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

[redacted]
Docket No. 847-24
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 6 September 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 6 March 1987. Your pre-enlistment physical examination, on 28 July 1986, and self-reported medical history both

noted no psychiatric or neurologic issues or symptoms. On 23 November 1987, you reported for duty on board the [redacted] in [redacted].

On 7 April 1989, your command withdrew your advancement recommendation to E-4 due to your demonstrated lack of initiative in completing work assignments and repeated minor unauthorized absences (UA). On 11 May 1989, you received non-judicial punishment (NJP) for UA. You did not appeal your NJP.

On 10 July 1989, you commenced a period of UA that terminated on 12 July 1989. On 10 August 1989, you commenced another UA when you were arrested by the [redacted] Police Department [redacted] for receiving stolen property.[1] While still in a UA status, you were arrested again, on 7 September 1989, by the [redacted] for indecent exposure and contempt of court. Your UA terminated on 8 September 1989 with your surrender on board your command. However, less than one (1) hour later after being back onboard your ship, you commenced another UA that terminated on 19 October 1989.

On 2 November 1989, you commenced yet another UA. Your command declared you to be a deserter on 9 December 1989. Your UA terminated on 2 April 1990. On 13 April 1990, your separation physical examination and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms.

On 25 April 1990, you were convicted in the [redacted] General District Court, Criminal Division, [redacted] of indecent exposure and failure to appear. For the indecent exposure offense, the Court sentenced you to pay a $250.00 fine plus court costs, and twelve (12) months in jail (9 months suspended). For the failure to appear offense, the Court sentenced you to pay a $20 fine plus court costs, and ten (10) days in jail, but the Court suspended the confinement. On 25 April 1990, you commenced another UA when you began to serve your term of confinement.[2] Your command declared you to be a deserter on 26 May 1990, and your UA terminated, on 7 June 1990, when you were released to military authorities.

Consequently, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to a civilian conviction and commission of a serious offense. You waived in writing your rights to consult with counsel, include written statements, and to request a hearing before an administrative separation board. Ultimately, on 31 August 1990, you were discharged from the Navy for misconduct with an under Other Than Honorable conditions (OTH) characterization of service and were assigned a 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 for a discharge upgrade and change to your basis for separation. You contend that: (a) you developed an underlying mental health condition after you witnessed a fellow sailor commit suicide by jumping overboard from the [redacted], (b) you attempted to self-medicate your mental health symptoms through

[1] The Board noted that each day you spent either in civilian custody or civilian confinement was in a UA status for Navy purposes on a day-for-day basis.
[2] Id.

the use of alcohol and drugs, (c) you were subsequently separated from service as a result of your drug use, (d) your underlying mental health condition is directly connected to your military misconduct, (e) this Board has previously granted relief to similarly situated applicants who have engaged in far more length and serious misconduct after determining that the applicant underlying mental health condition contributed to the military misconduct, and you should be afforded similar relief, and (f) post-service you received a lifesaving award in 2011. 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, a licensed clinical psychologist (Ph.D.) reviewed your contentions and the available records, and issued an AO dated 11 July 2024. The Ph.D. stated in pertinent part:

> 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. Temporally remote to his military service, he has received a diagnosis of PTSD that is attributed to his service. Unfortunately, available records are not sufficiently detailed to establish a nexus with his misconduct, particularly given pre-service behavior that appears to have continued in service. The much of his misconduct is not typical to behaviors associated with symptoms of PTSD and his UA appears to be related to civilian incarceration, rather than avoidance of traumatic reminders. 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 a civilian provider of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD or another mental health condition."

Following a review of your AO rebuttal submission, 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 purported 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, the Board concluded that your civilian criminal charge of indecent exposure partially forming the underlying basis of your OTH discharge was not the type of misconduct that would be excused or mitigated by any mental health conditions even with liberal consideration. 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

cumulative 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 also noted that your contention that you attempted to self-medicate your mental health symptoms with alcohol and drugs and were separated for your drug use to be without merit. The Board noted that you were separated for misconduct due to a civilian conviction and not drug use/abuse and determined the record does not support a finding that self-medication with alcohol and/or drugs was related to the misconduct underlying your discharge.

The Board did not believe that your record was otherwise so meritorious as to deserve a discharge 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 determined that characterization under OTH conditions is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. The simple fact remains is that you went into a UA status multiple times without any legal justification or excuse on no less than four (4) separate occasions totaling approximately 264 days.

As a result, the Board determined that there was no impropriety or inequity in your discharge and concluded that your misconduct and disregard for good order in discipline clearly merited your discharge. While the Board carefully considered the evidence you submitted in mitigation and commends you for your post-discharge good character, 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,

9/18/2024

[redacted]