

**BEFORE THE DEPARTMENT OF THE NAVY
NAVAL DISCHARGE REVIEW BOARD**

In re the Application of _____

April 26, 2017

**BRIEF IN SUPPORT OF
APPLICATION FOR DISCHARGE UPGRADE**

I. PRELIMINARY STATEMENT

In July _____, applicant _____ realized a life-long goal and enlisted in the United States Navy at the age of 18, with hopes of serving the country he loves and protecting it from the threat of foreign terror. _____ served honorably in the Navy for over three-and-a-half years, during which time he received several medals recognizing his achievements and numerous positive evaluations from his superiors regarding his performance. During his years of service, however, _____ was subjected to ongoing and systematic hazing at the hands of certain fellow service members, which escalated as time went on. The Navy took no steps to address this conduct or to protect _____. As a result of his service in the Navy -- and in particular the hazing and abuse that he endured -- _____ became increasingly depressed. These issues resulted in an incident on January 27, _____, in which _____ attempted suicide by cutting his wrists.

Following that suicide attempt, _____ was unceremoniously discharged only eight days later on _____. His administrative discharge was classified as "General (Under Honorable Conditions)," with an unspecified "Personality Disorder" identified as the reason for discharge. No medical professional diagnosed any mental condition of any kind at the time

of [REDACTED] discharge. While [REDACTED] subsequently received mental health treatment from the Veterans Administration (“VA”), he has never been diagnosed with a personality disorder. And, ironically, an Evaluation Report issued on the same day as his discharge lauded [REDACTED] job performance, noting his “quality work,” and “positive leadership,” and concluded by recommending that [REDACTED] be retained in the Navy and stating that he was promotable.

Since the time of his discharge, [REDACTED] has made great strides with his life. He has been consistently employed, continued his education, and completed the [REDACTED] School at which he received vocational training. In an effort to improve his life, [REDACTED] has sought help for his ongoing depression through the VA, from which he received a 70% service-connected disability rating for a depressive disorder in 2014. To further assist his efforts to improve his life, [REDACTED] now requests, pursuant to 10 U.S.C. § 1553 and 32 C.F. R. §§ 70.8(b)(8) and 70.9, that the Naval Discharge Review Board (the “Board”) upgrade his discharge on grounds of propriety and equity to Honorable status and change the narrative reason for his separation from “Personality Disorder” to “Secretarial Authority.” [REDACTED] initial application for a discharge upgrade was submitted to the Board in June 2005 and denied on May 2, 2006. [REDACTED] seeks reconsideration of the denial pursuant to 32 C.F.R. § 70,8(b)(8) because, *inter alia*, (1) the policies and procedures under which [REDACTED] was discharged in [REDACTED] differ in material respects from those currently applicable to a discharge for a “personality disorder” and these changes represent a substantial enhancement of the rights [REDACTED] was afforded, and (2) [REDACTED] was not represented in his previous application and accordingly the grounds for the current application were not previously raised or addressed.

[REDACTED] application is based on the following three grounds:

First, ██████ discharge was procedurally improper. The then-existing version of Department of Defense Instruction (“DoDI”) 1332.14 (Dec. 21, 1993) provided that “[s]eparation on the basis of personality disorder is authorized *only* if a diagnosis by a psychiatrist or a psychologist, completed in accordance with procedures established by the Military Department concerned, concludes that the disorder is so severe that the member’s ability to function effectively in the military environment is significantly impaired.” *Id.* § E3.A1.1.3.4.8.3 (emphasis added) (attached as Exhibit A hereto, at p. 19). ██████ was not diagnosed prior to his discharge by a psychiatrist or psychologist as having a personality disorder, let alone one that affected his ability to function effectively in the Navy. Indeed, such a diagnosis seems impossible in light of ██████ contemporaneous Evaluation Report which recommended that he be *retained* in the Navy and stated that he was *promotable*. It is also impossible because ██████ has never been diagnosed with a personality disorder in the course of his subsequent mental health treatment and simply does not have one. This error is not the only procedural deficiency associated with ██████ discharge, however. Even assuming that a proper diagnosis had been made, ██████ was also deprived of his right under the then-existing procedures to be “counseled formally” and afforded “an opportunity to overcome” any identified deficiency. *Id.* § E3.A1.1.3.4.8.2. Instead, he was abruptly discharged only eight days after his suicide attempt. There is no doubt that he was prejudiced by these fundamental procedural violations and that the discharge was therefore improper.

Second, the current discharge policies and procedures are materially different from those that led to ██████ discharge. After the time of ██████ discharge in ██████, it became clear that the military branches, including the Navy, had engaged in a systematic and improper

course of conduct of discharging service members for convenience by labeling them as suffering from a “personality disorder.” See, e.g., USGAO, *Defense Health Care -- Additional Efforts Needed to Ensure Compliance with Personality Disorder Separation Requirements (October 2008)* (<http://www.gao.gov/products/GAO-09-31>). Indeed, it is clear from the absence of any diagnosis by a psychiatrist or psychologist in ██████ record and the later diagnosis by the VA of a depressive disorder (*not* a personality disorder) that he *was* subject to this abusive practice and discharged improperly for the convenience of the Navy under the guise of a “personality disorder.”

In response to this overbroad and abusive practice, the Department of Defense amended DoDI 1332.14 in 2008 to include significant additional safeguards for service members, including requiring that: (1) a diagnosis of personality disorder be made by a psychiatrist or PhD-level psychologist using the Diagnostic and Statistical Manual of Mental Disorders, (2) the diagnosis address PTSD or other mental illness co-morbidity, and (3) specific deficiencies be documented in counseling or personal records, including a history from supervisors, peers and others to establish that the behavior is “persistent, interferes with assignment to or performance of duty, and has continued after the Service member was counseled and afforded an opportunity to overcome the deficiencies.” DoDI 1332.14, Enclosure 3 at 3(3)a.(8)(c) (Aug. 28, 2008) (attached as Exhibit B hereto, at p. 11). In addition, for service members like ██████ who served in imminent danger pay areas, a diagnosis of personality disorder had to be “corroborated by a peer or higher-level mental health professional and endorsed by the Surgeon General of the Military Department concerned.” (*Id.*) These enhanced safeguards were not made available to ██████ and, if they had been, he would not have been

administratively discharged. Accordingly, principles of equity and fairness compel the Board to update ██████ status to an honorable discharge and remove “personality disorder” as the narrative reason for separation.

Third, even if the Navy’s failure to comply with its own procedural rules in 2004 and its systematic abuse of the “personality disorder” label, including as applied to ██████ were not enough, equity and fairness further require the Board to upgrade ██████ status because the emotional difficulties and depression that led to his discharge were the result of the hazing and military sexual trauma he experienced during his naval service.

II. STATEMENT OF FACTS

A. ██████ Enlists in the Navy and Consistently Receives Positive Evaluations.

Before enlisting in the Navy, ██████ led an active life during which he went to school, spent time with his family, had part-time jobs he enjoyed, and was a member of a volunteer fire department in ██████, Connecticut. (Affidavit of ██████ ██████ (“██████ Aff.”) at ¶ 2, attached as Exhibit C hereto.) ██████ had wanted to enlist in the Navy since he was five years old, and he did so as soon as he was old enough. (*Id.* ¶ 3.) When he was 16 and 17 years old, he participated in the Delayed Entry Program. (*Id.*) He enlisted in the Navy on July 31 ██████, after he turned 18 and graduated from high school. (*Id.*) Joining the Navy was the fulfillment of ██████ lifelong dream, and he had every intention of making the Navy his career. (*Id.*)

██████ served in the Navy from July ██████ until February 4, ██████. (DD Form 214, attached as Exhibit D hereto). He attended boot camp at ██████, and then Aviation School in ██████, where he was trained as an aviation structural

mechanic. (██████████ Aff. at ¶ 4, attached as Exhibit C hereto.) After A School, ██████████ was assigned to Helosquadron 15 (“HS-15”) in ██████████. (*Id.*) From his squadron in Jacksonville, he was assigned to sea duty on the USS ██████████, the USS ██████████ and the USS ██████████. (*Id.*) He worked in the air frame and corrosion control shops. (*Id.*)

██████████ was deployed to the Persian Gulf from June to December ██████████ to serve on the ██████████ as part of Operation Enduring Freedom and Operation Southern Watch. (*Id.* ¶ 5.) During this time, he worked 18-hour minimum days, as well as some 27-hour continuous work days. (*Id.*) He received imminent danger pay (“IDP”) during this time period. (*See* Pay Statements for July, August, September ██████████, attached as Exhibit E hereto.) Conditions on board were stressful. During his tour of duty, the ship lost one pilot whose plane crashed, and another sailor hanged himself. (██████████ Aff. at ¶ 5.) In ██████████, after his tour on the USS ██████████ ended, he was deployed for additional sea duty on the USS ██████████ and the USS ██████████. (*Id.*)

██████████ received positive performance evaluations during every year that he served. His Evaluation Report & Counseling Record, dated July 26, ██████████ addresses his work as a Corrosion Control Technician-1. (Attached as Exhibit F hereto.) It states that ██████████ was a “welcome addition to the Corrosion Control Workcenter. His eagerness to learn and to obtain qualifications has him progressing in the right direction.” (*Id.*) The evaluation also noted that ██████████ “complete[d] all assigned tasks with minimum supervision and with little or no rework.” (*Id.*) He was found to meet standards in the areas of professional knowledge, quality of work,

equal opportunity, personal accomplishment/initiative and teamwork, and was rated “above standards” in military bearing/character. (*Id.*)

█████ Evaluation Report and Counseling Record, dated July 30, █████, also evaluated him positively for his work as a Corrosion Control Tech-7, which included a demanding six-month tour of duty from June to December █████ on the USS █████ during which he received IDP. (Attached as Exhibit G hereto.) This evaluation states that “Airman █████ continues to develop professionally and has shown dramatic improvement in his performance as a Corrosion Control Technician.” (*Id.*) He was found to meet standards in the areas of professional knowledge, quality of work equal opportunity, personal job accomplishment/initiative, and was rated “above standards” in the area of teamwork. (*Id.*) The evaluation stated that he was “ready for greater challenges. He is a hard worker whose continuing commitment to improvement should develop into a promising Navy career.” (*Id.*)

█████ was again evaluated on February 4, █████, after his third full year of service. (Evaluation Report & Counseling Record, attached as Exhibit H hereto.) He was found to meet standards in the areas of professional knowledge (“Strong working knowledge of rating, specialty and job”), quality of work (“Needs little supervision, Produces quality work”), command or organizational climate/equal opportunity (“Positive leadership supports Navy’s increased retention goals”), and personal job accomplishment/initiative (“Productive and motivated. Completes tasks and qualifications fully and on time”). (*Id.*) The evaluation concluded by recommending that █████ be retained in the Navy and finding that he was promotable. (*Id.*)

During his service, ██████ received the National Defense Service Medal, the Sea Service Deployment Ribbon, the Armed Forces Expeditionary Medal, the Marksman Ribbon 9MM Sharpshooter, M-16 Expert, and Meritorious Unit Commendation Medal. (DOD Form 214, Exhibit D hereto).

B. ██████ Is Subjected to Hazing and Military Sexual Trauma During His Service.

Notwithstanding his work ethic and high aspirations for his naval career, ██████ was subjected to inappropriate behavior and attacks by other Navy personnel from the outset of his service. He first experienced physical and verbal hazing during boot camp and A School. (████████ Aff., ¶ 9, attached as Exhibit C hereto.) The hazing included having heavy objects thrown at him, name calling and damaging his belongings. (*Id.*) Because he did not want to seem like a snitch, ██████ did not report this initial hazing. (*Id.*)

After he was assigned to HS-15, however, the hazing intensified, especially during sea duty. While serving on the USS ██████████ from June to December ██████, ██████ was frequently pushed and shoved, which repeatedly broke his glasses. (*Id.* ¶ 10.) Also, his rack was urinated upon and broken into. (*Id.*) ██████ reported the incidents to his supervisor, but they did not stop. (*Id.*) This physical and mental abuse persisted during ██████ service on the USS ██████████ and the USS ██████████. In ██████, while on sea duty, three crew members came into his compartment; two of them grabbed and held him down while the third punched him in the eye. (*Id.*) In late ██████3, he was subjected to an incident of military sexual abuse. While he was working, a petty officer who was his supervisor shoved a broomstick into his anus. (*Id.*)

████████ was also repeatedly abused verbally by different service members. (*Id.* ¶ 11.)

Among other things, other service members would call him "Cyclops," due to a congenital condition called ptosis, which gives him a drooping eyelid. (*Id.*) They also told him he was "ugly," "hideous" and that "no one would love him." (*Id.*) On one occasion, when he tried to defend himself, he was punished. (*Id.*) In July █████, a Third Class Sailor E-4 hit █████ on the back of his head while he was working. After █████ pushed him back to get him to stop, █████ was charged with assault of a superior officer and disorderly conduct. (*Id.*) The sailor who hazed him was not charged with anything. (*Id.*) Despite this incident, █████ Evaluation Report for that time period complimented his job performance and identified him as a "must promote." (*See Exhibit F.*)

After two years of hazing and abuse, █████ situation simply became too much for him. He became increasingly depressed and began to contemplate killing himself. (█████ Aff. at ¶ 12.) In late █████, he cut himself on the left wrist. (*Id.*) The wound was not severe, and █████ did not report the incident to anyone. (*Id.*) █████ second suicide attempt was significantly more serious. In January █████, he bought a US Navy Seal knife at the base Navy Exchange because he admired the work of the Seals. (*Id.* ¶ 13.) He had no idea that he was not permitted to have the knife on base, particularly since he had bought it at the on-base store. (*Id.*) He had also shown the knife to his supervisor, who never told him he could not have it in his possession. (*Id.*) Later, during a room inspection, the inspector saw the knife in █████ room and had █████ arrested. (*Id.*)

█████ was detained only briefly and then returned to his room. (*Id.*) After his arrest, he felt deeply depressed and concerned that he would be discharged. (*Id.*) On or about January 27, █████, █████ tried to kill himself by slashing his wrist. (*Id.*) He then called Base

911 to get medical attention because he was concerned about how his death would affect his family. (*Id.*) He was taken to the base clinic and later the hospital and treated by a doctor. He was then released. (*Id.*)

A few days later, [REDACTED] was informed by a supervisor that he was being discharged from the Navy. (*Id.* ¶ 14.) He responded that he did not want to be discharged. (*Id.*) Prior to his discharge, he was not told by anyone that he had a personality disorder or informed that this was the reason for the discharge. (*Id.*) Before being discharged, he did not receive any counseling to the effect that he had a personality disorder. (*Id.* ¶ 15.) Nor was he given an opportunity to address any concerns the Navy had about whether a so-called personality disorder affected his ability to function effectively in the Navy. (*Id.*)

D. [REDACTED] Life After Leaving the Navy.

Before enlisting in the Navy, [REDACTED] was actively involved in family life and, despite his youth, worked at retail jobs. (*Id.* ¶ 16.) He did not have difficulty in relating to family members or his fellow employees. (*Id.*) Since leaving the Navy, [REDACTED] has become more isolated. (*Id.*) He is estranged from his family and normal family life because he feels that he no longer fits in. (*Id.*) He has trouble developing and maintaining relationships with people, including any type of romantic relationship. (*Id.*)

Notwithstanding these challenges, [REDACTED] has made great efforts to create a normal life. He has held several jobs since leaving the Navy, including working at Home Depot and working for seven years doing plumbing and heating jobs through a local union. (*Id.* ¶ 17.) He received vocational training at the [REDACTED] and again became a member of the volunteer [REDACTED] Fire Department in [REDACTED] Connecticut. (*Id.*)

█████ has also made every effort to address the depression that he experienced during his years of service. He submitted a claim for disability benefits and sought treatment for his depression from the VA. (*Id.* ¶ 18.) To his knowledge, he has never been diagnosed with a personality disorder. (*Id.*) To the contrary, in June 2014, the VA found that █████ had an “unspecified depressive disorder” related to his military service and gave him a disability rating of 70%. (Attached as Exhibit I hereto.) The 2014 award stated that █████ depressive condition “which existed prior to military service, permanently worsened as a result of service.” (*Id.*; Rating Decision, at p. 2 of 3.) In the spring of 2016, the VA notified █████ that he would be paid at the 100% rate because he was “unemployable due to his service-connected disabilities.” (Attached as Exhibit J hereto.) The VA has never found that █████ suffers from a personality disorder.

In a further attempt to normalize his life, in June 2005, █████ requested that the Board upgrade his discharge status to honorable and remove the designation of “personality disorder” from his record. (*Id.* ¶ 19.) On May 2, 2006, the Board denied the request. (*Id.*) A member of the Connecticut Chapter of the Veterans of Foreign Wars helped █████ fill out the Form DD 293 and prepare a brief statement but otherwise did not provide any assistance, such as identifying the fundamental procedural errors associated with his discharge. (*Id.*)

Pursuant to 10 U.S.C. § 1553 and 32 C.F.R. §§ 70.8(b)(8) and 70.9, █████ now seeks reconsideration of the Board’s earlier decision and a discharge upgrade on grounds of propriety and equity. As set forth more fully below, an upgrade is appropriate on grounds of propriety and equity because: (1) █████ discharge for an unspecified “personality disorder” failed to comply with the applicable procedures in place for such a discharge in 2004; (2) █████ was

subject to an inappropriate and abusive practice of discharging service members for convenience on the basis of so-called “personality disorders;” the enhanced procedures for a personality disorder discharge implemented in 2008 are materially different from, and offer more safeguards than, those in existence in [REDACTED] and would not have supported [REDACTED] discharge; and (3) the discharge resulted from the sustained pattern of hazing, as well as military sexual trauma, to which [REDACTED] was subjected during his years of service.

III. ARGUMENT

A. Standard of Review.

[REDACTED] [REDACTED] seeks a discharge upgrade pursuant to 10 U.S.C. § 1553, which grants the Board the authority to “review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member” Subsection (b) of the statute further provides the Board with the ability to “change a discharge or dismissal, or issue a new discharge, to reflect its findings.” *Id.*¹ Pursuant to 32 C.F.R. § 70.9(a), the Board is authorized to grant upgrades on the basis of “propriety” or “equity.” For the reasons set forth below, [REDACTED] [REDACTED] is entitled to a discharge upgrade on both grounds.

The governing regulations also identify a number of grounds for reconsideration of an initial denial of an application for a discharge review. *See* 32 C.F.R. § 70.8(b)(8). Those grounds include the following:

¹ The requirement that such a request be made within 15 years after the date of discharge (*see* 10 U.S.C. § 1553(a)) is satisfied here.

- (ii) When the original discharge review did not involve a hearing and a hearing is now desired. . . ;²
- (iv) When the DRB determines that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided that such changes in policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and
- (v) When an individual is to be represented by a counsel or representative, and was not so represented in any previous consideration of the case by the DRB.

Reconsideration is appropriate under all three of these provisions.³

B. [REDACTED] Discharge Was Improper Because It Violated the Procedures in Effect at the Time of His Discharge.

Pursuant to 32 C.F.R. § 70.9(b)(1)(i), “[a] discharge shall be deemed proper” unless, in the course of a discharge review, it is determined that:

There exists an error of fact, law, procedure, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made).

[REDACTED] is entitled to an upgrade under this provision because his discharge decision failed to comply with the procedures applicable in 2004 to a discharge based on a “personality disorder.” Moreover, the Navy’s own contemporaneous actions establish substantial doubt as

² This provision is inapplicable when an applicant failed to appear for a hearing or respond to a scheduling notice. Neither circumstance occurred here.

³ The only assistance that [REDACTED] received from the Connecticut Chapter of the Veterans of Foreign Wars in connection with his prior application was in filling out the Form DD 293 and preparing a brief statement. ([REDACTED] Aff. ¶ 19.) [REDACTED] did not receive the substantive assistance that constitutes true representation, which is now being provided for the first time; for example, the prior application did not address any of the fundamental procedural irregularities that form the basis for this application.

to whether the same decision would have been reached had the proper procedures been followed.

Under the provisions of DoDI 1332.14 in effect in [REDACTED], a separation based on a personality disorder was authorized “only if a diagnosis by a psychiatrist or a psychologist, completed in accordance with procedures established by the Military Department concerned, concludes that the disorder is so severe that the member’s ability to function effectively in the military environment is significantly impaired.” (DoDI 1332.14, Section E3,A1;1.3.4.8.3. (Dec. 21, 1993); Exhibit A hereto, at p. 19). The regulations further provided that separation proceedings could not be initiated “until the member has been counseled formally concerning the deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.” (*Id.*, Section E3, A1,1.3.4.8.2.)

[REDACTED] discharge violated these requirements in fundamental respects: it was not accompanied by the diagnosis of a psychiatrist or psychologist that he had a personality disorder, let alone that he suffered from a personality disorder that was so severe as to substantially impair his ability to function effectively in the Navy. Indeed, any such diagnosis seems impossible in the light of the contemporaneous [REDACTED] performance appraisal that stated, among other things, that [REDACTED] should be retained and was promotable. In any event, even if [REDACTED] had properly been diagnosed with a personality disorder so severe as to substantially impair his ability to function effectively (which was not the case), he was not afforded any formal counseling or an opportunity to overcome the alleged deficiencies as was required by the procedures applicable at the time.

The record establishes that, on February 3, [REDACTED], the day before [REDACTED] discharge, Flight Surgeon [REDACTED] signed a DD Form 2807-1 (Report of Medical History) which stated the following: “Member Cutting on Wrist, Seen in Psych. *Likely Personality Disorder, No record available. No documentation.* Prompted separation from Navy.” (Copy attached hereto as Exhibit K, at p. 3) (emphasis added). These comments accompanied boxes indicating *inter alia* that [REDACTED] suffered from “depression or excessive worry,” a condition that is materially different from a “personality disorder.” (*Id.* at p. 2.) The Diagnostic and Statistical Manual of Mental Disorders in effect in [REDACTED] (the DSM-IV) characterized personality disorder as an Axis II disorder, which it defined as an “enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.” *Diagnostic and Statistical Manual of Mental Disorders*, at 685-86 (4th ed. 2000).⁴ By comparison, depression and anxiety, the conditions noted on [REDACTED] medical form at the time of discharge, are Axis I mental disorders, with substantially different characteristics. *Id.* at 27-28, 345-46. Significantly, the VA subsequently granted [REDACTED] benefits for a 70% service-connected unspecified *depressive* disorder, which is at odds with a finding of a personality disorder. (See Exhibit I hereto, at p. 2.) At the time of his discharge, however, the Navy made no attempt to determine whether his state of mind was linked to depression rather than a “personality disorder.”

Thus, [REDACTED] medical records at the time of discharge expressly acknowledge that he had *not* been diagnosed as having a personality disorder -- the flight surgeon who examined

⁴ The DSM-5 contains a similar definition. See *Diagnostic and Statistical Manual of Mental Disorders*, at 645 (5th ed. 2013).

him in connection with the discharge stated only that he “likely” had a personality disorder but that there was “No Record Available” and “No Documentation.” In addition, no consideration was given to whether any such disorder affected [REDACTED] ability to continue functioning in the Navy, as required by the regulations.⁵

The record also establishes beyond question that there is substantial doubt that the discharge would have proceeded had any consideration been given to [REDACTED] ability to perform, as required by DoDI 1332.14. On the very same day that [REDACTED] was discharged, the Navy issued an Evaluation Report that recommended that he be retained in the service and even deemed him promotable. (Evaluation Report & Counseling Record of [REDACTED], attached as Exhibit H hereto.) The Navy’s own actions therefore cast “substantial doubt” on the validity of the discharge decision and establish that [REDACTED] was prejudiced by this procedural error.

Finally, even if deficiencies in his performance had been identified, it is clear that [REDACTED] was not provided with any formal counseling about such supposed deficiencies resulting from the alleged personality disorder or an opportunity to “overcome” them, as required by DoDI 1332.14 at Section E3, A1,1.3.4.8.2. To the contrary, the Navy summarily discharged him within days of his suicide attempt, without the benefit of any counseling or opportunity to return to duty. Under these circumstances, and in the light of the Navy’s failure to follow the

⁵ Significantly, the Board’s initial decision in this matter states (at pp. 6-7) that “[t]here is no evidence in the record, nor has the Applicant produced any evidence, to support the contention that personality disorder is not the proper narrative reason for the Applicant’s discharge.” It was not [REDACTED] burden, however, to prove that he did not have a personality disorder. Rather, under the regulations in effect at the time, the Navy was required to prove that [REDACTED] had been diagnosed by a psychologist or psychologist as having a personality disorder that was so severe as to significantly impair his future functioning within the service. That never happened.

procedures required by DoDI 1332.44 in multiple respects, [REDACTED] discharge should be upgraded to Honorable status.

C. [REDACTED] Discharge Status Should Also Be Upgraded Based on Principles of Equity Because [REDACTED] Was Subject to the Abusive Practices of the Navy Relating to Personality Disorder Discharges and the Current Discharge Policies and Procedures Are Materially Different From Those in Effect When He Was Discharged.

The governing regulations provide, at 32 C.F.R. § 70.9(c)(1), that a discharge “shall be deemed to be equitable” unless:

- (1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration provided that:
 - (i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings, and
 - (ii) There is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration.

Similarly, 32 C.F.R. § 70.8(b)(8)(iv) provides that the Board may reconsider an application when the policies and procedures under which the applicant was discharged differ in “material respects” from current policies and procedures, and current discharge policies and procedures represent a “substantial enhancement” over the rights accorded the applicant at the time of discharge. The current discharge policies and procedures are materially different from those that led to [REDACTED] discharge and represent a “substantial enhancement” of those he received, and he is therefore entitled to a discharge upgrade on equitable grounds under these provisions.

As discussed above, the Navy failed in all respects to follow the required procedures in place in [REDACTED] in discharging [REDACTED] for a so-called personality disorder. This was not an

aberration. In 2008, in response to a congressional request, the General Accounting Office examined the records of hundreds of service members discharged for personality disorders and found overwhelming evidence that the military was not following the required procedures with regard to notice, diagnosis of a personality disorder, or counseling. See USGAO, *Defense Health Care -- Additional Efforts Needed to Ensure Compliance with Personality Disorder Separation Requirements (October 2008)* (<http://www.gao.gov/products/GAO-09-31>). The GAO concluded that “[t]he military services have not established a way to determine whether the commanders with separation authority are ensuring that DOD’s key separation requirements are met, and DOD does not have reasonable assurance that its requirements have been followed.” (*Id.*, at “What GAO Found.”) It recommended that the Secretary of Defense direct the Secretaries of the four service branches to “develop a system to ensure that personality disorder separations are conducted in accordance with DOD’s requirements” and ensure that DOD monitored the military services’ compliance with the applicable requirements. (*Id.* at 19.)⁶

Accordingly, based on this widespread concern about the overuse of personality disorders to justify discharges for convenience,⁷ in 2008 the Department of Defense issued new procedures applicable to discharges based on a personality disorder contained in DoDI

⁶ These problems persisted beyond 2008. In 2010, the GAO submitted a further report, in which it updated Congress on the actions taken by the Department of Defense since 2008 with regard to the GAO’s recommendations. See USGAO, *Defense Health Care -- Status of Efforts to Address Lack of Compliance with Personality Disorder Separation Requirements* (Sept. 15, 2010) (<http://www.gao.gov/products/GAO-10-1013T>). The 2010 Report found that “the military services have not demonstrated full compliance with DOD’s personality disorder separation requirements” and reiterated the importance of complying with the 2008 recommendations.

⁷ See “Adjustment Disorder Discharge: How command rid military of unwanted service members,” Gilbert, Kathleen. Military Law Task Force of the National Lawyers Guild <http://nlgnlrf.org/military-law-library/publications/adjustment-disorder-discharge/>.

1332.14. These changes substantially enhance the safeguards for service members to protect them from unwarranted and arbitrary discharges, such as the one experienced by [REDACTED]

[REDACTED] In particular, the following provisions were added:

- Separation on the basis of personality disorder is authorized only if a diagnosis by a psychiatrist or PhD-level psychologist using the Diagnostic and Statistical Manual of Mental Disorders, and in accordance with procedures established by the Military Department concerned, concludes that the disorder is so severe that the member's ability to function in the military environment is significantly impaired.
- For service-members who have served or are currently serving in imminent danger pay (IDP) areas, a diagnosis of personality disorder must be "corroborated by a peer or higher-level mental health professional and endorsed by the Surgeon General of the Military Department concerned."
- The personality disorder diagnosis has to address PTSD or other mental illness co-morbidity.
- Observed behavior of specific deficiencies should be documented in appropriate counseling or personnel records and include history from sources such as supervisors, peers, and others, as necessary to establish that the behavior is persistent, interferes with assignment to or performance of duty and has continued after the Service member was counseled and afforded an opportunity to overcome the deficiencies.

DoDI 1332.14, Enclosure 3 at 3(3)a.(8)(c) (Aug. 29, 2008) (attached as Exhibit B hereto, at p. 11.) These requirements have been incorporated into the Navy's own regulations. *See* Milpersman 1910-122 CH-28, at p. 2, 21 Aug 2009, "Separation by Reason of Convenience of the Government - Personality Disorder(s)."

Manifestly, [REDACTED] received none of these enhanced safeguards. His alleged "personality disorder" was not diagnosed by a psychiatrist or Ph.D.-level psychologist, let alone based on consideration of the Diagnostic and Statistical Manual of Mental Disorders. As noted above (at p. 15), under the DSM, depression is materially different from a "personality

disorder.” Accordingly, applying the principles of the DSM-IV would have underscored the inappropriateness of such a diagnosis in a person who was experiencing service-connected depression and had never (before or since) received a diagnosis of personality disorder.

In addition, because [REDACTED] was the recipient of imminent danger pay (*see Exhibit E hereto*), any such diagnosis would have had to have been “corroborated by a peer or higher-level mental health professional and endorsed by the Surgeon General” of the Navy. These safeguards, which would have revealed that [REDACTED] suffered from depression, not a “personality disorder,” never occurred here. Similarly, the Navy attributed a “personality disorder” to [REDACTED] without considering “other mental illness co-morbidity,” a further safeguard that would have demonstrated that he suffered from depression and not a personality disorder.

Finally, there was no attempt to document in appropriate “counseling or personnel records” any history from supervisors, peers or others that any alleged “personality disorder” was persistent or interfered with [REDACTED] performance of his duty. [REDACTED] consistently positive performance evaluations would have established the opposite; in the evaluation report dated the same day as the discharge, [REDACTED] supervisor complimented his job performance, recommended him for retention, and deemed him “promotable.” (*Exhibit H hereto.*) And, as previously noted, [REDACTED] was never counseled about a “personality disorder” and afforded an opportunity to “overcome” the alleged deficiencies.

In sum, the 2008 revisions to DoDI 1332.14 provided greatly enhanced protections for individuals in [REDACTED] situation. There is plainly substantial doubt that [REDACTED] would have received the same discharge under these procedures, and his discharge should accordingly be upgraded to Honorable.

C. Principles of Equity Also Support Upgrading ██████ Discharge to Honorable Status.

Even if procedural grounds alone were not sufficient to provide an upgrade, the equities of ██████ case also compel the Board to upgrade his discharge to Honorable status. The regulations further provide at subsection 32 C.F.R. § 70.9(c)(3) that a discharge “shall be deemed to be equitable” unless:

- (3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this section and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance.

The regulations then set forth a list of factors that can be considered for equitable arguments, including “Quality of service” and “Capability to serve.” *Id.* The latter category includes consideration of “Family and Personal Problems,” which include “*matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.*” *Id.* (emphasis added).

█████ enlisted at the young age of 18. From the outset of his service, he was subjected to harsh and sustained hazing by fellow service members. (█████ Aff., ¶¶ 9-11; attached as Exhibit C hereto.) This inappropriate conduct included physical attacks, such as being held down and punched in the eye; urinating on his rack; theft of his possessions; repeated verbal abuse; and being sexually assaulted with a broomstick. (*Id.*) After initially remaining silent out of a misplaced sense of loyalty, ██████ reported the misconduct only to have no corrective action taken. (*Id.*) Notwithstanding the pattern of abuse, ██████ continued to perform at a high level even as he grew more depressed. When the hazing escalated, he attempted to take his

own life, as a final act of despair. The Navy responded by summarily discharging him only eight days later, without giving him any help or according him the basic procedural safeguards required by its own regulations. Under these circumstances, basic fairness and equity require a discharge upgrade.

IV. CONCLUSION

For the reasons set forth above, [REDACTED] respectfully requests that the Board order that his discharge classification be upgraded to "Honorable" and that the reason for separation on his DD Form 214 be changed from "Personality Disorder" to "Secretarial Authority."

April 26, 2017

Respectfully submitted,

APPLICANT,

[REDACTED]

By:

[REDACTED]

His Attorneys