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

[redacted]
Docket No. 5032-24
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.

Because your application was submitted with new evidence not previously considered, the Board found it in the interest of justice to review your application. A three-member panel of the Board, sitting in executive session on 25 October 2024, has carefully examined your current request. 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 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (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, which was previously provided to you. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

You previously applied to the Board contending that your recent diagnoses of post-traumatic stress disorder (PTSD) was a factor in your pattern of misconduct due to an automobile accident in June 1993, and you submitted supporting medical records in support of your request. Your request was considered on 15 March 2021 and denied. At that time, the Board concurred with the advisory opinion of a licensed clinical psychologist that the preponderance of available objective evidence failed to establish that you suffered from a mental health condition at the time

of your military service. The summary of your period of active duty service and misconduct remains substantially unchanged from that provided for in the Board's previous decision.

In your request for reconsideration, the Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie, Kurta, and Hagel Memos. These included, but were not limited to, your desire to upgrade your discharge to be eligible for veteran benefits and your contention that PTSD was not well known or understood at the time of your 1993 accident, which you claim is the reason that you did not seek mental health care sooner and also the reason that there is no diagnosis of PTSD in your service health records. You have submitted evidence that your current counselor has assessed you "more likely than not suffered PTSD/TBI initially, suppressed it, and then had a delayed onset due to the wreck." For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

Because you again contend that PTSD or another mental health condition contributed to the misconduct which resulted in your discharge, the Board considered an AO, which reviewed the additional documentation you submitted for reconsideration, to include your civilian provider's temporally remote diagnosis of PTSD which has been attributed to your in-service car accident. The AO 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. Temporally remote to his military service, a civilian mental health provider has provided a diagnosis of PTSD attributed to his in-service car accident. Unfortunately, available records do not establish a nexus with his misconduct, particularly given his denial of either mental health symptoms or physical difficulties at the time of his separation from service. It is also difficult to attribute extended UA solely to PTSD-related avoidance. 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 provider of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence attribute his misconduct to PTSD."

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 NJP 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. Additionally, the Board concurred with the AO that there is post-service evidence from a civilian provider of a diagnosis of PTSD that may be attributed to military service but insufficient evidence to attribute your misconduct to PTSD, primarily given the significant length of your final period of UA, which would not normally be attributable to PTSD-related avoidance. Therefore, the Board 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. Finally, the Board also noted that the misconduct that led to your request to be discharged in lieu of trial by court-martial was substantial and, more likely than not, would have resulted in a punitive discharge and/or extensive punishment at a court-martial. Therefore, the Board determined that you already received a large measure of clemency when the convening authority agreed to administratively separate you in lieu of trial by court-martial; thereby sparing you the stigma of a court-martial conviction and possible punitive 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.

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,

11/19/2024

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