, you were convicted at a Summary Court-Martial (SCM) of four separate UA specifications and two separate specifications of failing to obey a lawful order. You were sentenced to confinement for fifteen days and forfeitures of pay. On 6 July 1983, the convening authority approved your SCM sentence.

Between 19 July 1983 and 22 August 1983, you commenced five separate UA periods totaling ten days. Upon the completion of appellate review in your case, on 29 August 1983, you were discharged from the Navy with a BCD and assigned an RE-4 reentry code.

On 25 September 2012, this Board denied your initial petition for relief. On 14 October 2017, your request for reconsideration was denied.

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: (a) you were the victim of continuous hazing resulting in your UAs, and (b) you requested Congressional Action in 1980 and continued to be harassed. 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 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 AO dated 28 July 2022. The Ph.D. stated in pertinent part:

> There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation. Post-service, he has provided evidence of diagnoses of PTSD and MDD that are temporally remote to his military service and appear unrelated. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

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

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. The Board determined that you did not provide convincing evidence to substantiate your hazing and harassment claims. 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 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 SPCM misconduct forming the basis of your discharge. The Board observed that your available active duty records did not contain evidence of a mental health diagnosis. The Board noted that although you have a post-service PTSD and major depressive disorder diagnoses, active duty records contemporaneous to your service lacked sufficient evidence to establish a nexus between your mental health conditions/symptoms and your in-service misconduct. As a result, the Board concluded that your misconduct was not due to mental health-related 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 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 noted that the evidence of record did not demonstrate you were not mentally responsible for your conduct or that you should 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. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating certain veterans' status or benefits, or enhancing educational or employment opportunities. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard for mental health conditions, the Board concluded that your serious misconduct and disregard for good order and discipline clearly merited your receipt of a BCD.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that despite your contentions this is not a case warranting any clemency. The simple fact remains is that you left the Navy while you were still contractually obligated to serve on multiple occasions and you went into a UA status each time without any legal justification or excuse. Based on your misconduct, the Board determined you were properly convicted at a SPCM and a SCM of serious misconduct and awarded a BCD. Even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an error or injustice exists to warrant upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. 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,

9/11/2022

[redacted]

Executive Director

Signed by: [redacted]