



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

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Docket No. 7425-23  
Ref: Signature Date



Dear █

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board, sitting in executive session, considered your reconsideration application on 3 November 2023. The names and votes of the panel members will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of the Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, 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).

After an initial period of Honorable service, you reenlisted in the U.S. Navy and began another period of active duty service on 29 July 1991. On 7 April 1992 you received non-judicial punishment (NJP) for four (4) separate specifications of sodomy upon a male E-2 Sailor, and three (3) separate specifications of contributing to the delinquency of a minor in contravention of █ law. You did not appeal your NJP.

On 9 April 1992, your command provided you notice that you were being administratively processed for separation from the Navy by reason of misconduct due to the commission of a serious offense, defective enlistment and induction due to fraudulent entry into the naval service, and for homosexuality due to: (a) your statement of being a bisexual, and (b) engaging in, attempting to engage in, or soliciting another to engage in homosexual acts. The least favorable

discharge you could have received was an under Other Than Honorable conditions (OTH) characterization of service. You consulted with counsel and, on 14 April 1992, you elected your right to request an administrative separation board (Adsep Board).

On 1 May 1992, an Adsep Board convened in your case, and at the Adsep Board you were represented by a Navy Judge Advocate. Following the presentation of evidence and witness testimony, the Adsep Board members unanimously determined that you committed the misconduct for each of the listed reasons for processing as charged. Subsequent to the misconduct findings, the Adsep Board members recommended that you be separated with an OTH characterization of service.

On 11 May 1992 your commanding officer (CO) recommended to the Separation Authority that you receive an OTH characterization of service. In his endorsement, the CO stated in pertinent part:

Subject member has appeared at Commanding Officer's Nonjudicial Punishment and punished for engaging in homosexual acts under aggravating circumstances. Subject member committed acts of sodomy with a subordinate under circumstances that clearly violated naval superior subordinate relationships. Subject member also admitted engaging in homosexual acts prior to and subsequent to enlisting into the Naval Service. Prior to enlistment, subject member answered question 35f of the Record of Military Processing - Armed Forces of the United States in a fraudulent manner. █ does not have the personal discipline to conduct himself responsibly or maturely. Therefore, I recommend subject member be separated from the Naval Service with an other than honorable discharge.

On 26 May 1992 the Separation Authority (PERS-83) specifically directed that upon your discharge you were to be administratively reduced in rank to E-3. Ultimately, on 10 June 1992, you were discharged from the Navy with an OTH characterization of service and assigned an RE-4 reentry code. Your narrative reason for separation specifically stated, "homosexuality – engaged in or attempted to engage in a homosexual act or acts."

In 2018, you filed an application with this Board requesting a change to your record. On 17 June 2019, this Board granted you partial relief. In accordance with current DADT policies, the Board modified your narrative reason for separation, separation code, and separation authority to reflect "Secretarial Authority." The Board, however, did not upgrade your discharge characterization or otherwise modify your reentry code, or restore your rank, citing certain aggravating factors associated with the misconduct underlying your discharge.

The Don't Ask, Don't Tell Repeal Act of 2010, and the Under Secretary of Defense Memo of 20 September 2011 (Correction of Military Records Following Repeal of Section 654 of Title 10, United State Code), both set forth the Department of the Navy's current policies, standards, and procedures for correction of military records following the "don't ask, don't tell" (DADT) repeal. The current policy now provides service Discharge Review Boards with the guidance to grant requests to change the characterization of service to "Honorable" or "General (Under

Honorable Conditions),” narrative reason for discharge to “Secretarial Authority,” separation code to “JFF,” and reentry code to “RE-1J” when the original discharge was based solely on DADT or a similar policy in place prior to enactment of it, and there are no aggravating factors in the record, such as misconduct.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo and the DADT repeal guidance. These included, but were not limited to, your desire for a discharge upgrade and changes to your separation authority and reentry code. You contend that: (a) you are entitled to an upgrade to Honorable discharge based on criteria established by Federal law, and the Stanley and Wilkie Memos, (b) you were targeted and treated more harshly than your fellow Sailors due to your sexual orientation, (c) under current Navy standards your administrative separation would not have been tainted by prejudice and discrimination, and (d) exemplary post-service conduct. For purposes of clemency and equity consideration, the Board considered the entirety of the evidence you provided in support of your application.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board concluded that significant negative aspects of your conduct and/or performance greatly outweighed any positive aspects of your military record. The Board determined that characterization under OTH conditions is generally warranted for misconduct and is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. The Board determined that the record clearly reflected your misconduct was intentional and indicated you were unfit for further service. Moreover, the Board noted that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not otherwise be held accountable for your actions.

Additionally, the Board concluded that discharge upgrade relief provisions of the DADT policy guidance did not mandate relief given the circumstances surrounding your discharge. First, your command processed you for three separate bases: defective enlistment and induction due to fraudulent entry into the naval service, misconduct due to the commission of a serious offense, and homosexuality. Thus, your separation processing and discharge was not based solely on the DADT policy. Second, the Board determined there were aggravating factors in the record, such as misconduct. Even with eliminating the four consensual sodomy offenses from the Board’s consideration given that such acts would no longer be prohibited today in the military, the Board determined the remaining misconduct in the record, namely the multiple violations of ██████████ law not related to homosexuality, still merited an OTH characterization.<sup>1</sup>

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<sup>1</sup> In addition to the three (3) ██████████ law violations, the Board also noted that the Navy fraternization policy also provided, in part, that personal relationships between officers or between enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited. The Board was further troubled that the Petitioner was a 34-year-old E-5 at the time of certain social interactions with junior enlisted personnel all under the age of 21 that did not respect differences in rank or grade.

The Board observed that character of military service is based, in part, on conduct and overall trait averages which are computed from marks assigned during periodic evaluations. Your overall active duty trait average in conduct during your reenlistment was approximately 1.0. Navy regulations in place at the time of your discharge required a minimum trait average of 3.0 in conduct (proper military behavior) for a fully honorable characterization of service. The Board concluded that your conduct marks during your active duty career were a direct result of your serious misconduct which further justified your OTH discharge and RE-4 reentry code.

As a result, the Board determined that there was no impropriety or inequity in your discharge, and the Board concluded that your serious misconduct and disregard for good order in discipline clearly merited your discharge. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants granting you the relief you requested or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

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 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.

Sincerely,

11/17/2023

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Executive Director

Signed by: █