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

Docket No: 4218-22
Ref: Signature Date

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 your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 8 July 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 the 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 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo).

You enlisted in the Navy on 22 July 1991. Your pre-enlistment physical, on 10 May 1991, and self-reported medical history noted no psychiatric or neurologic conditions or symptoms. Upon the completion of initial recruit training, on 15 November 2001, you reported for duty on board the in

After being on board for less than four months, on 29 February 1992, you commenced a period of unauthorized absence (UA). On 11 May 1992, your command declared you to be a deserter. Your UA terminated, after approximately 157 days, with your surrender to military authorities on or about 4 August 1992.

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. You would have also expressly acknowledged and understood that with an under Other Than Honorable (OTH) conditions discharge you would be deprived of virtually all rights as a veteran under both federal and state legislation, and you may encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the armed forces or the character of the discharge therein may have a bearing. 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 13 November 1992, you were separated from the Navy with an OTH discharge and assigned an RE-4 reentry code.

Unfortunately, your 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 officers, 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 block 29 your DD Form 214 it states "Time Lost" was "92FEB29 TO 92AUG04," a period lasting just over five months. Time Lost describes periods on active duty spent either in a UA status or while serving in military confinement. In blocks 25 through 28 of your DD Form 214 it states "MILPERSMAN 3630650," "KFS," "RE-4," and "USNR – Separation In Lieu of Trial by a 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. Lastly, your attorney's brief confirms that you "opted to take a discharge from the Navy in Lieu of a Trial by Court Martial."

On 11 September 2019, the Board denied your initial petition for relief. You had contended, in part, that you came from a military family and that you went UA because you were not allowed to visit your ailing father while he was sick with cancer.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo. These included, but were not limited to: (a) you have been improperly stigmatized and harmed by your discharge status, (b) multiple letters of recommendation were written on your behalf, (c) you own and operate your own barber shop business for many years, (d) the board should undo the discretionary error made against you and upgrade your discharge for reason of propriety and equity. For purposes of clemency consideration, the Board noted you provided advocacy letters but no supporting documentation substantiating post-service accomplishments.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First and foremost, the Board disagreed with the suggestion that your administrative separation and discharge was somehow a discretionary error. The Board unequivocally determined that your long-term UA was indeed a serious military offense, and that

the command was well within its discretion and military justice authority in order to hold you accountable for your crime, maintain good order and discipline, and deter other Sailors from committing similar misconduct. The simple fact remained is that you left the Navy while you were still contractually obligated to serve and you went into a UA status for just over five months without any legal justification or excuse. The Board concluded that, if anything, your command granted you significant clemency by accepting your request for discharge despite your long-term UA, which the Board determined almost certainly would have resulted in a Bad Conduct Discharge at a Special Court-Martial.

Second, despite the fact that your discharge request in lieu of trial by court-martial records were not in your service record, the Board relied 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 presumed that you were properly processed for separation and discharged from the Navy.

In addition, the Board unequivocally did not believe that your record was otherwise so meritorious to deserve a discharge upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record during your relatively brief military service. The Board noted that after you initially went UA under the premise of visiting your ailing father, that instead of turning yourself in to terminate the UA, you went into hiding with friends on an Army installation for months to further aggravate your already serious offense. The Board also determined that your misconduct constituted a significant departure from the conduct expected of a Sailor, and that the record clearly reflected your misconduct was intentional and willful and indicated you were unfit for further service. The Board also concluded that your lack of coping skills did not constitute any sort of unfitting mental health condition. Moreover, the Board noted that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not otherwise be held accountable for your actions.

The Board also noted that there is no provision of federal law or in Navy directives or regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. Moreover, 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 concluded that you received the correct discharge characterization based on your overall circumstances and that such characterization was in accordance with all Department of the Navy directives and policy at the time of your discharge. The Board also determined that there was no impropriety or inequity in your discharge, and the Board concluded that your serious misconduct clearly merited your receipt of an OTH. The Board carefully considered all matters submitted regarding your character, post-service conduct and personal/professional 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.

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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,

7/15/2022

Executive Director

Signed by: