



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

█
Docket No: 6465-21
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER █,
USN, █

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
(2) DD Form 214
(3) NAVPERS 1070/606, Record of Unauthorized Absence, 29 July 1987
(4) Special Court-Martial documentation
(5) █ Msg, subj: [Petitioner], Recommendation for Admin Separation by Reason of Misconduct due to Commission of a Serious Offense and Homosexuality, dtg 192347Z Nov 87
(6) BUPERS Memo 1910 Ser P8322/433, subj: [Petitioner], 8 December 1987
(7) ASN (M&RA) Memo, subj: [Petitioner], 11 December 1987

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" and that his narrative reason for separation be changed.

2. The Board reviewed Petitioner's allegations of error or injustice on 15 November 2021 and, pursuant to its regulations, determined the corrective action indicated below should be taken. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval records, and applicable statutes, regulations, and policies, to include references (b) and (c).

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

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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 23 April 1986. See enclosure (2).

d. On 29 May 1987, Petitioner commenced a period of unauthorized absence (UA) which continued until he was apprehended by civilian authorities on 25 July 1987. See enclosure (3).

e. On 27 August 1987, Petitioner was convicted by a special court-martial (SPCM) of UA from 29 May 1987 to 25 July 1987 in violation of Article 86, Uniform Code of Military Justice. He was sentenced to 70 days of confinement, to forfeit \$492 pay per month for two months, and to be reduced in grade to E-2. See enclosure (4).

f. On 5 November 1987, Petitioner made a statement to legal and medical personnel admitting to homosexual conduct. Specifically, he stated that he did not believe that he had any homosexual tendencies when he entered the Navy, but that he grew very close to a friend while UA and they developed an emotional and sexual relationship. See enclosure (5).

g. By memorandum dated 16 November 1987, Petitioner was notified that he was being considered for administrative separation for misconduct due to commission of a serious offense, as evidenced by his SPCM conviction, and homosexuality as evidenced by his 5 November 1987 statement. See enclosure (5).

h. By memorandum dated 17 November 1987, Petitioner waived his right to counsel and to request an administrative separation board. See enclosure (5).

i. By message dated 19 November 1987, Petitioner's commander recommended that Petitioner be discharged from the Navy with a general (under honorable conditions) characterization of service. In making this recommendation, Petitioner's commander opined that an other than honorable (OTH) discharged was not warranted because there were extenuating circumstances surrounding Petitioner's UA¹ and that none of the aggravating circumstances delineated in MILPERSMAN 3630400 applied to Petitioner's homosexual conduct. See enclosure (5).

j. By memorandum dated 8 December 1987, the Chief of Naval Personnel (CNP) recommended to that Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) that Petitioner be separated from the naval service under OTH conditions by reason of misconduct due to commission of a serious offense. The CNP opined that this action was appropriate in view of Petitioner's SPCM conviction for UA in excess of 30 days. See enclosure (6).

k. By memorandum dated 11 December 1987, the ASN (M&RA) directed that Petitioner be

¹ Petitioner claimed to have gone UA when his command at the time refused his request for leave when his father was in a rehabilitation hospital due to a serious, life-threatening stroke.

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discharged from the Navy under OTH conditions by reason of misconduct due to commission of a serious offense See enclosure (7).

1. On 6 January 1988, Petitioner was discharged from the Navy under OTH conditions by reason of misconduct due to commission of a serious offense. See enclosure (2).

m. Petitioner acknowledges his UA, but states that it was due to harassment and discrimination because of his homosexuality. He contends that relief is warranted because he was discharged due to his homosexuality and UA despite having already served the punishment imposed by the SPCM. See enclosure (1).

n. Reference (b) provides guidance that service discharge review boards should normally grant requests to change the narrative reason for a discharge, requests to recharacterize a discharge, and/or requests to change the reentry code when the original discharge was based solely upon the so-called "Don't Ask, Don't Tell" (DADT) policy or a similar policy in place prior to enactment of DADT, and when there were no aggravating factors in the record such as misconduct.

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board determined that Petitioner's application warrants partial relief in the interests of justice.

The Board determined that the guidance of reference (b) does not apply in Petitioner's case because his discharge was not based solely upon the DADT policy. Although homosexual conduct was included among the bases for initiating the administrative separation process, it was clearly secondary to the misconduct evidence by Petitioner's SPCM conviction. Ultimately, the ASN (M&RA) directed Petitioner's discharge from the Navy only upon the basis of misconduct for commission of a serious offense, and that offense was not related to his sexual orientation. Accordingly, the guidance of reference (b) is not applicable in this case.

In addition to considering whether the guidance of reference (b) is applicable, the Board 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 Board considered, among other factors, that Petitioner's commander recommended that he be discharged with a general (under honorable conditions) characterization of service; that Petitioner reportedly went UA because his father was in the hospital rehabilitating from a life-threatening stroke and his command denied his leave request; the likelihood that Petitioner's homosexual conduct influenced the decision to separate him under OTH conditions contrary to his commander's recommendation; the non-violent nature of the misconduct for which Petitioner was discharged; that Petitioner served the punishment imposed by the SPCM; Petitioner's contention that he was harassed and discriminated against because of his sexual orientation; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. While the Board did not condone Petitioner's misconduct, it did find that the mitigating circumstances outweighed the relatively minor misconduct. It also found it very unlikely that Petitioner would have been discharged under OTH conditions under similar

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circumstances today. Accordingly, the Board determined that Petitioner's characterization of service should be upgraded to general (under honorable conditions) in the interests of justice.

The Board considered Petitioner's request to upgrade his characterization of service to fully honorable and to change his narrative reason for separation, but determined that such relief was not warranted given the totality of the circumstances. Although the Board found that the mitigating circumstances outweighed the misconduct for which Petitioner was discharged, it did not find that these circumstances so significantly outweighed Petitioner's misconduct to warrant the extraordinary relief of upgrading his characterization of service to fully honorable. Petitioner was discharged for misconduct which warranted a SPCM and an adjudged sentence of 70 days in confinement. Accordingly, the Board determined that his service should not be characterized as honorable. Additionally, the Board did not believe that a change to Petitioner's narrative reason for separation was warranted, as he was in fact separated for misconduct and the mitigating circumstances did not so sufficiently outweigh his misconduct to justify changing history in this regard.

RECOMMENDATION:

In view of the above, 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 "General (under honorable conditions)."

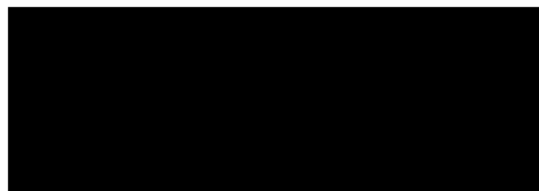
That a copy of this record of proceedings be filed in Petitioner's naval record.

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

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.

12/23/2021



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USN, [REDACTED]

ACTING ASN (M&RA)) DECISION:

FEB 04 2022

Board Recommendation Approved (Upgrade to General (under honorable conditions); No further relief.) [REDACTED]

Petitioner's Request Approved (Upgrade to Honorable; Change Narrative Reason for Separation to "Secretarial Authority.")

Board Recommendation Disapproved (Relief Denied; I disagree with the Board's conclusion that the mitigating circumstances outweighed the misconduct for which Petitioner was discharged. Petitioner was UA for an extended period of time, and his UA was terminated only because he was apprehended by civilian authorities. Accordingly, I believe that his service was properly characterized as OTH.)

