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

[redacted]
Docket No. 6193-24
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 8 November 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, as well as your AO rebuttal submission.

You originally enlisted in the U.S. Navy and began a period of active duty service on 22 October 1975. Your enlistment physical examination, on 12 August 1975, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. Your re-enlistment physical examination, on 1 September 1983, and self-reported medical history again noted no psychiatric or neurologic conditions or symptoms. You last reenlisted on 13 February 1986.

During your last enlistment, on or about 25 July 1995, pursuant to your guilty pleas, you were convicted at a General Court-Martial (GCM) of: (a) rape, (b) sodomy, (c) assault with a dangerous weapon, (d) assault, (e) burglary, (f) assault with intent to commit rape and sodomy, (g) kidnapping, and (h) the wrongful modification of a firearm. You were sentenced to a reduction in rank to the lowest enlisted paygrade (E-1), confinement for five (5) years, and to be discharged from the Navy with a dishonorable discharge (DD). On 2 April 1996, the Convening Authority (CA) approved the GCM sentence as adjudged.

On 30 April 1997, the US Navy-Marine Corps Court of Criminal Appeals affirmed the GCM findings and sentence as approved by the CA. On 26 September 1997, the U.S. Court of Appeals for the Armed Forces denied your request for review. Upon the completion of GCM appellate review in your case, on 15 April 1998, you were discharged from the Navy with a DD and were assigned an RE-4 reentry code.

On 23 April 2018, this Board denied your initial discharge upgrade application. The AO drafted for this petition noted the following:

> Regardless, even if he was suffering from Bipolar Disorder while in service, that in and of itself does not cause the criminal acts for which [redacted] was convicted …Bipolar Disorder in and of itself cannot be said to have caused the significant criminal activity for which [redacted] was arrested, confined and dishonorably discharged…it is my considered medical opinion that there is insufficient evidence to support [redacted]' contention that his post-service diagnosis of Bipolar Disorder caused his misconduct.

On 27 February 2020, this Board again denied your discharge upgrade application. The AO drafted for this petition noted the following:

> Additionally, as stated in previous opinions, even if the Petitioner were suffering from severe depression or even unrecognized bipolar disorder, it is not reasonable to consider that his misconduct was caused by his mental health condition. His responsibility for his actions would have been evaluated during his court martial trial and his mental health condition would have been considered during the court martial and appeals process. Based on the preponderance of the evidence, it is my considered medical opinion that there is insufficient evidence to attribute his misconduct to a mental health condition suffered during service and there is insufficient evidence of insufficient care provided to the Petitioner prior to his misconduct.

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 for a discharge upgrade and change to your reason for separation. You contend that: (a) you were a remarkable Sailor who dedicated over two decades to the service of your country, (b) the events leading to your discharge were a symptom of your untreated mental health disease, one that the Navy had ample

opportunity to diagnose and treat, (c) you had two failed suicide attempts, yet the care you so desperately needed was never forthcoming, (d) you were able to successfully self-manage your mental illness for nearly two decades and served your country with absolute honor, until the symptoms manifested in the tragic manner that they did, (e) you have taken full responsibility for your actions and spent your time in the brig, at times in nearly inhumane conditions, (f) it would be unjust for the Navy to continue your punishment for behavior that was beyond your control, and (g) you respectfully request that your upgrade request be granted, *inter alia*, to allow you to finally be able to proudly say, "I am a retired Navy Veteran!" For purposes of clemency and equity consideration, the Board considered the totality of the evidence you provided in support of your application.

A licensed clinical psychologist (Ph.D.) reviewed your contentions and the available records, and issued an AO dated 2 October 2024. As part of the Board's review, the Board considered the AO. The AO stated in pertinent part:

> Petitioner was appropriately referred for psychological evaluation during his enlistment and properly evaluated on multiple occasions, including during inpatient hospitalizations.
>
> Unfortunately, there is insufficient evidence to attribute his misconduct to a mental health condition. Throughout his military service, he was evaluated, any reported mental health symptoms were treated, and he reported a resolution of symptoms. There is no evidence that he was not competent to participate in his defense or not responsible for his behavior.

The Ph.D. concluded, "it is my clinical opinion that there is in-service evidence of a mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to a 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 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 serious 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 very serious GCM sexual assault-related offenses, forming the underlying basis of your DD, were 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 misconduct far outweighed any and all

mitigation offered by such mental health conditions. The Board determined the record reflected that your depraved-heart 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, 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 DD or Bad Conduct Discharge 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 in 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.

In the absence of sufficient new evidence for reconsideration, the decision of the Board is final, and your only recourse would be to seek relief, at no cost to the Board, from a court of appropriate jurisdiction.

Sincerely,

11/24/2024

[redacted]