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

[redacted]
Docket No. 4716-22
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 3 February 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 also considered the advisory opinion (AO) furnished by a qualified mental health provider, which was previously provided to you. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

You enlisted in the Marine Corps and entered active duty on 9 September 1966. Your enlistment physical examination, on 24 August 1966, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. Your pre-enlistment recruiting officer interview noted you were involved several times with civilian authorities. You indicated you had been living in foster homes, were running away, and being picked up for minor offenses. At

one point, you were committed to the [redacted] State Home for Boys due to your repeated involvement with civil authorities.

On 20 February 1967, you received non-judicial punishment (NJP) for an unauthorized absence (UA). You did not appeal your NJP. On 20 November 1967, you received NJP for UA lasting one (1) day. You did not appeal your NJP. On 2 April 1968, you were in another UA status that terminated after two (2) days on 4 April 1968. On 15 April 1968, you commenced another UA that terminated after eight (8) days, on 23 April 1968, with your return to military authorities. On 25 April 1968, you received NJP for your eight-day UA. You did not appeal your NJP.

Between 16 July 1968 and 6 October 1968, you participated in multiple combat operations in [redacted]. On or about 23 September 1968, you suffered a shrapnel wound to your left elbow. You were ultimately "medivac'd" to the [redacted] for further treatment and convalescence.

Following your transfer and reassignment to [redacted], on 6 January 1969, you commenced a UA that terminated after nine (9) days on 15 January 1969. On 16 January 1969, you received NJP for your UA. You did not appeal your NJP. On 3 February 1969, you received NJP for UA lasting less than one day, and for failing to obey a lawful order. You did not appeal your NJP.

On 24 February 1969, you commenced another period of UA. Your command declared you to be a deserter on 26 February 1969. Your UA terminated after forty-nine (49) days, on 14 April 1969, with your surrender to certain authorities in [redacted]. According to your service record, you stated you went UA "for no reason."

On 1 May 1969, you were convicted at a Summary Court-Martial (SCM) of your 49-day UA. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), confinement for thirty (30) days, and forfeitures of pay. On 5 May 1969, the Convening Authority (CA) approved the SCM findings and sentence, but suspended the confinement in excess of twenty (20) days for a period of six (6) months.

On 9 June 1969, you commenced another UA that terminated after twenty-five (25) days on 4 July 1969. On or about 9 July 1969, the CA vacated the suspended portion of your SCM sentence and ordered it executed due to your continuing misconduct. Upon your release from confinement on 18 July 1969, you were placed into a restricted status. However, on the very same day, you commenced another UA. Your command declared you to be a deserter and dropped you from the rolls. Your UA terminated after thirty (30) days, on 17 August 1969, with your arrest by civilian authorities.

On 11 September 1969, you submitted a voluntary written request for an undesirable administrative discharge for the good of the service in lieu of trial by court-martial for your two recent long-term UAs. 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 acknowledged if your request was approved, an Other Than Honorable (OTH) conditions 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 UAs, as well as the potential sentence of confinement and the negative ramifications of receiving a punitive discharge from a military judge. Ultimately, on or about 1 October 1969, you were separated from the Marine Corps with an OTH discharge characterization and assigned an RE-4 reentry code.

A review of your service record indicated that you initially enlisted into the Army National Guard (ANG) on or about 5 April 1971. Your military physical examination, on 21 November 1972, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. A copy of your Army Reserve (USAR) enlistment contract, dated 2 June 1973, indicated that you fraudulently represented you received an Honorable discharge characterization in October 1970 for your Marine Corps service instead of listing your OTH. Your USAR quadrennial physical examination, on 11 December 1976, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 15 April 1977, you received an Honorable discharge from the USAR, but immediately reenlisted for two more years beginning 16 April 1977.

On 16 January 1980, the Naval Discharge Review Board (NDRB) denied your application for relief. In addition to not presenting any decisional issues for NDRB's consideration, you did not proffer any mental health contentions in your application.

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 desire for a discharge upgrade and change to your reason for separation. You contend that: (a) your then-undiagnosed PTSD was a major contributing factor in the misconduct underlying your discharge, (b) you developed PTSD following a traumatic in-combat experience when you were injured in [redacted], (c) the condition excuses and mitigates your discharge because the UAs underlying your discharge resulted from the PTSD and its related symptoms, (d) you otherwise served honorably in combat, receiving the Purple Heart Medal, Combat Action Ribbon, and other ribbons and awards, (e) your highly decorated service meets the requirements for an honorable discharge, and (f) even after being injured, suffering from PTSD symptoms, and receiving an OTH discharge, you again volunteered to serve your country by joining the ANG and USAR and received an honorable discharge for such service. For purposes of clemency and equity consideration, the Board noted the evidence you submitted in support of your application.

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 8 November 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. Post-service, he has

> received a diagnosis of PTSD that has been attributed to his military service. Unfortunately, available records are not sufficiently detailed to establish a nexus with his misconduct, given his history of running away prior to entry into service and UA before combat deployment. Additional records (e.g., post-service mental health records describing the Petitioner's symptoms and their specific link to his misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence his misconduct could be attributed to PTSD avoidance."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant 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 service. However, the Board concluded there was no nexus between any mental health conditions and/or related symptoms and your misconduct, and determined 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, the Board concurred with the AO and concluded that your serious 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 cumulative 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 determined that your honorable service with the ANG and USAR, lasting several years, demonstrated that you able to perform adequately and were not suffering from any obvious occupational impairments from PTSD related to your [redacted] service. Moreover, the Board noted that your ANG/USAR medical examinations, in both 1972 and again in 1976, clearly indicated you were not suffering from any psychiatric or neurologic conditions or symptoms, respectively.

Additionally, the Board observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average in conduct was approximately 3.68. Marine Corps regulations in place at the time of your discharge recommended a minimum trait average of 4.0 in conduct (proper military behavior), for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your serious misconduct which further justified your OTH characterization of discharge.

The Board also 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 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 Marine. The simple fact remains is that you left the Marine Corps while you were still contractually obligated to serve and you went into a UA status without any legal justification or excuse on multiple occasions. Additionally, the Board also noted that the misconduct that led to your request to be discharged in lieu of trial by court-martial was substantial and, more likely than not, would have resulted in a punitive discharge and extensive punishment at a court-martial. Therefore, the Board determined that you already received a large measure of clemency when the convening authority agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and likely punitive discharge. Lastly, absent a material error or injustice, the Board generally will not summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. As a result, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your serious misconduct clearly merited your receipt of an OTH, and that your separation was in accordance with all Department of the Navy directives and policy at the time of your discharge. 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,

2/9/2023

[redacted]

Executive Director

Signed by: [redacted]