



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. 3480-24
Ref: Signature Date

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Dear Petitioner:

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 application on 7 June 2024. 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), 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).

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

You enlisted in the U.S. Navy and began a period of active duty service on 20 March 1989. Your enlistment physical examination, on 20 October 1988, and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On your enlistment application you denied being a homosexual or bisexual, and you also stated you did not intend to engage in homosexual acts.

On 5 February 1990, pursuant to your guilty plea, you were convicted at a Special Court-Martial (SPCM) of indecent acts on divers occasions between 1 September 1989 and 27 November 1989. You were sentenced to a discharge from the Navy with a Bad Conduct Discharge (BCD). On or about 2 April 1990, the Convening Authority approved the SPCM findings and sentence. Upon the completion of SPCM appellate review in your case, on 21 August 1991, you were discharged from the Navy with a BCD and assigned an RE-4 reentry code.

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. These included, but were not limited to, your desire for a discharge upgrade and contentions that: (a) you were discharged dishonorably due to being openly LGBTQ, (b) the VA encourages LGBTQ veterans to reach out to reassess eligibility for benefits, and (c) you want to be buried in a VA cemetery with both of your parents. For purposes of clemency and equity consideration, the Board noted that you did not provide any evidence in support of your application other than what you stated on the DD Form 149.

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 to deserve an 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 the record reflected that your misconduct was intentional and willful and demonstrated you were unfit for further service. The Board also determined that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should not be held accountable for your actions.

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.* (emphasis added).

Unfortunately, the Board determined that you were discharged strictly for misconduct involving indecent acts (as defined under the Uniform Code of Military Justice), and not discharged based on homosexual conduct and/or your sexual orientation. The Board noted that the available information in your service record did not indicate your SPCM conviction involved any homosexual conduct. Therefore, the Board concluded you did not qualify for discharge upgrade relief under the DADT repeal guidance.

The Board also noted that, although it cannot set aside a conviction, it might grant clemency in the form of changing a characterization of discharge, even one awarded by a court-martial. However, the Board concluded that, despite your contentions, this was not a case warranting any

clemency as you were properly convicted at a SPCM of serious misconduct. Moreover, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans benefits, or enhancing educational or employment opportunities.

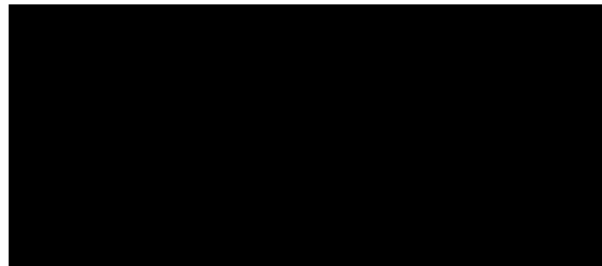
As a result, the Board determined that there was no impropriety or inequity in your discharge and concluded that your misconduct and disregard for good order and discipline clearly merited your discharge. Even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence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

This Board is not an investigatory agency and does not do any independent research or actively obtain records other than the Petitioner's service record. The Board panel makes its decisions on the available records in the Petitioner's service record, the documentary material submitted by the Petitioner for consideration, and any required advisory opinions. Accordingly, the Board strongly recommends that you obtain and submit the appropriate documentation indicating that your court-martial involved homosexual conduct. The Board noted that the Officer of the Judge Advocate General, Military Justice Administration (Code 40), processes Freedom of Information Act (FOIA) requests concerning the military justice system and individual courts-martial, and responds to requests for records of trial (ROT).¹ The Board suggests, in addition to any other relevant records you may already have, that you submit a FOIA request to Code 40 for your SPCM ROT, and subsequently resubmit your petition for relief for reconsideration and include the appropriate substantiating records.

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,

6/16/2024



¹ <https://www.jag.navy.mil/about/organization/ojag/code-02/code-40/>