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

Docket No. 7665-22
Ref: Signature Date

Dear :

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 reconsideration application on 17 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 an advisory opinion (AO) furnished by qualified mental health provider and your response to the AO.

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 16 November 1994. Your pre-enlistment medical examination, on 26 October 1994, and self-reported medical history both

noted no psychiatric or neurologic conditions or symptoms.

On 2 July 1995, you commenced a period of unauthorized absence (UA) that terminated after four days on 6 July 1995 with your surrender to military authorities. On 17 July 1995, you commenced another UA. On 17 August 1995, your command declared you to be a deserter. Your UA terminated after 267 days on 9 April 1996.

Your Division Officer referred you to the DAPA counselor due to receiving a report that you were using cocaine. The drug and alcohol abuse report (DAAR), completed on 1 September 1995, noted that you underwent a command directed urinalysis on 12 July 1995. The command received the test results, on 17 July 1995, indicating your urine sample tested positive for cocaine. You revealed during the DAPA interview that you had used cocaine approximately four times the previous year and approximately three times in the current year. You commenced your 267-day UA the day your command received the positive drug test results.

While in a UA status, on 2 November 1995, you were arrested by civilian authorities in [redacted] on charges of cocaine possession. You were held in the [redacted] City Jail until your trial. You were convicted of cocaine possession on 9 April 1996, released from civilian confinement, and returned to military authorities later that afternoon.

On 26 April 1996, you were convicted at a Special Court-Martial (SPCM) for your 267-day UA, as well as the other short-term UA. You were also convicted of two separate specifications of the wrongful use of a controlled substance (cocaine). You were sentenced to confinement for sixty days, forfeitures of pay, a reduction in rank to the lowest enlisted paygrade (E-1), and a discharge from the Navy with a Bad Conduct Discharge (BCD). In the interim, the DAAR, completed on 6 May 1996, noted you were screened and determined to be dependent on alcohol and cocaine. The DAAR also noted that you entered detox on 3 May 1996 and would begin Level III inpatient rehabilitation treatment on 6 May 1996. Upon the completion of appellate review in your SPCM case, on 16 July 1997, you were discharged from the Navy with a BCD and assigned an RE-4 reentry code.

On 19 November 2012, the Naval Discharge Review Board denied your initial application for discharge upgrade 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 Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) NCIS demanded you wear a wire and help them catch others at your command involved in illegal activity, (b) you were threatened and extremely scared, (c) others who tested positive went to treatment and allowed to stay at their duty stations, (d) you had no chance of keeping your enlistment and were temporarily insane with the threats made to you if you did not cooperate and wear a wire, and (e) you were so scared you ran, and after you were captured you were put in a treatment program and given Prozac due to suicide prevention. For

purposes of clemency and equity 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 20 December 2022. The Ph.D. stated in pertinent part:

> The Petitioner contends that "NCIS made her wear a wire to catch others who were using, and that doing so made her insane." There is no evidence that she was involved with NCIS while in service or that she took part in any investigation. There is no evidence that she was diagnosed with a mental health condition in military service, or that she exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. She has provided no medical evidence in support of her claims. Unfortunately, her personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with her misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to her misconduct) would aid in rendering an alternate opinion.

The Ph.D. concluded, "it is my considered clinical opinion there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that her misconduct could be attributed to a 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 convincing evidence of any 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 punitive discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Even if the Board assumed that your cumulative misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your drug-related misconduct far outweighed any and all mitigation offered by such mental health conditions. Additionally, the Board unequivocally determined that there was no convincing evidence you were ever requested by NCIS to wear a wire or otherwise participate in any undercover sting operations to catch other Sailors involved in illegal activity. The Board determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. The Board further concluded 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 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 veterans' benefits, or enhancing educational or employment opportunities. Moreover, the Board determined that illegal drug use by a Sailor is contrary to Navy core values and policy, renders such Sailors unfit for duty, and poses an unnecessary risk to the safety of their fellow Sailors. 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 and you went into a UA status on no less than two separate occasions for a total of 271 days without any legal justification or excuse. Accordingly, the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. 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. 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,

2/24/2023

Executive Director

Signed by: