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

[redacted]
Docket No. 7845-22
Ref: Signature Date

[redacted]

Dear Petitioner:

This is in reference to your application for correction of your husband's naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of his 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 limitations 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 6 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 husband's service 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)/mental health condition (MHC) (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). The Board also considered an advisory opinion (AO) from a qualified mental health professional. Although you were afforded an opportunity to submit an AO rebuttal, you chose not to do so.

Your husband enlisted in the United States Marine Corps and commenced a period of service on 15 October 1976. On 9 April 1977, he received non-judicial punishment (NJP) for violation of Uniform Code of Military Justice (UCMJ) Article 86, for absence from his appointed place of duty, specifically, the barracks security watch. He did not appeal this NJP. In October 1977, he began a period of unauthorized absence (UA) and remained absent until November 1978. During that period of UA, he committed additional serious misconduct that was handled by civilian authorities.

Upon return to military control, Special Court Martial (SPCM) charges were served for violation on UCMJ Article 86, for four periods of UA totaling 320 days. On 27 November 1978, your husband requested discharge under Other Than Honorable (OTH) conditions for the good of the service (GOS) in lieu of trial by court martial. He was briefed regarding his rights and stated "I understand that with a discharge under other than honorable conditions as a veteran under both Federal and State legislation, I may not be eligible for any benefits earned by service under honorable conditions, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or where the character of the discharge received therefrom may have a bearing." His request for GOS discharge was approved and, on 8 December 1978, he was discharged from the Marine Corps for misconduct with an OTH characterization of service and assigned an RE- 4 reenlistment code.

Your husband previously petitioned this Board and was denied relief on 21 August 2013.

The Board carefully considered all potentially mitigating and/or extenuating 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: (a) your desire to upgrade your husband's characterization of service, (b) your contention that he was struggling with undiagnosed mental health issues, and (c) your assertion that he was a good Marine. For purposes of clemency and equity consideration, the Board noted you did not provide documentation related to his post-service accomplishments or character letters.

In your petition, you contend that your husband was suffering from PTSD, which might have mitigated his discharge character of service. 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 12 January 2023. The Ph.D. noted in pertinent part:

> Petitioner was appropriately referred for psychological evaluation and properly evaluated during his enlistment. The substance use notation was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed. Substance use is incompatible with military readiness and discipline, and there is no evidence he was unaware of his misconduct or not responsible for his behavior. Unfortunately, there is no medical evidence to support his claims of a PTSD diagnosis. Furthermore, it is difficult to consider how PTSD would account for his misconduct, given his previous statement that his UA was related to poor management of personal stressors, rather than avoidance due to trauma exposure. Additional records (e.g., VA mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

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

After thorough review, the Board concluded that the 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 husband's record of service, and your

contentions about his mental health concerns and the possible adverse impact on his service. Specifically, the Board felt that his misconduct, as evidenced by his significant periods of UA and drug use, outweighed these mitigating factors. The Board considered the seriousness of his misconduct and the fact that he went UA after only a year of service. Further, the Board also considered the likely negative impact that his conduct had on the good order and discipline of his command. The Board determined that this type of misconduct is contrary to Marine Corps values and policy and likely had a detrimental impact on mission accomplishment. In making this determination, the Board concurred with the advisory opinion that there was no evidence that your husband suffered from any type of mental health condition while on active duty, or that any such mental health condition was related to or mitigated the misconduct that formed the basis of his discharge. As a result, the Board concluded that your husband's misconduct was not due to mental health-related symptoms. The Board determined his conduct constituted a significant departure from that expected of a Marine and continues to warrant an OTH characterization.

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. Finally, the Board also noted that the misconduct that led to your husband's request to be discharged for the GOS 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 he already received a large measure of clemency when the convening authority agreed to administratively separate him in lieu of trial by court-martial; thereby sparing him the stigma of a court-martial conviction and likely punitive discharge. Therefore, 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,

3/9/2023

[redacted]

Executive Director
Signed by: [redacted]