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

[redacted]
Docket No. 1602-24
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 23 August 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 a qualified mental health provider. Although you were provided an opportunity to respond to the AO, you chose not to do so.

You originally enlisted in the U.S. Navy and began a period of active duty service on 12 August 1999. Your pre-enlistment physical examination, on 29 July 1999, and self-reported medical history both noted no psychiatric or neurologic issues or symptoms. On 12 August 2003, you extended your enlistment.

On or about 20 March 2001, you were involved in a motor vehicle rollover accident as the driver. At the time of the accident, you were not wearing any seat belt restraint.

On 4 November 2004, pursuant to your guilty pleas, you were convicted at a General Court-Martial (GCM) for two separate sodomy specifications, and for failing to obey a lawful order by by wrongfully failing to conduct yourself with female prisoners/detainees/restrictees in accordance with the duties and responsibilities of Detention Facility Staff Member. During the GCM proceedings, the parties agreed to relieve you of your obligation to plead guilty to an indecent assault in return for an admission by you that your actions regarding one of the females amounted to behavior constituting the orders violation charged as the Additional Charge and that the appropriate changes would be made on the pretrial agreement and stipulation of fact. You were sentenced to confinement for twelve (12) months, a reduction in rank to the lowest enlisted paygrade (E-1, down from E-5), and a discharge from the Navy with a Bad Conduct Discharge (BCD).

On 6 May 2005, the Convening Authority (CA) approved the GCM sentence as adjudged. On 29 August 2005, the U.S. Navy-Marine Corps Court of Criminal Appeals affirmed the GCM findings and sentence as approved by the CA. On 4 October 2005, the Naval Clemency and Parole Board denied you any clemency. Upon the completion of GCM appellate review in your case, you were discharged from the Navy with a BCD on 21 December 2005 and 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 Hagel, Kurta, and Wilkie Memos. These included, but were not limited to, your desire to upgrade your discharge and change your reason for separation and reentry code. You contend that: (a) your application is based on matters relating to mental health conditions resulting from a Traumatic Brain Injury (TBI), (b) when viewing your military career in the totality of the circumstances, this Board should recognize the injustice of allowing your service to be characterized as it currently is, (c) your leadership and medical providers failed to recognize and treat your TBI, the result of which led to a slew of uncontrolled TBI symptoms, (d) had your TBI been treated, it is more likely than not, the misconduct underlying your discharge for would not have occurred, (e) since your discharge, changes to Department of Defense (DoD) policy have rendered it unlikely you would have been discharged in the same manner were you serving today, (f) when accounting for mitigating and excusing factors related to your TBI, your active duty performance and post-service conduct reflect your honorable character and merits clemency, and (g) when viewing your service in the totality of the evidence, considering the excusing and mitigating factors associated with your TBI, there is substantial doubt you would have received the same discharge if current screening laws and DoD discharge guidance concerning members with a TBI were in place at the time of your discharge. 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 and a licensed clinical psychologist (Ph.D.) reviewed your contentions and the available records and issued an AO dated 10 July 2024. The AO stated in pertinent part:

> There is evidence that the Petitioner received medical treatment for a head injury during military service. There is post-service evidence from Department of Veterans Affairs (VA) clinicians of diagnoses of TBI and other mental health concerns that may be attributed to military service. Unfortunately, available records are not sufficiently detailed to provide a nexus with his misconduct. Additionally, Petitioner did not present for medical attention in the year following his initial head injury incident (March 2001) until after a second head injury incident (April 2002). Following the second head injury incident he did not present for medical attention for over two years until June 2004. There is no other evidence of additional residuals of TBI during these intervals, during which his occupational performance resulted in the awarding of two NAMs. While TBI can result in behavioral symptoms, such as irrational behavior, aggression, or social inappropriateness, it is difficult to attribute repeated exploitation of individuals over which he holds a position of authority to TBI. 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 in-service evidence of head injury. There is post-service evidence from the VA of TBI and other mental health conditions that may be attributed to military service. There is insufficient evidence to attribute his misconduct to TBI or another 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 of any nexus between any mental health conditions, TBI, and/or related symptoms and your misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions or TBI 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, TBI, or related symptoms. Moreover, even if the Board assumed that your egregious 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 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. 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 observed that you pleaded guilty to the charged offenses and specifications at your GCM. The Board further noted that a plea of guilty is the strongest form of proof known to the law. Based upon your plea of guilty alone and without receiving any evidence in the case, a court-martial can find you guilty of the offenses to which you pleaded guilty. The Board noted that during a GCM guilty plea such as yours, the Military Judge (MJ) will only accept your guilty plea once they were satisfied that you fully understood the meaning and effect of your guilty plea, and only after determining that your plea was made voluntarily, of your own free

will, and with full knowledge of its meaning and effect. On the record, the MJ would have also had you state on the record that discussed every aspect of your case including the evidence against you and possible defenses and motions in detail with your lawyer, and that you were satisfied with your counsel's advice. Further, the MJ would have also had you state on the record that you were pleading guilty because you felt in your own mind that you were guilty. Moreover, the Uniform Code of Military Justice states that during the appellate review process, the appellate court may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In other words, the appellate court has a duty to conduct a legal and factual sufficiency review of the case. If any errors or improprieties had occurred at any stage in your case, the appellate court surely would have concluded as such and ordered the appropriate relief. However, no substantive, evidentiary, or procedural defects were identified in your case.

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 serious misconduct. The Board determined that characterization with a BCD appropriate when the basis for discharge is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor.

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 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,

9/4/2024

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