



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

[REDACTED]
Docket No. 8230-22
Ref: Signature Date

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

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

Ref: (a) 10 U.S.C. 1552
(b) USD (P&R) Memo, "Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code," 20 September 2011
(c) USD (P&R) 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) NCIS 5580/26, Statement, 30 August 2006
(4) Administrative Separation Processing Notice – Administrative Board Procedure, 25 October 2006
(5) [REDACTED] CO Memo 1910 Ser 21/, subj: [Petitioner]; Recommendation for Administrative Separation, undated
(6) COMNAVPERSCOM Msg, subj: Admin Discharge ICO [Petitioner], dtg 151010Z Nov 06

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, hereinafter referred to as the Board, requesting a discharge upgrade.

2. The Board reviewed Petitioner's allegations of error or injustice on 2 December 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner's naval record. Documentary material considered by the Board included the enclosures, relevant portions of Petitioner's naval record, 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, found 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 interest 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 26 June 2003. See enclosure (2).

d. On 30 August 2006, Petitioner made a voluntary statement to the Naval Criminal Investigative Service after been advised of and waiving his rights, in which he admitted to paying a junior Sailor to engage in homosexual activity him during a sea deployment. Specifically, Petitioner admitted to offering the junior Sailor \$100 if he would take his penis out of his pants, and then performed oral sex upon the Sailor once he did so. He later admitted to the same activity during the same deployment for the negotiated price of \$150. Petitioner expressly denied allegations of sexual assault, insisting that all sexual activity was consensual. See enclosure (3).

e. On 25 October 2006, Petitioner was notified that he was being processed for administrative separation for homosexual conduct, as evidenced by his above referenced admission. Petitioner waived his rights to consult with counsel and to request an administrative separation board. See enclosure (4).

f. By undated memorandum, Petitioner's commander subsequently recommended that Petitioner be administratively separated from the Navy for homosexual conduct with an honorable discharge. See enclosure (5).

g. On 15 November 2006, the separation authority, contrary to the commander's recommendation, directed that Petitioner be discharged for homosexual conduct under other than honorable (OTH) conditions. See enclosure (6).

h. On 30 November 2006, Petitioner was discharged from the Navy under OTH condition for homosexual conduct. See enclosure (2).

i. Petitioner admits that he made a mistake, but that no one was harmed by his mistake. He also claims to have otherwise served honorably, that he had the support of his chain of command, and that he was led to believe that he would receive no worse than a general (under honorable conditions) discharge based upon his service record. Finally, Petitioner asserts that he has since earned a college degree, been a productive member of society, and has never been in trouble with law enforcement. He is hoping to purchase a house in the next couple of years, and hopes to have the opportunity to utilize his Department of Veterans Affairs benefits for this purpose.

j. Reference (b) provides that requests to change a narrative reason for separation, to recharacterize a discharge to honorable, or to change a reentry code, should normally be granted when the original discharge was based solely upon the "Don't Ask, Don't Tell" policy and when there were no aggravating factors in the record, such as misconduct. It also provides that although each request must be evaluated on a case-by-case basis, the award of an honorable or general discharge should normally be considered to indicate the absence of aggravating factors.

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MAJORITY CONCLUSION:

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

The Majority found no error or injustice in Petitioner's discharge for homosexual conduct at the time it was administered. Based upon the policy in place at the time, Petitioner's administrative discharge was warranted under the circumstances. He was properly notified of this administrative separation action and the possibility of an OTH discharge, and he waived his right to an administrative separation board. Finally, even though his command recommended that he be honorably discharged despite his misconduct, such a characterization would have been unusual for any homosexual conduct at the time. In Petitioner's case, the aggravating factors related to Petitioner's misconduct justified the OTH discharge directed by the separation authority.

The Majority determined that relief is not warranted in this case pursuant to reference (b) because of the aggravating factors regarding Petitioner's misconduct. Specifically, the record reflects that Petitioner, as a non-commissioned officer at the time, paid a junior enlisted Sailor to engage in sexual activity with him. The solicitation of sexual conduct for money alone would warrant an involuntary separation even absent the homosexual conduct policy which was in place at the time, but Petitioner's misconduct is further aggravated by the grade disparity between Petitioner and the junior enlisted Sailor which made such solicitation inherently coercive and because he clearly compromised his authority as a non-commissioned officer and therefore undermined good order and discipline onboard his ship. Accordingly, the Majority found that relief is not warranted pursuant to the guidance of reference (b).

In addition to considering whether relief is warranted pursuant to the guidance of reference (b), the Majority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interest of justice in accordance with reference (c). In this regard, the Majority considered, among other factors, the totality of Petitioner's naval career, which apart from the acts for which he was discharged appears to have been meritorious and warranted a favorable recommendation for participation in the Seaman to Admiral-21 Commissioning Program; that Petitioner's commander recommended that he be honorably discharged despite his misconduct; Petitioner's post-service academic and professional accomplishments; the non-violent nature of Petitioner's misconduct; the subsequent change in Navy policy regarding homosexual conduct; Petitioner's relative youth and immaturity at the time of his misconduct; and the passage of time since Petitioner's discharge. While the Majority recognized the seriousness of Petitioner's misconduct, it ultimately believed that Petitioner's command was best positioned to assess the impact of Petitioner's misconduct upon the command; to know Petitioner's overall character and performance as a Sailor; and to weigh these factors against each other. This assessment resulted in no punitive action being taken against Petitioner, and in the recommendation that Petitioner's service be characterized as fully honorable at a time when such a characterization for even benign homosexual conduct was rare. This factor in particular, combined with the other mitigating factors discussed above, to include the subsequent repeal of the DADT policy in particular, convinced the Majority that full equitable relief is warranted in the interest of justice.

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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 in the interest of justice:

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 separation code was "JFF"; and that his reentry 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 corrections be made to Petitioner's record.

MINORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Minority of the Board found insufficient evidence of any error or injustice warranting an upgrade to Petitioner's characterization of service. It did, however, find that a change to Petitioner's narrative reason for separation, and its associated separation authority and separation code, is warranted in the interest of justice based upon the repeal of the DADT policy and the potential for future discrimination separate and apart from his OTH characterization of service based upon the reference to homosexual acts.

The Minority concurred with the Majority conclusions that there were no errors or injustice in Petitioner's discharge under OTH conditions at the time it was administered, and that relief is not warranted in this case pursuant to reference (b) due to the aggravating factors.

Like the Majority, the Minority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interest of justice in accordance with reference (c). In this regard, the Minority considered the same potentially mitigating factors as did the Majority. Even considering these mitigating factors, however, the Minority did not believe that an upgrade to Petitioner's characterization of service is warranted in the interest of justice. As mentioned above, Petitioner's conduct would have warranted an involuntary discharge even if the DADT policy was not in place at the time. The solicitation of sexual activity for money, the corrupting effect that such solicitation would have upon a junior enlisted Sailor, the inherently coercive nature of such solicitation based upon the rank disparity between Petitioner and the junior enlisted Sailor, and the compromise of Petitioner's authority as a noncommissioned officer that would have resulted from such solicitation and its associated adverse impact upon good order and discipline onboard the ship, all conspired to cause the severity of Petitioner's misconduct to far outweigh the potentially mitigating circumstances. Additionally, other than providing a copy of his college diploma, Petitioner offered no evidence of any post-service accomplishments or contributions to society which might otherwise justify such equitable relief.

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Accordingly, the Minority did not believe that an upgrade to Petitioner's characterization of service is warranted in the interest of justice given the totality of the circumstances.

While the Minority found an insufficient basis to justify an upgrade Petitioner's discharge, it did find Petitioner's narrative reason for separation to be an inequitable. The reference to homosexual acts in Petitioner's narrative reason for separation carries the potential for discrimination separate and apart from the stigma associated with Petitioner's OTH characterization of service. While the Minority found the latter to remain appropriate under the circumstances, it did not believe that Petitioner should continue to be discriminated against based upon his sexual orientation or homosexual acts, especially since such conduct is no longer prohibited in the Navy. While a reference to misconduct would be an appropriate narrative reason for separation under the circumstances, the Minority did not believe it would be appropriate to change Petitioner's record to reflect such a reason for separation since Petitioner was never notified of such as the basis for his discharge and such a change would place Petitioner in a relatively worse position. Accordingly, the Minority determined that Petitioner's narrative reason for separation, and associated separation authority and separation code, should be changed to reflect "Secretarial Authority" in the interest of justice.

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 in the interest of justice:

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 separation code was "JFF." No changes are to be made to Petitioner's characterization of service or reentry code.

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

That no further corrections 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.

12/20/2022

[REDACTED]

Executive Director

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ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

___ MAJORITY Recommendation Approved (Full Relief – I concur with the Majority conclusion and direct the relief recommended by the Majority above.)

X MINORITY Recommendation Approved (Partial Relief – I concur with the Minority conclusion and direct the relief recommended by the Minority above.)

___ Board Recommendation Disapproved (Deny Relief – I concur with the Minority conclusion that an upgrade to Petitioner’s characterization of service is not warranted in the interest of justice, but disagree with the Minority rationale to change his narrative reason for separation. Specifically, I find that Petitioner’s narrative reason for separation was properly assigned and appropriate based upon the policy in effect at the time, and the continuing potential for discrimination based upon that characterization to be minimal. Accordingly, no corrective action is to be taken on Petitioner’s naval record.)

2/7/2023

[REDACTED]

Assistant General Counsel (M&RA)

Signed by: [REDACTED]