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

[redacted]
Docket No. 7969-22
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 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 13 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 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 the advisory opinion (AO) from a qualified mental health professional and your response to the AO.

You enlisted in the Navy and commenced a period of active duty on 31 March 1965. From 1 December 1965 to 24 January 1966, you were stationed at [redacted]. On 24 January 1966, you were admitted to the [redacted], due to an injury incurred in the line of duty, which resulted in surgery to repair a serious fracture to your left heel bone. On 24 March 1966, you were discharged from the hospital to the Medical Holding Company, U.S. Naval Station, [redacted]. On 1 July 1966, you began a period of unauthorized absence (UA) from your unit, and remained absent until you were apprehended by civilian law enforcement. You were found guilty by the Circuit Court of the State of [redacted] on the charge of "Larceny (over the value of $75)", and on

6 October 1966, you were sentenced to a maximum term of one year in confinement in the [redacted] State Correctional Institution.

On 2 November 1966, you were notified that you were being recommended for administrative discharge from the Navy by reason of your civilian conviction. You were advised of and elected your right to consult with military counsel and to present your case to an administrative discharge board. On 15 February 1967, the administrative Separation Board convened and found, by a vote of 3 to 0, that the basis for misconduct was met and recommended your separation with an Other than Honorable (OTH) characterization of service. On 14 April 1967, you were discharged from the Navy by reason of civil conviction with an OTH characterization of service and an RE-4 reenlistment code.

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 characterization of service, (b) your assertion that you suffered from undiagnosed PTSD due to your service in Vietnam, and (c) the impact that your mental health had on your conduct during service. For purposes of clemency and equity consideration, the Board considered your arguments in conjunction with the Department of Veterans Affairs medical documents you submitted in support of your application.

In your petition, you contend that you were suffering from undiagnosed PTSD as a result of your time in Vietnam, and that your service connected injury (fractured heel bone), added to your mental health issues. You also assert that you were exposed to Agent Orange, which caused your prostate cancer and further drove your PTSD. You explain that you went UA to avoid the harassment which you suffered upon your return to the states. 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 4 January 2023 as part of your initial petition. The Ph.D. noted in pertinent part:

> There is no evidence that he was diagnosed with a mental health condition, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition in military service. He has provided no medical evidence in support of his claims. Unfortunately, available records are not sufficiently detailed to establish clinical symptoms in service or provide a nexus with his misconduct, particularly as it is difficult to attribute larceny to a mental health condition. Additional records (e.g., 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 military service. There is insufficient evidence his misconduct could be attributed to PTSD."

In response to the AO, you submitted a diagnosis of PTSD from the Department of Veterans Affairs (VA) from 2022. You also provided a statement that addressed the various issues raised in the opinion. After review of your documents, the Ph.D. revised the opinion to state that there is post-service evidence of a diagnosis of PTSD from the VA, but highlighted that it is

temporally remote to military service. The AO still concluded that there is insufficient evidence that all of your misconduct could be attributed to PTSD.

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. Specifically, the Board felt that your misconduct, as evidenced by your significant period of UA and civil conviction, outweighed these mitigating factors. 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 your mental health and the adverse impact on your service. The Board considered the seriousness of your misconduct and the likely negative impact your conduct had on the good order and discipline of your command. The Board determined that your serious misconduct was contrary to the Navy core values and policy, and renders such Sailor unfit for duty. The Board considered the Circuit Court's order setting aside the conviction in May of 1978, however, this did not weigh sufficiently in your favor to warrant relief.

In making this determination, the Board concurred with the advisory opinion that there was no convincing evidence that you 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 your discharge. The Board felt that your post service diagnosis of PTSD was temporally remote to your service and is not consistent with your service record or your pre-service conduct. Further, the diagnosis lacked the specificity necessary to draw a nexus between the mental health condition and your misconduct during service. The Board concurred with the AO that while UA could be attributed to avoidance associated with PTSD, the larceny is inconsistent with PTSD symptomology. The Board also noted that you never raised any psychiatric or neurologic concerns, and/or mental health symptoms during the separation process. As a result, the Board concluded that your misconduct was not due to mental health-related symptoms and instead found that your active duty 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 otherwise not be held accountable for your actions. The Board determined your conduct constituted a significant departure from that expected of a Sailor 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. 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,

2/21/2023

[redacted]