



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

[REDACTED]
Docket No. 5964-21
Ref: Signature Date

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

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

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

Encl: (1) DD Form 149 w/enclosures
(2) DD Form 214
(3) NAVPERS 1626/607, Court Memorandum, 30 April 1996
(4) [REDACTED] CO Memo 1910 [REDACTED] LEGAL, subj:
Notice of an Administrative Board Procedure Proposed Action, 27 April 1996
(5) Petitioner's Memo, subj: Statement of Awareness and Request for, or Waiver of Privileges, 27 April 1996
(6) USS [REDACTED] Msg, subj: [Petitioner], Recommendation for Administrative Separation for Misconduct due to Commission of a Serious Offenses [sic] and by Reason of Homosexual Conduct, dtg 020048Z May 96
(7) BUPERS Washington DC (PERS 83) Msg, subj: Admin Discharge ICO [Petitioner] / (UIC 21247) PERS 832, dtg 091938Z May 96

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 to honorable.

2. The Board reviewed Petitioner's allegations of error or injustice on 15 November 2021 and, pursuant to its regulations, determined by a majority vote that only the partial relief indicated below should be granted. As discussed further below, I disagree with the conclusion of the Majority of the Board, and recommend that the Minority's recommendation for relief be adopted. Documentary material considered by the Board included the enclosures, relevant portions of Petitioner's naval records, and applicable statutes, regulations, and policies, to include reference (c).

3. The Board, having reviewed all the evidence of record pertaining to Petitioner's allegations of error and injustice, found as follows:

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a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation 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 review Petitioner's application on its merits.

c. Petitioner enlisted in the Navy and began a period of active duty service on 3 November 1992. See enclosure (2).

d. On 27 April 1996, Petitioner received nonjudicial punishment (NJP) for two specifications of sodomy on divers occasions while on board the USS [REDACTED] in violation of Article 125, Uniform Code of Military Justice (UCMJ). See enclosure (3).

e. By memorandum dated 27 April 1996, Petitioner was notified that he was being considered for administrative discharge from the Navy by reason of misconduct due to commission of a serious offense, as evidenced by his NJP for violation of Article 125, UCMJ, and by reason of homosexual conduct, as evidenced by his "engaging in, attempting to engage in, or soliciting another to engage in a homosexual act." See enclosure (4).

f. By signature dated 27 April 1996, Petitioner waived his right to consult with counsel and to request an administrative discharge board. He also indicated that he did not object to the proposed separation. See enclosure (5).

g. By message dated 2 May 1996, Petitioner's commanding officer recommended to the separation authority that Petitioner be expeditiously discharged from the Navy under other than honorable (OTH) conditions for misconduct due to commission of a serious offense and due to homosexual conduct. In support of this recommendation, he cited the "aggravating circumstances" surrounding Petitioner's homosexual conduct, which appear to be based on the fact that his conduct occurred on board a naval vessel. See enclosure (6).

h. By message dated 9 May 1996, the separation authority directed that Petitioner be administratively discharged from the Navy under OTH conditions by reason of "homosexual conduct acts." See enclosure (7).

i. On 20 June 1996, Petitioner was discharged from the Navy under OTH conditions for "Homosexual Conduct Acts." See enclosure (2).

j. Petitioner contends that relief is warranted because he was discharged from the Navy due to his sexual orientation/preference, over which had had no control. He wishes to "mend that part of [his] life." See enclosure (1).

k. Reference (b) sets forth the Department of Defense policy with regard to the correction of military records of former Servicemembers discharged under the "Don't Ask, Don't Tell" (DADT) policy or previous policies following the repeal of 10 U.S.C. § 624. It provides that Service Discharge Review Boards should "normally grant requests to change the narrative reason for a

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discharge (the change should be to 'Secretarial Authority' (Separation Program Designator Code (SPD) code JFF)), requests to re-characterize the discharge to honorable, and/or requests to change the reentry code to an immediately-eligible-to-reenter category (the new RE code should be RE code 1J) when both of the following conditions are met: (1) the original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT and (2) there were no aggravating factors in the record, such as misconduct."

MAJORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Majority of the Board determined that partial relief is warranted.

The Majority noted that Petitioner received NJP for committing sodomy on board a naval vessel in violation of Article 125, UCMJ. Due to the serious nature of this misconduct, the Majority determined that the guidance of reference (b) did not apply to Petitioner's case since his discharge was not based solely upon DADT and there was a significant aggravating factor.

The Majority also considered the totality of the circumstances to determine whether relief is warranted in the interests of justice in accordance with reference (c). In this regard, the Majority considered the entirety of Petitioner's naval record; Petitioner's relative youth at the time of his misconduct; and the passage of time since Petitioner's discharge. Unfortunately, the Majority determined that the severity of the misconduct for which Petitioner was discharged far outweighed the mitigating circumstances. Accordingly, the Majority determined that Petitioner's characterization of service was, and remains, appropriate, and therefore should not be changed.

The Majority did, however, find that Petitioner's narrative reason for separation should be changed in the interests of justice since homosexual conduct is no longer an appropriate basis for separation and the narrative reason for separation listed in enclosure (2) does not accurately describe the reason for Petitioner's OTH discharge. Accordingly, the Majority determined that Petitioner's narrative reason for separation and the associated entries on his DD Form 214 should be changed to reflect "Secretarial Authority."

MAJORITY RECOMMENDATION:

In view of the above, the Majority of the Board recommends that the following corrective action be taken on Petitioner's naval record:

That Petitioner be issued a new DD Form 214 reflecting that the narrative reason for his separation was "Secretarial Authority"; that his separation authority was "MILPERSMAN 1910-164"; and that his SPD code was "JFF."

That a copy of this record of proceedings be filed in Petitioner's naval record.

That no further changes be made to Petitioner's naval record.

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MINORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Minority of the Board determined that full relief is warranted in the interests of justice.

The Minority agreed with the Majority conclusion that the guidance of reference (b) did not apply to this case due to the aggravating circumstances. Unlike the Majority, however, the Minority believed that the mitigating circumstances outweighed the relatively minor misconduct for which Petitioner was discharged. Specifically, the Minority noted that Petitioner's naval record reflected receipt of a Good Conduct Medal and a Navy Achievement Medal, as well as deployment to southwest Asia. The Minority also noted that the only apparent aggravating circumstance regarding Petitioner's sodomy charge was that it took place on board a naval vessel, and believed it unlikely that a similarly situated individual would be discharged for the same conduct today, particularly under OTH conditions. Accordingly, the Minority found that the mitigating circumstances far outweighed the misconduct for which Petitioner was discharged, and that full relief was therefore warranted.

MINORITY RECOMMENDATION:

In view of the above, the Minority of the Board recommends that the following corrective action be taken on Petitioner's naval record:

That Petitioner be issued a new DD Form 214 reflecting that his service was characterized as "Honorable"; that the narrative reason for his separation was "Secretarial Authority"; that his separation authority was "MILPERSMAN 1910-164"; that his SPD code was "JFF"; and that his reenlistment code was "RE-1J."

That Petitioner be issued an Honorable Discharge certificate.

That a copy of this record of proceedings be filed in Petitioner's naval record.

That no further changes be made to Petitioner's naval record.

EXECUTIVE DIRECTOR CONCLUSION:

I disagree with the Board's conclusion regarding the applicability of reference (b) to Petitioner's case. While it is true that the record reflects misconduct in that Petitioner received NJP for sodomy in violation of Article 125, UCMJ, that misconduct appears to be the same homosexual act for which Petitioner was discharged. There is nothing in the record suggesting that this was a nonconsensual act – it was not charged as aggravated sodomy, and it warranted only minor NJP. It also apparently took place on board a naval vessel, but I do not believe that factor removes the applicability of reference (b). Petitioner likely would not have been separated from the Navy for similar heterosexual conduct at the time, nor would he likely be separated for similar homosexual conduct today, and he certainly would not be separated under OTH conditions. Accordingly, I believe that the guidance of reference (b) does apply to this case, and agree with the Minority that full relief is warranted.

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EXECUTIVE DIRECTOR RECOMMENDATION:

In view of the above, I recommend that you adopt the Minority's recommendation for relief as stated above.

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 titled matter.
5. The foregoing action of the Board is submitted for your review and action.

1/3/2022

[REDACTED]

Executive Director

ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

MAJORITY Recommendation Approved (Partial Relief – Change Narrative Reason for Separation to “Secretarial Authority”; Separation Authority to “MILPERSMAN 1910-164”; and SPD Code to “JFF”; No further relief)

MINORITY/EXECUTIVE DIRECTOR Recommendation Approved (Full Relief – Upgrade Characterization Service to Honorable; Narrative Reason for Separation to “Secretarial Authority”; Separation Authority to “MILPERSMAN 1910-164”; SPD Code to “JFF”; and reenlistment code to “RE-1J.”)

1/25/2022

[REDACTED]

Assistant General Counsel (M&RA)

Signed by: [REDACTED]