



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

██████████
Docket No. 8164-23
Ref: Signature Date

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

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

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
(d) OPNAV Instruction 5370.2E, Navy Fraternalization Policy, 4 November 2020

Encl: (1) DD Form 149 w/attachments
(2) City of ██████████, Department of Health, Bureau of Records and Statistics, Certificate of Death, 7 June 1967
(3) N.Nav. 360, Appointment in Naval Reserve, 15 February 1941
(4) Navy Department Bureau of Navigation Memo Nav-1614-WOK 96365-4, subj: Active duty with pay and allowances – chargeable against appropriation, "Pay, Subsistence and Transportation of Naval Personnel," 25 February 1941
(5) N.Nav. 448, Report on the Fitness of Officers (19410228 – 19410630)
(6) N.Nav. 448, Report on the Fitness of Officers (19410701 – 19410930)
(7) N.Nav. 448, Report on the Fitness of Officers (19411001 – 19420331)
(8) N.Nav. 448, Report on the Fitness of Officers (19420401 – 19420619)
(9) N.Nav. 448, Report on the Fitness of Officers (19420620 – 19431043)
(10) SECNAV Memo (Confidential) P13-7 83443, subj: Procedure for the DISPOSITION of HOMOSEXUALS among Personnel of the U.S. Naval Service., 1 January 1943
(11) ██████████ Commandant Memo, subj: ██████████ and [Subject], investigation in the case of ██████████ 19 March 1943 (with supporting statements)
(12) Statement of ██████████ undated
(13) Subject's Memo, subj: Resignation, 23 March 1943
(14) SECNAV Memo Pers-3101-GT 96365, subj: Resignation from U.S. Naval Reserve, acceptance of., 16 April 1943
(15) Medical History Slip
(16) BUPERS Letter PERS-B23-BS:gm 96365, 28 October 1968

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1. Pursuant to the provisions of reference (a), the Subject's next of kin, hereinafter referred to as Petitioner,¹ filed enclosure (1) with the Board for Correction of Naval Records, hereinafter referred to as the Board, requesting that the Subject's characterization of service be upgraded to honorable and that his narrative reason for separation be changed to reflect the equivalent of "Secretarial Authority." Petitioner further requested that the Subject's record be corrected to reflect any awards or decorations posthumously granted, and to remove all adverse information related to the Subject's sexual orientation.

2. The Board reviewed Petitioner's allegations of error or injustice on 13 October 2023 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the Subject's naval record. Documentary material considered by the Board included the enclosures; relevant portions of the Subject's naval record; and applicable statutes, regulations, and policies, to include references (b) and (c).

3. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board 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 (DON).

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. On 28 February 1941, the Subject was appointed as an Ensign in the U.S. Naval Reserve (USNR). See enclosure (3).

d. The Subject was subsequently ordered to active duty as a Communication Watch Officer on the staff of the Commander, Base Force, Pacific Fleet, onboard the [REDACTED] in [REDACTED]. See enclosure (4).

e. The Subject's first four fitness reports (FITREP), covering the period 28 February 1941 to 19 June 1942, were generally favorable. The least favorable of these FITREPs was for the period 1 October 1941 to 31 March 1942, as he was described in this FITREP as "[a]n extremely intelligent but somewhat temperamental officer," and his commander stated that he would only "be satisfied to have him" in war. Despite these comments, the Subject's performance of duty during and after the attack on Pearl Harbor, and during subsequent salvage operations, was described as "outstanding" and he was recommended for promotion. See enclosures (5), (6), (7), and (8).

f. On or about 20 June 1942, Petitioner was assigned to special duty with the [REDACTED], [REDACTED], [REDACTED]. See enclosure (9).

g. By memorandum dated 1 January 1943, the Secretary of the Navy (SECNAV) published then-confidential guidance establishing procedures for disposing of cases of homosexual

¹ Petitioner is the Subject's son. The Subject passed away in June 1967. See enclosure (2).

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conduct. This guidance identified two classes of homosexual acts: Class I acts were defined as those acts accompanied by assault or coercion, any action with a child under the age of consent, or the invasion of the rights of others so long as the other person concerned in the act did not willingly cooperate; while Class II acts were defined as acts representing habitual performances of persons actually homosexual in their inclinations and involving no invasion of the rights of others. This guidance directed commanding officers to conduct a thorough inquiry into the circumstances of any cases of homosexuality brought to their attention to determine whether the alleged act(s) occurred and whether the act(s) are properly classified as Class I or Class II homosexual acts. The preferral of court-martial charges was required for any substantiated homosexual acts, but those charged with Class II-type acts were to be encouraged to resign for the good of the service with the promise of favorable consideration. See enclosure (10).

h. In late February 1943, the Subject and several other officers became suspected of engaging in homosexual acts in the officer quarters. An investigation was initiated which gathered incriminating evidence about the Subject and one other officer. This included the testimony of several enlisted Sailors who admitted to homosexual acts with the Subject. In the midst of this investigation, the Subject was arrested on the evening of 8 March 1943 after allegedly interfering with a sentry on duty.² On 13 March 1943, the Subject signed the following hand-written statement: "I am a homosexual, having had tendencies in that direction all my life. I have indulged in overt acts with enlisted men since having entered the Navy. I have never molested children or coerced anyone." See enclosure (11).

i. On 23 March 1943, Petitioner tendered his resignation from the Navy for the good of the service and to escape trial by general court-martial (GCM). See enclosure (13).

j. By memorandum dated 16 April 1943, the SECNAV accepted the Subject's resignation from the USNR, subject to the determination that he was physically qualified for discharge.³ See enclosure (14).

k. On 23 April 1943, Petitioner was found physically qualified for discharged from the USNR. See enclosure (15).

l. The Subject's resignation for the good of the service to escape trial by GCM became effective on 23 April 1943.⁴ His separation was considered to be under other than honorable (OTH) conditions. See enclosure (16).

m. Petitioner asserts that the Subject served honorably for almost three years, and was forced to resign under OTH conditions under a policy similar to the now revoked "Don't Ask, Don't

² The sentry reported that the Subject approached him and engaged in a conversation about penis sizes and his erection. He then allegedly followed the sentry around and arguably sexually harassed the sentry before being arrested. See enclosure (12).

³ The Subject's resignation was to be effected upon the date of a finding that he was physically qualified for separation.

⁴ The Subject's discharge and characterization of service are not reflected any discharge documents, as his resignation predated the DD Form 214. The effective date and characterization of the Subject's discharge is reflected in enclosure (16).

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Tell" (DADT) policy. He further asserts that charges were never preferred against the Subject, that the Subject was not afforded legal counsel, and that the Subject's record is free of any other misconduct. Petitioner requests that the Subject's honor be restored and his name added to the ranks of all who served during World War II in accordance with reference (b). Petitioner also asserts that the Subject was not afforded any due process in his discharge, and cited to reference (c) as a basis for relief.⁵ See enclosure (1).

n. Upon the repeal of the DADT policy in September 2011, reference (b) was published to provide guidance that discharge relief should normally be granted when the original discharge was based solely on DADT or a similar policy in place prior to the enactment of DADT and there were no aggravating factors, such as misconduct, in the record.⁶

MAJORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Majority of the Board found sufficient evidence of an injustice warranting relief.

The Majority found no error in the acceptance and/or circumstances of the Subject's resignation, or in the characterization of his discharge, at the time that they were executed. In this regard, the Majority did not concur with Petitioner's contention that the Subject was denied due process. There is no evidence that the Subject's confession was coerced, or that he was denied the right to counsel. Additionally, Petitioner's argument that the procedures outlined in enclosure (10) were not complied with was without merit, as there were no restrictions upon when a member could submit a request for resignation for the good of the service. In the absence of evidence to the contrary, the Board relies upon the presumption of regularity to establish that naval authorities properly performed their functions. Unfortunately, Petitioner failed to provide sufficient evidence to overcome this presumption as it pertains to the investigation of the Subject's conduct and the subsequent processing of his resignation and discharge. Accordingly, the Majority found no error in the acceptance of the Subject's voluntary resignation at the time that it was administered, or in the OTH characterization of his discharge. That was, regrettably, the standard at the time.

The Majority found that the Subject was, in fact, discharged solely based upon a policy similar to DADT prior to the enactment of DADT. Enclosure (10) was a similar policy which essentially prohibited homosexual conduct in the DON, and established the procedures by which the Subject's resignation for the good of the service was undoubtedly encouraged and executed. Further, the Majority found no evidence of misconduct unrelated to the Subject's homosexual conduct in his service record. To the contrary, the Subject's record reflects that he was a well-respected and promising young officer prior to the revelation of his sexual orientation.

⁵ Specifically, Petitioner cited to paragraph 6f of the Attachment to reference (c), which directs the Board to consider that "[c]hanges in policy, whereby a service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received" in determining whether to grant relief on the basis of an injustice.

⁶ Reference (b) provides that the narrative reason for separation should be changed to "Secretarial Authority"; that the characterization of the discharge should be upgraded to honorable; and the reentry code should be changed to RE-1J, when these conditions are met.

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Accordingly, the Majority found the guidance of reference (b) to be applicable, and therefore determined that relief is warranted in the interests of justice.

Despite finding that changes to the Subject's discharge are warranted under the circumstances pursuant to reference (b), the Majority did not find Petitioner's request to remove all adverse information related to the Subject's sexual orientation from the Subject's naval record to be warranted. In this regard, the Majority found that there was no error in these documents at the time they were created. Although these documents express opinions and beliefs about homosexual conduct, and the Subject's sexual orientation in particular, which do not comport with acceptable current norms, the presence of such documents are not unusual in naval records of the day. Additionally, the Board noted that the Subject's naval record is protected by the Privacy Act. As such, the documents within are not available for public scrutiny and therefore present a negligible risk of future harm. Accordingly, the Majority also found no injustice in the continuing presence of these documents in the Subject's naval record.

MAJORITY RECOMMENDATION:

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

That the Subject's naval record be corrected to reflect that his discharge and service ending on 23 April 1943 was characterized as "Honorable"; and that the narrative reason and authority for his discharge on 23 April 1943 was the closest analogue to what is today referred to as "Secretarial Authority."

That an appropriate document be added to the Subject's naval record memorializing his honorable service, to be recorded consistently with this decision. Such a document may be the modern version of the DD Form 214, or the contemporary equivalent in 1943.

That the Subject be issued an Honorable Discharge Certificate, one copy of which is to be filed in his naval record while the original is to be delivered to the Petitioner.

That Navy Personnel Command (NPC) review the Subject's naval record to determine what, if any, decorations, medals, badges, citations, and campaign ribbons (hereinafter described collectively as "Awards") he may be entitled to receive for his period of service, and to add any such identified Awards to the Subject's naval record as appropriate.

That no further corrective action be taken on the Subject's naval 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 relief.

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The Minority concurred with the Majority conclusion that there was no error in the acceptance of the Subject's voluntary resignation at the time that it was administered, or in the OTH characterization of his discharge. The Minority also concurred with the Majority's conclusion that the removal from his naval record of all adverse information pertaining to the Subject's sexual orientation is not warranted under the circumstances.

The Minority concurred with the conclusion that the Subject's resignation was encouraged and executed pursuant to a policy similar to the former DADT policy. However, the Minority did not concur with the Majority conclusion that relief is warranted pursuant to reference (b). Specifically, the Minority disagreed with the Majority that there was no evidence of other misconduct in the Subject's naval record. The evidence reflects that the Subject routinely engaged in sexual activity with junior enlisted personnel, some of whom were within the same command. Such conduct, even of a heterosexual nature, would be considered to be serious misconduct under current standards and would warrant disciplinary proceedings and consideration for involuntary separation.⁷ Further, the Minority found that the Subject's alleged conduct which resulted in his arrest on 8 March 1943, as reported by the alleged victim in enclosure (12), constituted what could best be described as sexual harassment upon a sentry on duty. Having found clear evidence of misconduct in the Subject's nature beyond the homosexual conduct for which he was discharge, the Minority did not believe the guidance of reference (b) to be applicable to this case.

The Minority also considered the totality of the circumstances to determine whether equitable relief is warranted in the interests of justice in accordance with reference (c). In this regard, the Minority considered, among other factors, the entirety of the Subject's naval service, which included three years of otherwise honorable service in wartime which earned the respect of his superiors; that the Subject's performance of duty during and after the attack on [REDACTED] and during subsequent salvage operations, was described as "outstanding"; that changes in policy, whereby a Service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received, may be grounds for relief; Petitioner's claim that the Subject's patriotism and love of country never wavered despite the circumstances of his discharge from the Navy; and the passage of time since the Subject was discharge. Even considering these factors, however, the Minority did not believe that equitable relief was warranted. Specifically, the Minority did not find that the Subject would reasonably expect to receive a more favorable outcome for similar conduct today based upon the change in policy regarding homosexual conduct in the military. As stated previously, the Subject's conduct would be prohibited today just as it was in 1943. Fraternalization has a serious adverse effect upon good order and discipline in the fleet, and the Subject engaged in such damaging conduct at a perilous time and place in American history. As such, the Minority did not find the mitigating circumstances to be of sufficient weight to justify an upgrade to the Subject's discharge.

⁷ Paragraph 3 of reference (d) provides that "[p]ersonal relationships between officer and enlisted members that are unduly familiar and do not respect differences in rank and grade are prohibited and violate long-standing customs and traditions of the U.S. Navy... Commands are expected to take administrative and disciplinary action as necessary to correct such inappropriate behavior." Paragraph 6b provides that "intimate or sexual relations ... between officer and enlisted members, regardless of Service, are unduly familiar and are prohibited."

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MINORITY RECOMMENDATION:

In view of the above, the Minority of the Board recommends only that NPC review the Subject's naval record to determine what, if any, Awards he may be entitled to receive for his period of service, and to add any such identified Awards to the Subject's naval record as appropriate.

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.

11/3/2023

[REDACTED]

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SECRETARY OF THE NAVY DECISION:

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

— MINORITY Recommendation Approved (Deny Relief – I concur with the Minority conclusion that and therefore direct only the relief recommended by the Minority above.)

[REDACTED] MAJORITY Recommendation Approved (with modification) (Partial Relief – I concur with the Majority conclusion in all regards with one exception. The Majority found no error or injustice in the presence of the adverse information related to the Subject's sexual orientation. I agree with this conclusion with regard to all such entries in the Subject's naval record except one. Specifically, the Medical Officer who conducted the Subject's psychiatric determination on 26 March 1943 opined that the Subject was "a sexual psychopath." While I recognize that the use of such language to describe homosexuals was commonplace at the time in question, this was a clearly erroneous description of the Subject which carried an extremely negative connotation not warranted due simply to an individual's sexual orientation. Accordingly, I find an injustice in the presence of this inaccurate and offensive description of the Subject in an official naval record which was accessed by his next of kin. This is distinguishable from the remaining documents in the record that reference Subject's sexual orientation, as those relate to his conduct (e.g., the investigation and his confession). I therefore direct the relief recommended by the Majority above, as well as the removal from the Subject's naval record of the 26 March 1943 "Special Examination and Treatment Request" which included this offensive language.

— Petitioner's Request Approved (Full Relief – I concur with the Majority conclusion that the guidance of reference (b) applied to this case, and that the Subject's discharge should therefore be upgraded. However, I disagree with the Majority's conclusion with regard to the adverse information pertaining to the Subject's sexual orientation. Specifically, I find this material to be inappropriate and unnecessarily stigmatizing. Accordingly, I direct the relief recommended by the Majority above. I further direct that NPC carefully scrub the Subject's naval record and remove all references to the Subject's sexual orientation, the Subject's resignation for the good of the service and the investigation which apparently prompted that resignation, and his discharge under OTH conditions.

[REDACTED]

Date: 11/21/24