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

[redacted]
Docket No: 7047-21
Ref: Signature Date

[redacted]

Dear [redacted]:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, and the Order of the United States District Court for the District of Columbia (DDC) (Civil Action No. [redacted] ([redacted])), dated 9 September 2021, which remanded your case to the Board for Correction of Naval Records [hereinafter referred to as the "Board"] to consider your allegations of error and/or injustice regarding your discharge from the Navy. After careful review and consideration of all of the evidence of record, the Board found insufficient evidence to establish the existence of any material error or injustice related to your discharge. Accordingly, your application has been denied.

A three-member panel of the Board, sitting in executive session, considered your case on 27 April 2022. The names and votes of the panel members will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with administrative regulations and procedures applicable to the Board's proceedings. Documentary material considered by the Board included your Complaint to the DDC, filed 27 January 2021, and all exhibits attached thereto; your application to the Board made pursuant to the DDC Remand Order, signed on 5 November 2021, and all exhibits attached thereto including your attorney's brief; an advisory opinion (AO) provided by the Office of the Judge Advocate General (OJAG Code 13), dated 10 February 2022, to which was attached the record of proceedings for your administrative separation board, and your attorney's response to that AO dated 16 March 2022 with the exhibits attached thereto; relevant portions of your naval record; and applicable statutes, regulations, and policies, to include 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 determined that your personal appearance, with or without counsel, would not materially add to its understanding of the issues involved. Accordingly, your request for a personal appearance was denied.

You made the following allegations of error or injustice in your Complaint to the DDC:

(1) That the Navy violated the Administrative Procedures Act (APA) by improperly denying you the right to appear in person with counsel at your administrative separation board hearing in violation of MILPERSMAN 1910-516;

(2) That the Navy violated the APA by erroneously forcing your administrative discharge board hearing to occur via video teleconference (VTC) based on the erroneous premise that your end of active obligated service (EAOS) date was 27 July 2020, rather 27 January 2021, and that the Navy erroneously relied upon the Coronavirus Aid, Relief and Economy Security (CARES) Act to justify the VTC-based hearing; and

(3) That the Navy violated the APA by involuntarily discharging you under other than honorable (OTH) conditions based upon allegations unsupported by substantial evidence.

In your subsequent application to the Board made pursuant to the DDC's Remand Order, you added the following allegations of error or injustice:

(1) The November 2019 command investigation (CI) which substantiated allegations of sexual harassment in violation of Article 92, Uniform Code of Military Justice (UCMJ), and false official statement in violation of Article 107, UCMJ, included materials errors and was not supported by the evidence;

(2) The March 2020 preliminary inquiry (PI) which substantiated an allegation of assault in violation of Article 128, UCMJ, was prematurely and arbitrarily substantiated;[1] and

(3) That your overall service substantially outweighed any wrongdoing found by the administrative separation board.

FINDINGS OF FACT

The Board, having reviewed all the evidence of record pertaining to your allegations of error or injustice, finds as follows:

a. You initially enlisted in the Navy on 18 June 2008, and remained on active duty continuously pursuant to a series of reenlistment contracts and/or enlistment extensions until your discharge in July 2020.

b. Your final reenlistment contract was signed in July 2017 for a period of three years. This contract established an EAOS date of 27 July 2020. However, you subsequently signed an "Agreement to Extend Enlistment" for an additional six months. This extension would have

[1] Your application described this inquiry as a CI, but it was actually appointed as a PI. The distinction is irrelevant for purposes of this review.

extended your EAOS to 27 January 2021, but it never became operative.[2] Accordingly, at all relevant times your EAOS remained 27 July 2020.

c. At all times relevant in this case you were stationed at Naval Air Station, [redacted], [redacted], with Fleet Air Reconnaissance Squadron [redacted] Detachment. Your parent command, Fleet Air Reconnaissance Squadron [redacted], was located at [redacted] Air Force Base (AFB) in [redacted].

d. By memorandum dated 30 October 2019, a CI was initiated to inquire into the facts and circumstances surrounding allegations that you sexually harassed and assaulted a female subordinate.[3] On 8 November 2019, the CI investigating officer (IO) issued a report in which he substantiated the sexual harassment allegations. Specifically, he found that you "acted out-of-bounds and used [your] position and authority to sexually harass and assault [the subordinate] by making inappropriate comments and making unwanted physical contact." The IO further found that you provided a false statement by saying that you never touched the subordinate Sailor, contrary to eyewitness reports. You submitted a rebuttal to these findings on 25 November 2019, which included your own statement, several witness statements, and your application for consideration by the Limited Duty (LIMDU) officer procurement selection board.

e. On 29 February 2020, your girlfriend at the time, who was also an enlisted Sailor, filed a criminal domestic violence complaint against you with local civilian law enforcement. Specifically, she reported that you became agitated while at her residence (which you shared at the time) and began poking her in the chest with your finger. She further reported that you "grabbed her by the neck and began to choke her" with your hand and "pushed her against the wall" after you had confronted her about messages that you found on her computer. In addition to making this criminal complaint, your girlfriend also applied for a protective order. Your report differed from hers, in that you reported only that you pushed her out of the way as you attempted to regain access to the residence. A final protective order was later issued that prohibited you from having contact with her until 30 June 2020 and required you to surrender your firearms. On 2 March 2020, your command initiated a PI into the circumstances regarding this alleged assault. Although this PI made no formal findings,[4] the officer who conducted it recommended that your command proceed with disciplinary action and that your security clearance remain suspended pending the outcome of civil court proceedings for the pending charge of assault in the second degree.

f. By memorandum dated 11 March 2020, the Secretary of Defense (SECDEF) issued official travel restrictions for service members in response to the COVID-19 pandemic.

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[2] The NAVPERS 1070/621 form that you signed to extend your enlistment was never signed by a certifying officer to make the extension operative.

[3] The specific allegation was that you asked this subordinate numerous personal questions about her relationship status, and that you pressured her to get food with you and to attend a flag football game later that evening. It was also alleged that you pressured this subordinate to give you a hug, and that you grabbed her sleeve in this effort.

[4] Neither you nor your accuser were willing to give a statement – you simply explained that things did not go well when you went to your accuser's house to get your belongings. The preliminary inquiry consisted of gathering evidence and speaking to your supervisory and your accuser's supervisor.

Specifically, SECDEF ordered that all official and non-official travel for service members be stopped for 60 days, subject to a list of potential exceptions that would have to be granted in writing by either the appropriate Combatant Commander or the Service Secretary.[5] These travel restrictions were modified and reissued by SECDEF by memorandum dated 20 April 2020, with several forms of travel exempted from the restrictions. One of these exemptions was "[t]ravel by individuals pending retirement or separation," but there was no exception that would be applicable to administrative separation boards.

g. On or about 13 March 2020, you were notified that you were being considered for administrative separation for misconduct due to commission of two serious offenses, as evidenced by the October 2019 CI and the March 2020 PI. You elected to exercise your right to an administrative separation board.

h. By e-mail dated 16 April 2020, the Staff Judge Advocate (SJA) of your parent command at [redacted] AFB notified your detailed military defense counsel that the convening authority wanted your administrative separation board to proceed via VTC due to the travel restrictions, with you and your military defense counsel participating remotely at the [redacted] while the board members and recorder convened at [redacted] AFB. Your defense counsel immediately objected to the conduct of the administrative separation board by these means, but the SJA informed him that it was the convening authority's discretion as confirmed by the Navy Personnel Command (NPC) Office of Legal Counsel (OLC).[6] By memorandum dated 30 April 2020, your attorney's request for an exception to the travel restrictions based upon the "mission essential" nature of the administrative separation board was denied based upon the availability of VTC facilities for this purpose.

i. On 21 May 2020, your administrative separation board convened with the board members and recorder in a conference room at [redacted] AFB, while you and your detailed counsel appeared via VTC from a courtroom at the [redacted]. You report that this connection was fraught with technical glitches, and that the technology limited your ability to see the board members and vice versa. You did, however, call six witnesses in your defense, and their testimony is recorded in the record of proceedings for your board.[7] After considering all of the evidence, the administrative separation board unanimously found that the preponderance of the

[5] The travel restriction permitted this exception authority to be delegated in writing to no lower than the first general or flag officer in the potential traveler's chain of command

[6] Specifically, your command's SJA stated that the NPC OLC provided guidance on the conduct of administrative separation boards via VTC as follows: "Whether ADSEP boards will proceed as scheduled will be determined on a case-by-case basis by the … convening authority. In evaluating whether cases should proceed as scheduled, … convening authorities should consider postponing the case unless the member is approaching their retirement date or obligated service date or a board is otherwise required for operational reasons." NPC OLC further advised the SJA that it appeared from the facts related that your case fell within the categories excepted from the guidance to consider postponement, and that "[c]ommands are encouraged to consider travel alternatives such as telephonic or video testimony for ADSEP boards."

[7] Three of the witnesses that you called had previously provided statements that you submitted in response to the substantiated CI findings, and one of the witnesses that you called had been interviewed during the PI regarding the assault allegations against you regarding the character of the alleged victim. All of these witnesses testified consistently with their previous statements.

evidence supported both allegations of misconduct by reason of commission of a serious offense, and recommended that you be separated from the Navy under OTH conditions. Your detailed counsel subsequently submitted a letter of deficiency regarding the administrative separation board proceedings, raising the same objections that you have raised in your complaint to the DDC. Despite these objections, the separation authority approved the recommendation of the administrative separation board that you be involuntarily separated under OTH conditions for misconduct due to commission of a serious offense. You were subsequently separated from the Navy under OTH conditions on 13 July 2020.

j. Despite your discharge from the Navy under OTH conditions, in December 2020 the Department of Veterans Affairs (VA) determined that the entirety of your service was to be considered honorable for VA purposes. The VA made this determination based upon its findings that the administrative separation board findings were not supported by substantial evidence[8] and that the procedures were tainted by procedural defects.

k. On 4 September 2020, the civilian prosecutor decided not to pursue the criminal assault charge pending against you.[9]

l. By memorandum dated 10 February 2022, OJAG Code 13 provided an AO for the Board's consideration regarding the legal considerations pertaining to the circumstances of your administrative separation board.[10] The AO offered the following findings for consideration:

(1) Your administrative separation board was conducted in compliance with all relevant and applicable military procedures, policies, regulations, directives, and federal case law, including but not limited to MILPERSMAN 1910-512 and MILPERSMAN 1910-516. Specifically, OJAG Code 13 opined that the applicable law and regulations do not afford respondents the right to a physical, in-person appearance before the administrative separation board, and that the VTC utilized during your administrative separation board afforded you all of the rights due to you in these proceedings. In making this determination, the AO noted that the term "in person" is not defined in the MILPERSMAN, nor is the term modified by any descriptive text that would inform its meaning.

(2) None of the technical deficiencies that you described for your administrative separation board violated your due process rights. In making this finding, the AO noted that the record of proceeding for your board did not note any technical difficulties, but that it did reflect the effective exercise of your rights at the administrative separation board. Specifically, it noted that you were able to *voir dire* and challenge board members, despite the technical challenges that you described. It also stated that there was no evidence of any ex parte communications or any improper actions by either the board members or the recorder during the periods of technical

[8] Specifically, the VA was persuaded by the testimony of the witness statements that you presented which contradicted the administrative separation board findings.
[9] The prosecutor entered a verdict of *nolle prosequi*.
[10] This AO was specifically limited to addressing whether or not the Navy complied with the applicable law and regulation in effect. It did not address whether the circumstances represented an injustice warranting relief.

difficulty that you described, nor of any harm caused by the reported inability of the board members to observe your military bearing.

(3) There was no error in the convening authority's decision to convene the administrative separation board remotely and/or to deny your travel waiver request. Specifically, the AO stated that the denial of the travel waiver request was consistent with the travel restriction policy in place at the time, and was reasonable under the circumstances.

(4) Any confusion over your EAOS date would not affect the AO findings, but the understanding of your EAOS date likely did impact the urgency to conduct the board since there is no authority to extend an enlistment solely for separation processing. The AO also noted that the CARES Act had no legal impact on Navy administrative separation processing.

m. By letter dated 16 March 2022, your attorney submitted a rebuttal to the above referenced AO for the Board's consideration. Specifically, your attorney accused OJAG Code 13 of attempting "to stretch the plain meaning of what 'in person' connotes" in the context of MILPERSMAN 1910-156, asserting that this term is "clear and unambiguous" in creating the right for an in-person, physical presence during an administrative separation board. He further asserted that the failure of OJAG Code 13 (or your previous military defense counsel) to identify any other example of a remote administrative separation board being conducted over the objection of the respondent supports the argument that the term "in person" must entitle the respondent to physically appear before the administrative separation board. Your attorney then argued that the CARES Act did not authorize the use of VTC as a substitute for in person appearance at an administrative separation board absent the consent of the respondent. Finally, your attorney asserted that OJAG Code 13 glossed over the critical error created by the confusion over your EAOS date, as the alleged confusion caused your administrative separation board to be pushed through without the opportunity to personally appear and before the decision was made by civilian authorities not to prosecute you for the assault offense.

CONCLUSION

As stated previously, the Board found no error or injustice in your case warranting relief.

First, the Board determined that you did not have a right to appear *physically* in person before the board. Your attorney's contention that the term "in person," as it appears in MILPERSMAN 1910-516, is "clear and unambiguous," is simply not accurate – the Cambridge dictionary definition is not controlling or persuasive in this regard. In this context, the term could mean physical presence, as you contend, but it could just as easily be interpreted as the opposite of "in absentia." Considering that the MILPERSMAN provides exceptions to the "in person" requirement under certain circumstances to permit administrative separation boards to be conducted "in absentia," the latter is a more supportable interpretation.[11] The Board believes that this interpretation of the term would indeed support the participation of a respondent via VTC.

[11] The Board notes that the case law cited by your detailed military defense counsel in the request for mission essential travel (*Lewis v. United States*, 114 Fed. Cl. 682 (2014)), which was referenced in your application to the

The Board is not alone in finding this to be a reasonable interpretation of the term. Both the NPC OLC and OJAG Code 13 also interpreted the MILPERSMAN in this manner. The proponent of the MILPERSMAN is the Chief of Naval Personnel, who receives legal advice regarding the interpretation of regulations from OJAG Code 13. In the case of ambiguity within a naval regulation, the proponent's interpretation of the ambiguous provision governs so long as that interpretation is reasonable. The fact that the same legal office which would advise the proponent of the regulation in question on its meaning found that the term "in person" would permit appearance via VTC was very persuasive.

Finally, the Board believes that the interpretation of the term "in person" in the MILPERSMAN to encompass appearances via VTC is the most reasonable one and the one most consistent with the unique nature of the military. One of the primary reasons for a separate justice system within the military is its expeditionary nature. Given this unique characteristic of the military, it is inconceivable that the military officials who drafted the MILPERSMAN intended to unnecessarily tie the hands of commanders and in doing so risk hindering vital operations by requiring the respondent to be in the same room as the board members. There simply would be no reason for this requirement, especially since VTC appearances do not deprive a respondent of any right, capability, or benefit in the administrative separation board process that they would enjoy if physically present in the same room. You were clearly able to participate fully and meaningfully in this process. The Board does not question that it is preferable to afford a respondent this right; it simply questions the reading of an ambiguous term in the MILPERSMAN in such a way as to mandate it even under adverse or even under impossible circumstances – such an interpretation would be detrimental to good order and discipline within the Navy. The circumstances of 2020, in the midst of the COVID-19 pandemic, were certainly adverse, and precisely the type of circumstances which would justify convening an administrative separation board remotely. An administrative separation board is far from a "mission critical" event, so the denial of the travel waiver was entirely reasonable under these circumstances and actually required by the SECDEF-imposed travel restrictions in place at the time. Further, the "pending retirement or separation" exception to the travel restrictions clearly did not apply to your case because you were not pending separation at the time of the administrative separation board.

The Board was not persuaded by your contention that the inability of either OJAG Code 13 or your detailed military defense counsel to identify any other examples of administrative separation board respondents being required to appear via VTC over their objection supported your assertion that the MILPERSMAN mandates physical presence. First, OJAG Code 13 was not asked to provide any such examples, and the AO provided did not rely upon such examples. Further, the Board was not surprised that your former military defense counsel had not seen other cases such as yours since he likely had never before served as a defense counsel during a

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Board, in support of the assertion that "Federal courts have gone so far as to overturn the results of boards where the respondent's right to be physically present was denied" involved a board of inquiry which proceeded *in absentia* of the officer involved due to his incarceration. Your case is not analogous, as you did appear before the administrative separation board in person via VTC. The Board also noted that the Federal court in this case did not overturn the results of the separation board in question as your military defense counsel suggested, as the legality of those proceedings were not at issue.

worldwide pandemic which shut down virtually all official military travel. This was clearly an unprecedented situation. However, when asked for guidance by your command, the NPC OLC was prepared with a response regarding the appropriate considerations under the circumstances. The Board found it to be extremely unlikely that you were the only Sailor who appeared before an administrative separation board via VTC without consent during the travel restrictions that were imposed due to the COVID-19 pandemic.

Based upon the Board's interpretation of the MILPERSMAN to permit VTC appearances at administrative separation boards by respondents even over their objection, the Board did not find any violation of applicable laws or regulations in the administrative separation proceedings which resulted in your involuntary separation.

Next, the Board found no merit in your contention that the confusion over your EAOS date resulted in the error or injustice of unnecessarily pushing your administrative separation board because there was no confusion over your EAOS date. Your naval records reflect that your enlistment extension, which you signed on 16 January 2019, was never accepted and made operative by naval authorities. Accordingly, your EAOS date was, at all relevant times, 27 July 2020. Therefore, naval authorities were acting upon an accurate understanding of your EAOS date when they acted to conduct your administrative separation board before your EAOS date. In this regard, the Board notes that the Navy had no authority to involuntarily extend your enlistment for the purpose of facilitating an administrative separation board after your EAOS as you suggested. Accordingly, it was appropriate to conduct the administrative separation board prior to your EAOS date to ensure that your service during your final enlistment was appropriately characterized.

Even if your EAOS date had been extended, however, the Board would have found no error or injustice in the conduct of your administrative separation board under the circumstances. As discussed above, the Board found that you had no right to physically appear in the same room as the board members when VTC capabilities provided the same opportunity. At the time that your travel waiver was denied, there was no way to know how long the travel restrictions would be in place.[12] The Navy was not obligated to delay your administrative separation proceedings indefinitely in order to facilitate a right which did not actually exist.

The Board agreed with your contention that the CARES Act did not apply in your case. Your reliance upon this argument, however, was a red herring because the Navy did not rely upon it to justify conducting your administrative separation board via VTC. Rather, the evidence reflects that your command relied upon the guidance that they received from the NPC OLC. The only relevance of the CARES Act to your case was that it provided an example of Congress loosening the requirements for physical presence in even criminal proceedings due to COVID-19. This was relevant to show the reasonableness of requiring an administrative separation board hearing to proceed via VTC under the circumstances since significantly more due process attaches to criminal proceedings. It was not, however, the underlying legal justification to conduct your

[12] In fact, the Board was not certain that the travel restrictions that remained in place would have permitted your administrative separation board to proceed prior to your EAOS date, even if it had been extended as you believed.

administrative separation board via VTC. As discussed above, no such legal justification was required.

The Board did not find sufficient evidence to support your contention that the limitations of the technology and/or any technical glitches deprived you of due process or a fair hearing. The record of proceedings reflects that you had the opportunity to *voir dire* and challenge the board members. It also reflects that you were able to meaningfully participate in the proceedings, as you clearly offered a thorough defense against the allegations. There was no evidence of any ex parte conversations or improper actions on the part of the board members or the recorder outside of your observation, and the Board will not infer such actions to professional officers based solely upon speculation, especially since such actions could theoretically occur even if you were in the same room. The photograph that you provided of the conditions of the courtroom in which you appeared at the [redacted] did not support your contention that the limitations denied you the opportunity to observe the board members or for them to observe your bearing. Specifically, the large screen appeared to provide you a clear view of the members, and any limitations upon the Board's opportunity to continuously observe you would likely aver to your favor since you would only need to worry about maintaining your bearing while on the screen.

Finally, the Board found your contention that your involuntary separation was not supported by substantial evidence to be entirely without merit. Despite the fact that you presented witnesses at the administrative separation board hearing to counter the allegation of sexual harassment in October 2019, there was more than sufficient evidence to support this charge. Not only did an alleged victim make immediate allegations against you, but her allegations were corroborated by multiple eyewitnesses who provided statements attesting to your actions and her demeanor and reaction to them. Further, the testimony that you provided to counter these allegations was not nearly as exculpatory as you believe it to be. Certainly these witnesses were favorable to your case, but their testimony was subjective from their individual perspectives and they were not necessarily in a position to counter the evidence against you. There was also no question that these allegations, if true, constituted sexual harassment given their nature, the timing and location of their occurrence, and your relevant superiority in grade to the alleged victim. The Board had no doubt whatsoever that the sexual harassment allegation, which was one of the serious offenses for which you were discharged, was supported by at least the preponderance of the evidence, which is the applicable standard of proof. Likewise, the Board found sufficient evidence to support the allegation of assault. Although the available evidence was conflicting and essentially "he said, she said" since both you and the alleged victim refused to cooperate in the PI, its preponderance did support the allegation. In fact, even your own version of the events would support the charge of assault, if not the specific facts alleged by your accuser. Again, the Board had no doubt that this charge was supported by at least the preponderance of the evidence.

The Board did not find the fact that the civilian authorities ultimately decided not to prosecute you for the assault charge to be persuasive. First, the standard of proof to sustain a criminal conviction is much higher than the standard of proof required to sustain an administrative discharge from the Navy. The higher standard of proof likely could not be met, especially if the alleged victim continued to refuse to cooperate. That does not, however, negate the preponderance of the evidence which did support the allegation. Additionally, the Board has no

way to know what motivated the civilian prosecutors not to pursue the charge against you. It is entirely possible that the civilian prosecutor decided that the OTH discharge that you received was sufficient punishment for the offense, and decided not to waste limited prosecutorial resources to pursue additional punishment. In any case, the Board found the civilian prosecutor's decision not to pursue the charge against you to be largely irrelevant to the question of whether there was sufficient evidence to support your involuntary separation, as there clearly was.

The Board found the action taken by the VA on your case to be even less persuasive in this regard. The VA based its determination that the administrative separation board's findings were not supported by substantial evidence upon an incomplete record. It is not apparent from the list of evidence considered on page 4 of the VA decision letter that the VA considered the evidence gathered during the CI or the PI, which was entered as exhibits during the administrative separation board hearing but not included with the record of proceedings that we retrieved from your official records. Further, the VA's analysis makes no reference to this evidence, and its findings ignore it.[13] The VA also found procedural defects in your administrative separation proceedings, but provided no analysis in this regard. It made this conclusion based solely upon your arguments. The VA is not qualified to interpret Department of the Navy regulations. While the VA is certainly free to make their own conclusions for their own purposes, their conclusions in this regard were not based upon the evidence in the record. Accordingly, the Board did not find the VA findings to be persuasive.

The Board found no error in the CI upon which the allegation of sexual harassment was based, or in the PI which gathered evidence pertaining to the allegation of assault. Both were conducted in accordance with all applicable regulations. The findings of the former were very clearly supported by the preponderance of the evidence, while the latter did not even make findings, but rather only gathered and summarized the evidence upon which the decision to initiate separation procedures was based. Accordingly, the latter was not "prematurely and arbitrarily substantiated" as you claimed. The substantiation of this conduct occurred at the administrative separation board upon the unanimous vote of the board members, after you had the opportunity to confront the evidence against you and to present evidence in your defense. As stated previously, the findings regarding your conduct made during the CI very clearly met the definition of sexual harassment. The relevant conduct in question was not limited to the fact that you touched the sleeve of your accuser, as you suggest. Rather, the primary relevance of the observation that you touched her sleeve was that it corroborated her allegations. Further, even your own description of the events at your former girlfriend's residence would meet the elements for assault, albeit not one as egregious as that described by your accuser. Your description of the event in your application to the Board differs significantly from the description that you have previously provided.[14] Even if there were shortcomings in either of these investigations, they

[13] The Board concluded that the VA's statement that "[t]he findings returned by the [administrative separation] board fall far short even of a preponderance standard" could only have been made if the author was unaware of the weight of the evidence which supported the finding, as that evidence clearly outweighed the exculpatory or mitigating evidence upon which the VA relied.

[14] Your description of the event was not one in which you made contact with your girlfriend during a conversation, as you described it in your application to the Board.

would not constitute an error or injustice warranting relief because neither of these investigations served as the basis for your discharged from the Navy. You were discharged from the Navy pursuant to the unanimous recommendation of the administrative separation board. This recommendation was made only after you had the opportunity to confront all of the evidence against you and to provide exculpatory and/or mitigating evidence. The investigations that you claim to have been defective merely gathered the evidence upon which you were later properly discharged from the Navy.

In addition to reviewing the substance of the allegations against you and your administrative separation proceedings for any errors or injustices, the Board also considered the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice in accordance with the Wilkie Memo. In this regard, the Board considered, among other factors, the totality of your career in the Navy, to include your generally high trait averages, favorable evaluation reports, and selection for positions of significant responsibility; the fact that you had been recommended for selection by the LIMDU officer program; your denial of the allegations which resulted in your discharge of the Navy; your contention that your original accuser was influenced by outside sources; your description of the events which resulted in the allegation of assault, and the character of your accuser as described by her supervisor; the favorable descriptions of your character and performance provided in witness statements; and the fact that you were not afforded the opportunity to be physically present for your administrative separation board. Countering these favorable circumstances, however, was the serious nature of the misconduct substantiated against you, which the Board found to be supported by the preponderance of the evidence. The substantiated finding that you assaulted your girlfriend soon after having had sexual harassment allegations substantiated against you, when one would assume your conduct to be guarded, also did not weigh in your favor. Finally, the Board noted that the favorable opinion of your character and performance, as reflected in the statements that you provided and by the witnesses presented at the administrative separation board, was far from unanimous. Specifically, your officer-in-charge (OIC) made a statement during the PI that your performance noticeably declined and that your behavior became "toxic" following the allegation of sexual harassment. He also stated that you had a pattern of misconduct as a "womanizer, who takes advantage of junior [female] Sailors," and that one of your previous OICs confirmed that you had issues with female Sailors.[15] Finally, your OIC stated that did not trust you to carry a weapon, to handle classified material, or to be around junior Sailors. Weighing all of these factors, and considering that the administrative separation board which considered the same evidence was unanimous in its recommendation that you should be involuntarily separated under OTH conditions, the Board found that both your involuntary discharge for commission of serious offenses, and the characterization of your service, was, and remains, appropriate.

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

[15] Specifically, your previous OIC stated that you had a previous sexual assault allegation while serving on-board the U.S.S. [redacted], which was reduced to sexual harassment and was informally resolved.

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.

If you have no new matters to submit, you have the right to appeal the Board's denial of an upgrade of the characterization of your discharge to the Department of Defense Discharge Appeal Review Board (DARB).[16] Pursuant to Section 1553a of Title 10, U.S. Code, the DARB's review is limited to conducting a final review of a request for an upgrade in the characterization of a discharge, so the DARB cannot review those aspects of your case not related to the characterization of your discharge. All DARB requests must be submitted through the Air Force Review Board Agency eApplication Portal (https://afrba-portal.cce.af.mil). The DARB will have access to and review the casefile for this case. Please do not submit any new evidence in support of your request to the DARB, as this will result in their administrative closure of your application. The DARB is the highest administrative level of appeal for a request to upgrade the characterization of a discharge, and their decisions are final.

Sincerely,

5/5/2022

X [redacted]

[redacted]

Executive Director

Signed by: [redacted]

[16] The Board recognizes that this was not the specific relief that you requested, but it considered and denied such relief regardless. Accordingly, you may appeal this aspect of the Board's decision to the DARB.