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

[redacted]
Docket No. 1071-23
Ref: Signature Date

[redacted]

Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 Board waived the statute of limitation 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 29 September 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 to 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). The Board also considered the advisory opinion (AO) of a qualified mental health provider. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

The Board determined that your personal appearance, with or without counsel, would not materially add to the understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on evidence of record.

You initially served in the Coast Guard from 27 June 1977 through 15 February 1978 and were honorably discharged to enlist into the Army's Delayed Entry Program (DEP). However, you enlisted in the Marine Corps and began a period of active duty on 10 August 1978. On 3 November 1979, shortly after your first year of Marine Corps service, you were subject to nonjudicial punishment (NJP) for a violation of the Uniform Code of Military Justice (UCMJ) under Article 121 due to larceny by stealing roast beef which was the property of the U.S.

government. You subsequently absented yourself without authority, from 18 April 1980 through 7 May 1980, fraudulently enlisted into the Army, and commenced active duty on 23 May 1980.

On 13 November 1980, you were tried and convicted by a Marine Corps Special Court-Martial (SPCM) for a violation of the Uniform Code of Military Justice (UCMJ) of Article 86, due to your unauthorized absence (UA). Your sentence did not include a punitive discharge; and, although you were permitted to continue serving in the Marine Corps, you again absented yourself without authority from 9 February 1981 through 5 May 1981. Upon your return pending charges for your second UA period, you requested separation in lieu of trial (SILT) and submitted a statement addressing a variety of issues which contributed to your desire to cease your Marine Corps service. Specifically, you statement indicated that you were embarrassed by being arrested and court-martialed, that you felt additional charges your command was "threatening" were baseless, that you did not want to return to duty due to your inability to adapt to military lifestyle, and because your girlfriend was pregnant and you had proposed to her. Although your command and the staff judge advocate favorably endorsed your SILT, your request was disapproved and your charges again proceeded to SPCM. On your second offense of a protracted Article 86 offense, you pleaded guilty and were convicted by SPCM but, again, were not subject to a punishment of a punitive discharge. You were also subject to a second NJP for violation of Article 134 due to bad checks. Consequently, on 21 July 1981, you were recommended for discharge under Other Than Honorable (OTH) conditions for misconduct due to frequent involvement with military authorities. You waived applicable rights with respect to your administrative separation and were discharged on 19 August 1981.

You previously applied to this Board on three occasions. First, in Docket Number 4243-06, your request was reviewed on 13 April 2007 wherein you contended that you were not appropriately advised of your rights prior to your discharge. Your request for reconsideration in Docket Number 5414-14 was denied on 6 October 2016; however, you subsequently submitted new evidence of post-service accomplishments, to include transcripts and character statements, in addition to medical records and evidence of Department of Veterans Affairs (VA) determinations. Although your second request for reconsideration was considered in Docket Number 3056-18 on 25 July 2018 for contentions that your trauma due to a traumatic brain injury (TBI) during your Coast Guard service resulted in poor judgment and excessive alcohol consumption, you did not submit clinical evidence for consideration by the Board's medical advisor and your request was again denied.

The Board carefully considered all potentially mitigating 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, your desire to upgrade your discharge and your contentions that previous reconsideration request was decided without a clinical evaluation of the observations and diagnoses of your post-traumatic stress disorder (PTSD) and TBI. You assert that it is unfair and unjust to rely on inadequate previous records given the true nature of the conditions you claim to have suffered at the time of your service, which you state you still suffer from today. You contend these incidents occurred during your Coast Guard service as a result of a personal attack, which you claim resulted in PTSD and which you believes explains your poor decision making during your Marine Corps service. For purposes of clemency and equity consideration, the Board noted you submitted supplemental VA rating decisions.

Because you also contend that PTSD or TBI affected your Marine Corps discharge, the Board also considered the AO. The AO stated in pertinent part:

> The Petitioner submitted VA Disability Rating indicating 70% service-connection for PTSD and 70% service-connection for Traumatic Brain Injury (TBI, concussion). He did not submit any supporting documentation that would better explain the etiology or rationale for service connection. He maintains that his misconduct in the Marine Corps was due to PTSD and TBI, however there is no report of any TBI or symptoms thereof on either entry or discharge from the Marine Corps. In a letter to the Commanding General dated May 13, 1981, the Petitioner never mentioned any TBI or PTSD symptoms, but rather stated that he had been going home to support his pregnant girlfriend during his periods of UA. 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. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct and is inconsistent with previous petitions. Additional records (e.g., active duty medical records containing the events described by the Petitioner, post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The AO 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 his misconduct could be attributed to a mental health condition."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs and SPCMs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a complete disregard for military authority and regulations. Further, the Board concurred with the AO regarding your contended PTSD and TBI conditions as well as the alternative reasoning you provided, contemporaneously with your second UA period, regarding the cause and motivation behind your misconduct. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos and reviewing the record liberally and 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 the 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 is attached 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,

10/16/2023

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