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

Docket No. 9339-23
Ref: Signature Date

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 reconsideration application on 10 May 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 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 provider and your AO rebuttal submission.

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 enlisted in the U.S. Navy and began a period of active duty service on 25 August 1988. Your pre-enlistment physical examination, on 5 April 1988, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms. On 28 January 1989, you reported for duty on board the [redacted].

On 3 June 1989, you commenced a period of unauthorized absence (UA) when you failed to return from emergency leave. Your UA terminated after nine (9) days on 12 June 1989.

On 26 June 1989, you commenced another UA. Your UA terminated on 6 July 1989. On 7 August 1989, you commenced another UA. Your UA terminated on 31 August 1989.

On 2 October 1989, you commenced another UA. While in a UA status you missed movement of your ship twice. Your command declared you to be a deserter on 11 October 1989. Your UA terminated on 5 January 1989.

On 21 February 1990, you commenced another UA. While in a UA status you again missed the movement of your ship twice. Your UA terminated with your arrest in [redacted] on 22 March 1990.

On 1 May 1990, you were convicted at a Summary Court-Martial (SCM) of five (5) separate UA specifications for failing to go to restricted muster. You were sentenced to forfeitures of pay and confinement for thirty (30) days. On 8 May 1990, the Convening Authority (CA) approved the SCM sentence.

On 27 July 1990, you commenced another UA. While in a UA status, you missed movement of your ship. Your command declared you to be a deserter on 27 August 1990. Your UA terminated on 19 October 1990.

On 26 November 1990, you commenced another UA. While in a UA status you missed the movement of your ship. Your UA terminated with your arrest in [redacted] on 4 January 1991.

On 8 March 1991, you commenced another UA. Your UA terminated on 26 March 1991.

On 4 May 1991, you commenced another UA. While in a UA status, you were arrested by civilian authorities in [redacted] on 26 August 1991, for car theft and receipt of stolen property. Your UA terminated with your return to military control on 10 October 1991. Upon your return to military authorities, you were placed in pretrial confinement.

On 29 November 1991, you were convicted at a Special Court-Martial (SPCM) of nine (9) separate UA specifications totaling approximately 467 days. You were sentenced to forfeitures of pay, confinement for 100 days, and a discharge from the Navy with a Bad Conduct Discharge (BCD). On 29 January 1992, the CA approved the sentence as adjudged, except suspended confinement in excess of ninety (90) days for a period of twelve (12) months. Upon the completion of SPCM appellate review, on 1 June 1993, you were discharged from the Navy with

a BCD and were assigned an RE-4 reentry code.

On 12 April 2021, this Board denied your initial discharge upgrade petition.

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, you desire for a discharge upgrade and contentions that: (a) you enlisted in the Navy as a young, 18-year-old man, and within the first year of your service, you were subjected to a brutal hazing attack, witnessed the death of fellow sailors when a ship in your fleet exploded, and you suffered the death of your biological father, (b) despite multiple requests to your command for help coping with these traumatic events, you were never provided any mental health counseling or treatment and, as a result, you absented yourself without authority on multiple occasions for the admitted purpose of avoiding the sailings of the [REDACTED] the site of these multiple tragic events, (c) if the Navy had evaluated you, the Navy would have discovered clear signs of psychiatric distress, including depression and PTSD, warranting an evaluation for fitness for continued service, (d) the Navy's failure to provide any treatment of conduct any mental health evaluation, coupled with the Nayv's sustained pursuit of criminal charges against you for your accumulating absences, unnecessarily compounded and exacerbated your misconduct, and (e) following your first BCNR upgrade attempt, you have been diagnosed by a psychologist and a psychiatrist with service-connected PTSD, and you were pardoned by the [REDACTED] Board of Pardon and Paroles. For purposes of clemency and equity consideration, the Board considered the entirety of 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 April 2024. The Ph.D. stated in pertinent part:

> There is no evidence that he was diagnosed with a mental health condition in military service. Throughout his disciplinary processing, there were no concerns raised of a mental health condition that would have warranted a referral for evaluation.
>
> During his separation physical, the Petitioner endorsed symptoms of depression, and he provided statements in support of his experience in service. At the end of his service, the Petitioner was found fit for separation.
>
> Temporally remote to his military service, he has received a diagnosis of PTSD attributed to military service. Available records indicate that the Petitioner's clinically significant mental health symptoms resulting in formal diagnosis onset following his 2010 TBI.
>
> It is possible that some of his UA could be attributed to undiagnosed mental health symptoms of depression or avoidance associated with unrecognized PTSD. However, it is difficult to attribute chronic and extended UA solely to mental health

> concerns, given the absence of clinically meaningful symptoms until after the 2010 TBI. Additionally, the civilian misconduct of car theft and receipt of stolen goods can not be attributed to a mental health concerns, as the Petitioner denies the actions and theft is not a typical symptom of PTSD or depression. 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 Ph.D. concluded, "it is my clinical opinion there is post-service evidence from civilian mental health providers of a diagnosis of PTSD and another mental health condition that may be attributed to military service. There is insufficient evidence to attribute all of his misconduct to PTSD or another mental health condition."

Following a review of your AO rebuttal, the Ph.D. did not change or otherwise modify their original AO.

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 of any nexus between any mental health conditions and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. As a result, the Board concluded that your misconduct was not due to mental health-related conditions or symptoms. Moreover, even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record reflected that your 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 not be held accountable for your actions.

The Board was troubled by one of your proffered contentions; specifically, your assertion that the [redacted] explosion and your participation in the recovery of bodies and cleanup had an adverse impact on your mental health. The Board noted that the [redacted] tragedy occurred in the [redacted] near [redacted] on 19 April 1989. The Board also noted that at such time your ship, the [redacted], was in the middle of a [redacted] [redacted] deployment and, specifically on 20 April 1989 through 2 May 1989, was engaged in the live exercise [redacted] with NATO and non-NATO allies involving air, land, and sea operations in the [redacted] and/or [redacted]. The Board determined that your narrative of events cannot be reconciled with the location of your ship at the relevant times and that this factual impossibility seriously undermined your credibility with the Board.

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 SPCM of serious misconduct. The simple fact remained is that you left the Navy while you were still contractually obligated to serve and you went into a UA status on no less than nine (9) separate times without any legal justification or excuse for a staggering total of approximately 467 days.

As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your willful and persistent 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,

5/19/2024