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

[redacted]
Docket No. 8647-23
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 7 June 2024. 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 and your response to the AO.

You enlisted in the Marine Corps/Navy and began a period of active duty on 17 June 1969. You joined the [redacted] for duty on 16 March 1970. During your tour aboard the [redacted], the ship provided off-shore fire support in the Gulf of [redacted] during August 1970. On 23 April 1971, you were subject to nonjudicial punishment (NJP) for violations of the Uniform Code of Military Justice (UCMJ) under Articles 86 and 87 due to an unauthorized absence (UA) from 12 through 22 April 1971, during which you missed your ship's movement.

You were again UA from 21 March 1972 until your return on 6 June 1972. Following your prolonged absence, you received a psychological evaluation, on 13 June 1972, during which you stated that your reason for absenting yourself was "to get away from being bossed around and getting the raw end of the deal." You pointed out that you did not like the fact that you were constantly shifted from job to job aboard your current duty vessel and had submitted numerous, unsuccessful requests to be transferred off your ship. The mental health provider observed that you did not appear to be suffering from any diagnosable mental disease and were able to distinguish right from wrong; however, this exam noted an impression of passive-aggressive personality disorder (PD).

On 19 June 1972, you were convicted by Special Court-Martial (SPCM) for your Article 86 violation. Your sentence included a 75-day period of confinement, forfeitures, reduction to the grade of E-1, and a Bad Conduct Discharge (BCD); however, the convening authority (CA) approved only 45 days of confinement and the next level of review commuted your BCD to the lesser punishment of two months of confinement at hard labor.

On 31 July 1972, shortly after being released from confinement, you against absented yourself without authority and remained absent until 14 August 1972. You were subject to NJP for your third UA violation and, in addition to forfeiture of pay, 21 days of your suspended confinement was vacated. You served this period of confinement and, again, absented yourself on 7 September 1972 until 5 January 1973. You continued to absent yourself for four additional, prolonged periods from 15 January 1973 until your apprehension by the Federal Bureau of Investigation on 3 December 1974.

The four of periods of UA were charged and referred to SPCM on 28 February 1974, just prior to your final period of UA. You submitted a request for voluntary separation for the good of the service and to escape trial by court-martial, which was accepted, and you were issued an undesirable discharge, on 26 December 1974, under the authority of Bureau of Naval Personnel Manual paragraph 3850270, with a separation code of "KFS," and a restrictive "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 Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire to upgrade your discharge to "Honorable" and to change your narrative reason for separation and accompanying separation and reentry codes to reflect a "Secretarial Authority" or "Convenience of the Government" discharge. The Board also considered your contentions that you served honorably until you had a mental breakdown, you experienced mental insanity which rendered it impossible for you to meaningfully participate in your administrative separation process or to waive your rights, and this resulted in an erroneous discharge. You also assert that you were never offered mental health treatment and you believe that it is unlikely your discharge would have been less than fully honorable if you had received mental health care. You further allege that your discharge characterization is inequitable and disproportionate in light of people who either deserted or dodged the draft but ultimately received a Presidential pardon whereas you voluntarily enlisted and served during wartime but have spent the majority of your life since with the label of your negative discharge. Finally, with respect to your mental health contentions, you assert that your service aboard the [redacted] during the Vietnam War caused you to suffer from post-traumatic stress disorder (PTSD), which was not a known diagnosis until the 1980s. For

purposes of clemency and equity consideration, the Board considered your counsel's brief, your personal statement, post-service health records, a medical letter from your primary care doctor, and a criminal records check reflecting no history of offenses. However, the Board noted that you did not provide further documentation of your post-discharge character or accomplishments.

Because you contend that PTSD or another mental health condition affected the circumstances of your discharge, the Board also considered the AO. The AO stated in pertinent part:

> Petitioner was appropriately referred for psychological evaluation and properly evaluated during his enlistment. His personality disorder diagnosis was based on observed behaviors and performance during his period of service, the information he chose to disclose, and the psychological evaluation performed by the mental health clinician. A personality disorder diagnosis is pre-existing to military service by definition, and indicates lifelong characterological traits unsuitable for military service, since they are not typically amenable to treatment within the operational requirements of Naval Service. Temporally remote to his military service, he has received a diagnosis of PTSD that has been attributed to military service. While it is possible that some of his UA could be attributed to PTSD avoidance, it is difficult to attribute all of his misconduct solely to PTSD, given the chronic, repeated, and lengthy periods of UA, which seem to be consistent with his diagnosed characterological difficulties. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

The AO concluded, "it is my clinical opinion there is post-service evidence from a civilian physician of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute all of his misconduct to PTSD."

After review of your rebuttal evidence, the AO remained unchanged.

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, SPCM, and separation in lieu of trial by court martial, 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 in general with clinical opinion that there is insufficient evidence to attribute all of your misconduct to PTSD. The Board further concurred that the chronic, repeated, and lengthy periods of your UA appear consistent with your PD diagnosis. More significantly, the Board noted that, contemporaneous with your psychological evaluation during your military service, you provided alternate rational regarding the reason for your UA period, specifying that you went UA to get away from being bossed around because you were essentially tired of having your job changed frequently and "getting the raw end of the deal." The Board found this statement, which you made at the time of your UA, to be the more credible motivation behind your absences, which continued even after being afforded the substantial benefit of your adjudged BCD being commuted to merely 45 days of additional confinement.

To the extent that you claim to have been insane at the time of your discharge due to your mental health concerns and, therefore, could neither assert nor waive your rights incident to

administrative separation, the Board found insufficient evidence to support such a conclusion. First, the Board noted that your post-service diagnosis of PTSD was based on events that occurred during your service without any specific detail regarding the nature of your purported traumatic experience. However, you clearly contend that your traumatic experience or experiences were connected to your "Vietnam War" service aboard the [redacted]. Given the known operational history of its off-shore fire support during the period of your service aboard the ship, absent substantiating evidence, the Board found it unlikely that your relatively brief period of ship-board service during the Vietnam War resulted in the purported trauma. Additionally, the Board observed that you were formally charged with at least four counts of prolonged periods of UA and would have been afforded legal defense counsel upon your final return to military authority to advise you regarding your second SPCM referral. Under a presumption of regularity, this defense counsel would have addressed possible legal defenses to your UA periods, would have requested an additional psychiatric evaluation if there were even a remote reason to question your mental competence or sanity, and would have ensured that you understood your rights incident to submitting your voluntary request for separation for the good of the service to escape trial by court-martial. Recognizing that your second SPCM would. more likely than not, have resulted not only in an adjudged sentence of a BCD but in a substantial period of confinement, the willingness of the convening authority to accept your voluntary request for discharge afforded you a significant clemency in avoiding the most severe consequences of your misconduct.

Finally, the Board noted you were given multiple opportunities to correct your conduct deficiencies, most notably the clemency provided when your BCD was commuted. However, you chose to continue to commit misconduct that ultimately formed the basis for your OTH discharge.

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.

In your rebuttal to the AO, you stated that you continue "to try to seek treatment at the VA but so far [have] been unsuccessful due to [your] OTH" characterization of discharge. The Board noted that Executive Order (EO) 13822 permits eligibility for mental health care for certain former service members with other than honorable discharges when their condition is determined to be incurred in or aggravated during your active duty service. If you previously applied for mental health care with the Department of Veterans Affairs (VA) prior to enactment of EO 13822, but were denied, the Board recommends that you seek reconsideration directly through the VA.

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,

6/25/2024

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