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

[redacted]
Docket No. 9425-22
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 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 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 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).

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 originally enlisted in the Navy and entered active duty on 18 September 1989. Your enlistment physical, on 17 December 1988, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. At [redacted] you acknowledged in writing being briefed on the Navy's policy of drug and alcohol abuse, the legal consequences of illicit drug use, the effects of drug and alcohol abuse on discipline and combat readiness, the consequences of drug trafficking, and the Navy's urinalysis screening program.

On or about 15 July 1993, you were directly involved in the purchase of approximately 100 tabs of lysergic acid diethylamide (aka LSD or "acid") from someone, who unbeknownst to you, was acting as a Navy informant. Following the purchase, you were arrested for possession of a controlled substance with the intent to distribute. On 28 February 1994, you submitted a statement in support of your request for a separation in lieu of a trial by court-martial for your drug-related offenses. Your command, however, chose to convene a General Court-Martial (GCM) instead to adjudicate your offenses.

On 23 March 1994, pursuant to your guilty pleas, you were convicted at a GCM of: (a) attempted possession of a controlled substance with intent to distribute (LSD), (b) conspiracy to possess a controlled substance with intent to distribute (LSD), and (c) wrongful possession of a controlled substance with intent to distribute (LSD). You were sentenced to confinement for one year, a reduction in rank to the lowest enlisted paygrade (E-1); total forfeitures of pay, and a dishonorable discharge (DD) from the naval service. The pretrial agreement (PTA) noted that only a BCD would be approved. Additionally, if you submitted a voluntary appellate leave request within ten days from date of trial, the Convening Authority (CA) would suspend all confinement in excess of six (6) months. You were released from confinement on 7 July 1994. The CA approved the GCM findings and sentence as partially suspended, but erroneously approved a DD instead of a BCD per the terms of the PTA. Upon the completion of appellate review in your case, on 14 September 1995, you were discharged from the Navy with a less severe Bad Conduct Discharge (BCD) and assigned an RE-4 reentry code.

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, your desire to make the requested changes to your record and contentions that: (a) you were subject of a GCM that was convened out of prejudice to towards the gay community, (b) after your request for an administrative discharge in lieu a court-martial was denied, and after hearing your command was going to make an example of you implying it was based upon your sexual orientation you accepted an unfavorable plea deal to cut your losses, (c) while you received some relief during the post-trial review process, your discharge was not corrected despite your PTA protecting against a DD, (d) the initial actions of not disapproving the DD spoke volumes about your command's improper treatment and disproportionate action towards you, (e) post-service you have been a productive member of society in various ways, (f) you have been sufficiently penalized for your misconduct, and (g) in light of changes in policy concerning the treatment of homosexual service members and the reduced punishment associated with certain drug offenses relief is warranted to correct this otherwise perpetual injustice. For purposes of clemency and equity consideration, the Board noted you provided supporting documentation describing post-service accomplishments and advocacy letters.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. First and foremost, the Board determined there was no credible evidence to demonstrate or even suggest your command acted improperly and convened a GCM, charged you with multiple drug offenses, and erroneously approved a DD instead of a BCD due to your

sexual orientation. The Board also concluded that the CA approving a DD instead of a BCD per the terms of the PTA was nothing more than an administrative error, and not a deliberate attempt to avoid the PTA's terms. The Board noted that any error was rendered harmless as the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) ultimately corrected the discrepancy and affirmed the less severe BCD. The Board also noted that the NMCCA found no merit in your assertion you were subjected to illegal pretrial confinement. Additionally, the Board determined any arguments about disparate treatment with your GCM sentence was not persuasive. The Board noted that every court-martial presents a unique set of facts and circumstances, and that CA's are given broad discretion in how to adjudicate each individual matter based on the nature and seriousness of the offense and the character of the offender. The Board determined there was no convincing evidence in the record to indicate your GCM sentence was inappropriately severe. Moreover, the Board noted the CA reduced your adjudged confinement and that you were released from confinement on 7 July 1994, less than four months after your GCM conviction.

The Board unequivocally did not believe that your record was otherwise so meritorious to deserve an upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board also determined that your serious 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 demonstrated you were unfit for further service. 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 noted that during a GCM guilty plea such as yours, the Military Judge (MJ) will only accept your guilty plea once they were satisfied that you fully understood the meaning and effect of your guilty plea, and only after determining that your plea was made voluntarily, of your own free will, and with full knowledge of its meaning and effect. On the record, the MJ would have also had you state on the record that discussed every aspect of your case including the evidence against you and possible defenses and motions in detail with your lawyer, and that you were satisfied with your counsel's advice. Further, the MJ would have also had you state on the record that you were pleading guilty because you felt in your own mind that you were guilty of each and every element of each and every charged offense. Thus, the Board concluded that any such suggestion or argument of entrapment was without merit. Accordingly, the Board determined that you knowingly and voluntarily pleaded guilty at your GCM to attempted possession with intent to distribute, conspiracy to possess a controlled substance with intent to distribute, and the wrongful possession of a controlled substance with intent to distribute LSD because you were indeed guilty of each such offense.

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. Moreover, the Board determined that illegal drug possession, use, and/or distribution 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 concluded that your misconduct and disregard for good order and discipline clearly merited your BCD. In the end, the Board concluded that you received the correct discharge characterization based on the totality of your circumstances, and that such action was in accordance with all Department of the Navy directives and policy at the time of your discharge.

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. You were properly convicted of multiple offenses at a GCM of serious misconduct and the Board did not find any evidence of an error or injustice in this application that warrants upgrading your BCD. The Board carefully considered any 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 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,

2/12/2023

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