



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

█
Docket No. 5783-24
Ref: Signature Date

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

Subj: REVIEW NAVAL RECORD OF █
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Ref: (a) 10 U.S.C. 1552
(b) 10 U.S.C. 654 (Repeal)
(c) UNSECDEF Memo of 20 Sep 11 (Correction of Military Record following Repeal of 10 U.S.C. 654)
(d) USECDEF Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," of 25 July 2018 (Wilkie Memo)

Encl: (1) DD Form 149 with attachments
(2) Case summary

1. Pursuant to the provisions of reference (a), Petitioner filed enclosure (1) with the Board for Corrections of Naval Records (Board), requesting that his naval record be corrected to upgrade his characterization of service and make other conforming changes to his Certificate of Release or Discharge from Active Duty (DD Form 214) to reflect current military directives and policy.

2. The Board, consisting of █ reviewed Petitioner's allegations of error and injustice on 9 August 2024 and, pursuant to its regulations, determined that the corrective action indicated below should be taken. Documentary material considered by the Board consisted of Petitioner's application together with all material submitted in support thereof, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies, to include references (b) through (d).

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice 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.

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 the application on its merits.

c. Petitioner enlisted in the U.S. Navy and began a period of active duty on 25 May 1982. On 15 November 1982, Petitioner reported for duty on board the █

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[REDACTED]
[REDACTED].

d. On 29 July 1983, Petitioner received non-judicial punishment (NJP) for the larceny of a wristwatch. Petitioner did not appeal his NJP.

e. On 31 October 1983, Petitioner's command notified him of administrative separation proceedings by reason of homosexuality as evidenced by his admission of committing a homosexual act with another Sailor. The least favorable discharge characterization Petitioner could receive was under Other Than Honorable conditions (OTH). Petitioner consulted with counsel and initially elected his right to request an administrative separation board.

f. Petitioner subsequently submitted a conditional waiver request (CWR). As part of the terms of the CWR, provided the command would recommend him for a General (Under Honorable Conditions) (GEN) discharge characterization, Petitioner would waive his right to an administrative selection board. On 6 November 1983, the [REDACTED] commanding officer favorably endorsed Petitioner's CWR.

g. In the interim, on 25 November 1983, Petitioner received NJP for: (i) dereliction of duty, (ii) failing to obey a lawful order, (iii) insubordinate conduct, and (iv) unauthorized absence. Petitioner did not appeal his second NJP.

h. Ultimately, on 8 December 1983, the Petitioner was discharged from the Navy for homosexuality with a GEN characterization of service and was assigned an RE-4 reenlistment code.

i. References (b) and (c) 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 of 10 U.S.C. 654. It provides service Discharge Review Boards with the guidance to normally grant requests to change the characterization of service to "Honorable" or GEN, the narrative reason for discharge to "Secretarial Authority," the separation code to "JFF," the reentry code to "RE-1J," and other conforming changes to the DD Form 214 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.

CONCLUSION:

Upon review and consideration of all the evidence of record, and in light of references (b) and (c), the Board concludes that Petitioner's request warrants partial relief. The Board noted Petitioner's record supports that he was administratively discharged due to his homosexuality based on DADT. However, the board determined there were aggravating factors in the record consisting of his two (2) separate NJPs for misconduct unrelated to homosexuality. In this regard, the Board noted the Petitioner's overall record of military service and current Department of the Navy policy as established in reference (c), and concluded that relief in the form of only making certain administrative changes to Petitioner's DD Form 214 to conform with current military directives and policy was proper at this time.

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[REDACTED]

Notwithstanding the corrective action recommended below, the Board was not willing to upgrade the Petitioner's discharge characterization to Honorable. The Board observed the Petitioner had two (2) NJPs in his record for misconduct separate and distinct from homosexuality. The Board noted that certain offenses subject to his NJP hearings could have independently formed the basis for administrative separation for misconduct and potentially resulted in an under OTH characterization. Additionally, the Board also 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. Petitioner's overall active duty trait average calculated from his available performance evaluations during his enlistment was approximately 2.8 in conduct. Navy regulations in place at the time of his discharge recommended a minimum trait average of 3.0 in conduct (proper military behavior), for a fully Honorable characterization of service.

Given the aggravating factors in Petitioner's record, the Board noted that an Honorable discharge was appropriate only if the Sailor's service is otherwise so meritorious that any other characterization of service would be clearly inappropriate. The Board concluded that significant negative aspects of the Petitioner's conduct and/or performance outweighed the positive aspects of his military record, and that even though flawless service is not required for an Honorable discharge, in this case the Board determined a GEN discharge characterization and no higher was appropriate. The Board determined that characterization under GEN or 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 also determined that the evidence of record did not demonstrate that Petitioner was not mentally responsible for his conduct or that he should not be held accountable for his actions.

The Board also denied Petitioner's supplemental request to receive constructive service credit for purposes of Department of Veterans Affairs health care eligibility. Absent a material error or injustice, the Board in his case declined to summarily upgrade a discharge and/or provide credit for time not served on active duty solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. Moreover, reference (c) indicates that such relief is inappropriate. Reference (c) expressly states:

Although DADT is repealed effective September 20, 2011, it was the law and reflected the view of Congress during the period it was the law...Similarly, DoD regulations implementing various aspects of DADT were valid regulations during that same period...the issuance of a discharge under DADT or that taking of an action pursuant to DoD regulations related to a discharge under DADT should not by itself be considered to constitute an error or injustice that would invalidate an otherwise proper action taken pursuant to DADT and applicable DoD policy. Thus remedies such as correcting a record to reflect continued service with no discharge, restoration to a previous grade or position, credit for time lost...would not normally be appropriate.

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The Board determined there was no material error or injustice with Petitioner's restrictive reentry code and was not willing to change it from RE-4. Lastly, in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded that insufficient evidence of an error or injustice exists to warrant upgrading Petitioner's characterization of service or granting clemency in the form of an upgraded characterization of service. Accordingly, given the totality of the circumstances, the Board determined that Petitioner's discharge upgrade request does not merit relief.

RECOMMENDATION:

In view of the above, the Board directs the following corrective action.

That Petitioner be issued a new DD Form 214, for the period ending 8 December 1983, indicating that his narrative reason for separation was "Secretarial Authority," the separation authority was "MILPERSMAN 1910-164," and the separation code was "JFF."

No additional changes to Petitioner's record are warranted.

That a copy of this report of proceedings be filed in 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-entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)), and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

8/14/2024

