



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

[REDACTED]
Docket No: 2630-20

Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW NAVAL RECORD OF FORMER [REDACTED]
XXX-XX-[REDACTED], USMC

Ref: (a) 10 U.S.C. §1552
(b) 10 U.S.C. §654 (repealed)
(c) USD Memo, "Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code," 20 September 2011
(d) USD Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determination," 25 July 2018

Encl: (1) DD Form 149 w/attachments
(2) NAVMC 118 (11) Administrative Remarks
(3) "Page 12" Offenses and Punishments
(4) NAVMC 118 (11) Administrative Remarks
(5) NAVMC 118 (11) Administrative Remarks
(6) Standard Form 600, Chronological Record of Medical Care
(7) DD Form 458, Charge Sheet
(8) Petitioner Memo, subj: Request for Separation in Lieu of Trial by Court-Martial in the case of [Petitioner], 5 Oct 92
(9) [REDACTED] CG Memo, subj: Request for Separation in Lieu of Trial by Court-Martial in the case of [Petitioner], 3 Nov 92
(10) DD Form 214
(11) Record of Service

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his characterization of service be upgraded.

2. The Board reviewed Petitioner's allegations of error and injustice on 23 November 2020 and, pursuant to its regulations, the Majority of the Board determined that the corrective action indicated below should be taken. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies, to include references (c) and (d).

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of

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error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Although enclosure (1) was not filed in a timely manner, it is in the interests of justice to waive the statute of limitations and consider Petitioner's application on its merits.

c. Petitioner enlisted in the Navy and began a period of active duty on 11 September 1991. See enclosure (10).

d. Petitioner was absent without leave from the Marine Corps training detachment at [REDACTED] from 20 February 1992 to 25 February 1992. See enclosure (3).

e. On 24 March 1992, Petitioner was convicted by civil authorities of theft of services, and ordered to pay for those services, court costs and a fine. See enclosure (2).

f. On 31 March 1992, Petitioner was counseled concerning his financial negligence and mismanagement, and poor attitude and performance. He was warned that that further deficiencies could result in his administrative separation. See enclosure (2).

g. On 1 April 1992, Petitioner received nonjudicial punishment (NJP) for two specifications of failing to obey lawful orders by having a female visitor in the barracks and exceeding the prescribed liberty limits,¹ in violation of Article 92, Uniform Code of Military Justice (UCMJ), and for the unauthorized absence described in paragraph 3c above, in violation of Article 86, UCMJ. See enclosure (3).

h. On 19 June 1992, Petitioner was counseled for fighting in the barracks with other Marines. See enclosure (4).

i. On 12 August 1992, after being reassigned to [REDACTED] Petitioner was counseled concerning his conduct on liberty that resulted in his apprehension by civilian police while he was stationed at [REDACTED]. This conduct involved a failure to pay just debts to two motels and association with persons of questionable moral character. The counseling statement directed that Petitioner report for a psychiatric evaluation and counseling. See enclosure (5).

j. An entry in Petitioner's medical records dated 4 August 1992 references a homosexual experience in February 1992. See enclosure (6).

k. On 21 September 1992, Petitioner was charged with one specification of sodomy in violation of Article 125, UCMJ. See enclosure (7).

¹ Petitioner asserts in enclosure (1) that the charge of having a female in the barracks was clearly an error.

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l. By memorandum dated 5 October 1992, Petitioner requested separation in lieu of trial by court-martial. See enclosure (8).

m. By memorandum dated 3 November 1992, the separation authority approved Petitioner's request for separation in lieu of trial by court-martial, and directed that his service be characterized as other than honorable (OTH). See enclosure (9).

n. On 2 December 1992, Petitioner was discharged from the Marine Corps under OTH conditions for conduct triable by courts-martial. See enclosure (10).

o. Petitioner's final average conduct rating was 4.0. At the time of his service, an average of 4.0 was required for service to be considered fully honorable. See enclosure (11).

p. Petitioner asserts that he never engaged in homosexual conduct. Rather, he engaged in a consensual relationship with an individual whom he did not know to have been a post-operative transsexual. He admitted that he violated the limits of liberty and was absent without leave for a period to engage in sexual relations with this individual whom he believed to be a consenting woman, but that she turned out to be a "manipulative and duplicitous predator who made a living scamming other people." It was allegedly this individual's duplicity which caused Petitioner to be convicted of failing to pay for a hotel room after she failed check out on time or to settle the bill. Petitioner further asserts that a superior noncommissioned officer (NCO) subsequently harassed him for engaging in a relationship with a transsexual and threatened to have him kicked out of the Marine Corps. Despite this, Petitioner completed the training course at [REDACTED] and was permitted to report to his first duty assignment at [REDACTED]. However, the above referenced NCO contacted Petitioner's new chain of command about Petitioner's homosexual conduct, resulting in further harassment in his new unit. Finally, Petitioner asserts that he falsely admitted to homosexual conduct with the above referenced individual to Naval Investigative Services only after significant harassment and threats.

q. Reference (c) sets forth the Defense Department's current policies, standards and procedures for correction of military records following the repeal of reference (b). It provides that service Discharge Review Boards should normally grant requests to change the narrative reason for discharge and upgrade characterizations of service when the original discharge was based solely on the so-called "Don't Ask, Don't Tell" policy, or any similar policy in place prior to its enactment, and when there are no other aggravating factors in the record such as misconduct.

MAJORITY CONCLUSION:

Upon careful and conscientious review of all of the evidence of record, the Majority of the Board concludes that full relief is warranted in Petitioner's case.

The Majority notes that Petitioner was charged only with sodomy, and therefore was separated only for alleged homosexual conduct. There is no evidence or suggestion that this conduct was anything other than consensual. Although he had some other disciplinary infractions at Fort Knox, these were apparently deemed insufficient at the time to warrant court-martial or

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separation since he was not charged for them and was permitted to report for his first duty assignment at [REDACTED]. Further, Petitioner's conduct trait average reflects that his overall conduct would have otherwise warranted an honorable characterization of service. Applying the guidance of reference (c), along with the guidance of reference (d) (discussed below), the Majority determined that Petitioner's characterization of service should be upgraded to honorable.

In addition to considering Petitioner's application in light of the guidance of reference (c), the Majority of the Board also considered the totality of the circumstances to determine whether relief is warranted in the interests of justice in accordance with reference (d). In this regard, the Board considered, among other factors, that Petitioner's troubles were apparently caused by a dishonest and manipulative individual who took advantage of his relative immaturity; that the circumstances of Petitioner's separation reportedly resulted in Petitioner's estrangement from his father and has caused him to contemplate committing suicide; that Petitioner could not be charged for what was otherwise private consensual sexual activity today; that Petitioner was reportedly subjected to illegal pretrial punishment and harassment by his superior NCO; that Petitioner's "confession" appears to have been coerced; that there was apparently insufficient evidence to separate or court-martial Petitioner while he was at [REDACTED] and the only apparent new evidence that warranted the opening of the investigation at [REDACTED] that resulted in Petitioner's eventual separation was a comment made in the context of a psychiatric evaluation; the lifetime of embarrassment and shame that the circumstances of Petitioner's discharge has caused; that Petitioner apparently went on to achieve success in his career despite the stigma attached to his characterization of service; Petitioner's otherwise meritorious military service, as evidenced by his conduct and proficiency ratings; Petitioner's relative youth and immaturity at the time of his discharge; and the passage of time since Petitioner's discharge. Based upon this review, and considered in conjunction with the guidance of reference (c), the Majority of the Board determined that relief is warranted in the interests of justice.

MAJORITY RECOMMENDATION:

That Petitioner be issued a new DD Form 214 reflecting that on 2 December 1992 he received an "Honorable" discharge; that his separation authority was "MARCORSEPMAN par 6214"; that his separation code was "JFF1"; that his reenlistment code was "RE-1J"; and that the narrative reason for his separation was "Secretarial Authority."

That Petitioner be issued an honorable discharge certificate.

MINORITY CONCLUSION:

The Minority of the Board also considered Petitioner's application in light of the guidance of references (c) and (d). However, the Minority disagreed with the Majority's conclusion that Petitioner's characterization of service constitutes an injustice. With regard to the application of reference (c), the Minority noted that Petitioner's record included several instances of misconduct, some of which were directly related to his alleged homosexual act. Specifically, he was convicted by a civilian court of failing to pay for a hotel room, and he received NJP for his unauthorized absence and for disobeying orders. His record also reflects counseling statements

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for poor attitude and performance, as well as for fighting. Accordingly, the record reflects misconduct sufficient to negate the upgrade guidance of reference (c).

For the same reason, the Minority found that the totality of the circumstances do not warrant relief in Petitioner's case. The Minority found that Petitioner's misconduct, even apart from the sodomy for which he was charged, outweighed all of the potentially mitigating circumstances. Accordingly, the Minority determined that relief was not warranted.

MINORITY RECOMMENDATION:

In view of the above, the Minority of the Board recommends that no corrective active be taken on Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.
5. The foregoing action of the Board is submitted for your review and action.

1/25/2021

[REDACTED]

Executive Director

Assistant General Counsel (Manpower and Reserve Affairs) Decision:

MAJORITY Recommendation Approved (Full Relief)

~~MINORITY Recommendation Approved (Deny Relief)~~

[REDACTED]

Assistant General Counsel (M&RA)

Signed by: [REDACTED]