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

[redacted]
Docket No. 3231-23
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 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 application on 8 December 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 professional. Although you were provided an opportunity to submit an AO rebuttal, you chose not to do so.

You originally enlisted in the Marine Corps and began a period of active duty service on 30 January 1975. Your pre-enlistment medical examination, on 30 January 1975, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. After being honorably discharged at the end of your obligated active service, you reenlisted on 30 January 1979, and again on 30 October 1982.

During your second enlistment, on 25 June 1979, you received non-judicial punishment (NJP) for drunk/reckless driving of a government vehicle. You did not appeal your NJP. On 17 August 1979, you commenced a period of unauthorized absence (UA) that terminated after twenty-nine (29) days on 15 September 1979. On 7 November 1979, you were convicted at a Summary Court-Martial (SCM) of your 28-day UA. You were sentenced to a reduction in rank to Corporal (E-4). On 10 November 1979, the Convening Authority approved the SCM sentence.

During your last enlistment, in December 1983, you received NJP for UA. You did not appeal your NJP. On 15 May 1985, pursuant to your guilty pleas, you were convicted at a General Court-Martial (GCM) of four (4) separate specifications of indecent acts upon a female child under the age of sixteen (16) with the intent to gratify your sexual desires. Specifically, you committed indecent acts upon your daughter's seven (7) and nine (9) year old friends by causing them to masturbate you. You continued this egregious predatory misbehavior until you were finally reported. You were sentenced to confinement for twelve (12) years, total forfeitures of pay, a reduction in rank to the lowest enlisted paygrade (E-1), and a Dishonorable discharge from the Marine Corps. On 10 July 1985 the Convening Authority approved only so much of the GCM sentence that provided for confinement at hard labor for twenty-four (24) months, total forfeitures of pay, a reduction in rank to the lowest enlisted paygrade (E-1), and a Bad Conduct Discharge (BCD).

On 7 July 1986, the Naval Clemency and Parole Board (NCPB) denied your clemency request. On 15 August 1986, the NCPB denied your request for parole after finding no sufficient reason to parole you before your current confinement release date. On 19 December 1986, you were released from confinement and placed on involuntary appellate leave awaiting your BCD. Ultimately, upon the completion of appellate review in your case, on 4 March 1988, you were discharged from the Marine Corps with a BCD.

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) you currently have a pending benefits claim under review with the Department of Veterans Affairs (VA) for PTSD, traumatic brain injury (TBI), and other disorders for injuries incurred on active duty in [redacted] (b) such PTSD, TBI, and other disorders were the underlying cause of the behavior resulting in your BCD, (c) your military medical records are not available due to a fire in St. Louis, Missouri at the records storage facility, and (d) you are currently suffering from chronic traumatic encephalopathy ("CTE"). For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

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 October 2023. The Ph.D. stated in pertinent part:

> The Petitioner contends that he sustained a TBI while stationed in Japan which caused a myriad of mental health symptoms that may have mitigated the circumstances of his misconduct. A thorough review of his entire medical record does not indicate any brain injury or accident of any sort. Furthermore, if he had sustained a TBI, this would still not account for child molestation. There is no evidence that the Petitioner was diagnosed with a mental health condition while in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition aside from alcohol abuse. His personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., 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 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 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. In accordance with the Hagel, Kurta, 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 that you suffered from any type of TBI or mental health condition while on active duty, or that any such purported TBI or mental health condition was related to or mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to TBI or mental health-related conditions or symptoms. Additionally, even if the Board assumed that your misconduct was somehow attributable to any TBI or mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such TBI or mental health conditions. The Board determined the record reflected that your misconduct was intentional and willful and demonstrated you were unfit for further service. Moreover, the Board concluded that your criminal offenses of indecent acts upon minor children were not the type of misconduct that would be excused or mitigated by a TBI or mental health conditions even with liberal consideration. 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 not be held accountable for your actions.

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 was not a case warranting any clemency as you were properly convicted at a GCM of egregious predatory misconduct involving minor children. The Board determined that characterization with a BCD was appropriate when the basis for discharge is the commission of an act or acts constituting a significant departure from the conduct expected of a Marine. Moreover, 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. As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your serious misconduct and disregard for good order and discipline clearly merited your discharge.

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 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,

12/13/2023

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