

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**JIM A. TURNER,**

**Plaintiff,**

**V.**

**Case No.**

**1:97CV01653 (PLF)**

**UNITED STATES NAVY, *et al.*,**

**Defendants.**

**PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS  
AND COUNTER-STATEMENT OF DISPUTED MATERIAL FACTS**

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**PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Local Rule 108(h), plaintiff Jim A. Turner respectfully submits this Statement of Undisputed Material Facts in support of his present cross-motion for summary judgment.

A. **PLAINTIFF'S NAVY CAREER**

**Plaintiff's Statement No. 1:** Plaintiff enlisted in the Navy on September 3, 1987.

Compl., || 46; Ans., || 46. Throughout his seven years of service, plaintiff received excellent performance reviews, high recommendations, and strong recommendations for advancement. R. 202-27.

**Plaintiff's Statement No. 2:** In or about November 1987, after completing basic training in Great Lakes, Illinois, plaintiff entered operations specialist "A" school in Dam Neck, Virginia. Compl., || 48; Ans., || 48. Because of his outstanding performance there, the

company commander appointed plaintiff as "class leader" for his class of over 40 students. R.227, 234.

**Plaintiff's Statement No. 3-** Plaintiff's first duty station after graduation from Dam Neck in March 1988 was the USS MAHLON S. TISDALE (FFG-27), a guided missile frigate stationed in San Diego, California, which conducted missions in both the Eastern and Western Pacific regions. Plaintiff advanced to Operations Specialist, Third Class (" OS3 ") in July 1988.

Compi., 1 49; Ans., 1 49.

**Plaintiff's Statement No. 4:** On or about October 7, 1988, the Commanding Officer of the USS TISDALE, P.D. Leibendguth, chose plaintiff as USS TISDALE's "Junior Sailor of the Quarter" for the fourth quarter of 1988. R. 23 1. In his citation,

Commanding Officer  
Leibendguth wrote:

You have displayed those rare qualities most sought in today's Navy ... Your dynamic leadership, initiative, maturity, and exceptional professional performance are admired by both peers and subordinates alike. A polished understanding of the communications suite on board the TISDALE sets you apart from your peers, as does a rare blend of personal candor, mature judgment, and self-starting motivation.

Id.

**Plaintiff's Statement No. 5:** On or about November 3, 1988, the Commander of Surface Squadron One, Captain H.E. Bailey, similarly selected plaintiff as the Surface Squadron One "Junior Sailor of the Quarter" for the fourth quarter of fiscal year 1988. R. 232. In his citation, Bailey commended plaintiff for his "sustained outstanding performance." He further wrote: "You have consistently demonstrated an exceptionally high degree of military and professional excellence that marks you as a valuable member of the command.

Id.

**Plaintiff's Statement No. 6:** On or about December 31, 1988, plaintiff was selected as the TISDALE's "Sailor of the Year." R. 233. Commanding Officer Oliver Hazard Perry III commended plaintiff for "perform[ing] all duties in a uniformly outstanding manner," concluding that plaintiff's " [t]otal reliability and sound judgement [sic] enabled [him] to complete all assigned tasks with exceptional results. " Id.

**Plaintiff's Statement No. 7.-** In early 1989, plaintiff was also selected as the Surface Squadron One "Sailor of the Year" for 1988. R. 228. In presenting this award, Captain H.E. Bailey stated:

Petty Officer Tumer's extraordinary professionalism, initiative and loyal dedication to duty reflected great credit upon himself and were in keeping with the highest traditions of the United States Naval Service.

Id.

**Plaintiff's Statement No. 8:** On or about October 16, 1989, plaintiff advanced to Operations Specialist, Second Class ("OS2"). R. 1528.

**Plaintiff's Statement No. 9:** During his subsequent deployment with the TISDALE in 1990 to the Northern and Western Pacific regions, plaintiff helped to control the airspace and operations for numerous aircraft during several search-and-rescue missions. During one of these missions, he played an integral part in the rescue of 23 shipwrecked Korean sailors. Compl., || 55; Ans., || 55.

**Plaintiff's Statement No. 10:** On or about May 11, 1990, the TISDALE's Executive Officer, Lieutenant Commander J.E. Grause, recognized plaintiff as "TISDALE's number

one air controller-" R. 223.

**Plaintiff's Statement No. 11:** On or about April 24, 1991, the TISDALE's subsequent Executive Officer, Lieutenant Commander L.M. Henry, noted that plaintiff "is driven by an unflinching desire to make everything in his area of responsibility flawless, streamlined, and smooth running.... A self-starter .... he performs his own duties, then assists others on his own time. He starts early and stays late to get the job done." R. 220-21.

**Plaintiff's Statement No. 12:** In May 1991, plaintiff received a Letter of Commendation from the Commander of Surface Squadron Five. R. 250.

**Plaintiff's Statement No. 13:** On or about July 31, 1991, the TISDALE's Executive Officer, Lieutenant Commander L.M. Henry, described plaintiff as a "self starter with [a] desire for challenge. Demands high standards of performance from self and subordinates. R. 218-19.

**Plaintiff's Statement No. 14.** On or about December 9, 1991, plaintiff was re-billeted to the USS ANTIETAM (CG-54), an AEGIS-class cruiser stationed at Long Beach, California and scheduled for a January 1992 deployment to the Western Pacific region. Compl., || 60; Ans., || 60.

**Plaintiff's Statement No. 15:** On or about September 8, 1991, soon after reporting for duty aboard the ANTIETAM, plaintiff received a Good Conduct Award from the ANTIETAM's then Commanding Officer, Captain R. J. Natter. Compl., || 61; Ans., || 61.

**Plaintiff's Statement No. 16:** In July 1992, plaintiff received a Letter of

Commendation from Rear Admiral B.M. Bennett, Commander of Carrier Group Five and the Carrier Strike Force for the Seventh Fleet and Commander of the Battle Force for the Seventh Fleet. R. 240. Admiral Bennett wrote:

Displaying meticulous attention to detail, [Petty Officer Turner] spent countless hours personally ensuring that precise data reporting and plotting standards were maintained. His diligent efforts inspired all who observed him and contributed to the accomplishment of ANTIETAM's mission.

Id.

**Plaintiff's Statement No. 17:** On or about April 1993, the ANTIETAM's then-

Executive Officer, Michael D. Palatas, noted the following in his evaluation of plaintiff:

Petty Officer Turner's performance has been superb. He is an integral part and significant contributor to ANTIETAM's Combat Information Center. His experience, knowledge and skill support every aspect of his division's administration and supervision .... He consistently obtains outstanding results in all assigned tasks.

R. 214-15.

**Plaintiff's Statement No. 18:** In the fall of 1993, the Navy gave plaintiff another

Letter of Commendation for his meritorious service, while serving as air controller during a search-and-rescue operation. In this commendation, Captain G.L. Hanson wrote:

Demonstrating the highest degree of technical knowledge, flexibility, forethought, and meticulous attention to detail, he assumed control of up to six aircraft for over six consecutive hours. His excellent air control, airspace management, and coordination procedures for numerous aircraft resulted in thoroughly safe and efficient flight situations. R. 24 1.

**Plaintiff's Statement No. 19.** In a memorandum dated October 5, 1993, Lt. Commander K.J. Bickel wrote the Command Advancement Program Board to recommend plaintiff for advancement to Operations Specialist, First Class ("OS1").

R. 249-51. Bickel noted:

Petty Officer Tumer's dynamic leadership, maturity, and initiative combine smoothly with his experience, knowledge and skill in all warfare areas second to none.

R. 250-51.

**Plaintiff's Statement No. 20:** On April 10, 1994, in plaintiff's annual evaluation aboard the USS ANTIETAM, Executive Officer Palatas acknowledged that plaintiff is "the most experienced ASTAC [Air Surface/Subsurface Tactical Air Controller] on board ANTIETAM" with "an unparalleled level of operational skill and systems knowledge R. 211-12. Based on plaintiff's "acute level of awareness normally expected of more senior petty officers," "dynamic leadership skills," and "sound technical knowledge," Palatas "strongly recommended" plaintiff for "immediate advancement to operations specialist first class. " Id.

**Plaintiff's Statement No. 21:** During April and May 1994, plaintiff was billeted as an ASTAC aboard the ANTIETAM performing operations in the Persian Gulf. Compl || 69; Ans., || 69.

**Plaintiff's Statement No. 22:** At this time, the ANTIETAM was under the command of Commanding Officer ("CO") Captain J.L. Frank and the Chief Master-At-Arms ("Chief") aboard the ship was Chief Petty Officer C.M. Clanahan.

## **B. UNDERLYING ALLEGATIONS**

**Plaintiff's Statement No. 23:** In late April 1994, Seaman Chad M. Maurer informed

plaintiff that the ANTIETAM's command was pressuring him to present an accusation

against plaintiff. See Turner Rule 56(f) Declaration (Jan. 14, 1998).

**Plaintiff's Statement No. 24.** After Maurer came to him with this information, plaintiff purchased a telephone card, went down to the chaplain's office to use the ship's satellite telephone and, on his own initiative, called a civilian attorney in the United States that had previously assisted him with a traffic incident. This civilian attorney informed plaintiff not to speak to anyone until he had military counsel. Id.

**Plaintiff's Statement No. 25:** On or about April 29, 1994, Petty Officer John T. King provided a written statement against plaintiff to Chief Clanahan. R. 48.

**Plaintiff's Statement No. 26:** King accused plaintiff of four acts. R. 48. First, King alleged that, on April 24, 1993, plaintiff offered to perform oral sex on King for \$50.00 on the ANTIETAM's forward port breezeway. King alleged that he refused this request. Id. Second, King alleged that, on the following day, plaintiff wrote down "\$75.00" on a radar scope repeater and showed it to King, while he and plaintiff were on watch aboard the ANTIETAM. Id. King alleged that he ignored this message. Id. Third, King alleged that, on April 12, 1994, plaintiff "put his hand on my leg and then brought it up to my groin. " Id. King also alleged that another member of the ANTIETAM's crew, OS3 Nishon Bames, witnessed this alleged incident. Id. Fourth, King alleged that plaintiff "signed off on several PQS [performance qualification sheets] ... even though I never completed the assigned tasks or was qualified." Id.

**Plaintiff's Statement No. 27:** At the time that he made these four allegations against plaintiff, King was known to many people aboard the ANTIETAM as "off the wall," unreliable,

**Plaintiff's Statement No. 28:** For example, at the time that he made these

allegations, King was known to have engaged in the following misconduct:

- a. masturbating into another's raincoat in the ANTIETAM's command information center in order to be, in his own words, "off the wall" and to be able to brag that he had engaged in such misconduct (R. 116, 118);
- b. stealing cigarettes from a store while on shore leave (R. 117, 127, 141);
- c.. "parading around naked" and making "provoking" gestures in front of other service members while in port in Dubai (R. 129);
- d. failing to perform his duties (R. 112, 117, 127); and
- e. requiring mandatory counselling for alcohol abuse (R. 117, 127).

**Plaintiff's Statement No. 29:** On or about April 28, 1994, Seaman Apprentice Lee J. Poore provided a written statement against plaintiff to Chief Clanahan. R. 49-49a.

**Plaintiff's Statement No. 30:** Poore accused plaintiff of one act. Poore alleged that, in or about September 1993 (approximately seven months before he executed his written statement), plaintiff, Poore, and three other enlisted members of the ANTIETAM's crew -Seaman Chad M. Maurer, Seaman Apprentice J. Ryan Barnett, and Seaman Apprentice Anderson -- left the ship while in port in Long Beach, California to watch some football and drink beer at a nearby hotel. Poore alleged that, after the two had finished a card game and were alone in the room, plaintiff threw Poore on the bed and stated that he was going to perform oral sex on Poore. Poore alleged that he resisted this advance, left the hotel room, and waited outside until Maurer, Barnett and Anderson returned, at which time he alleged that he informed them of what had occurred. Poore stated that he thought plaintiff "was horseplaying" at first,

although he then determined plaintiff was serious. R. 49.

**Plaintiff's Statement No. 31:** At the time that he made his allegation against plaintiff, Poore regarded King as a close friend. Compl., || 80; Ans., || 80. Poore made the foregoing allegation against plaintiff only after first speaking with King and Maurer and hearing about their allegations. R. 87-88.

**Plaintiff's Statement No. 32:** At the time that he made his allegation against plaintiff, Poore was known to have engaged in the following misconduct:

- a. illegal gambling, which resulted in a "captain's mast" proceeding and stiff disciplinary action against him, including 15 days of restriction and extra duties and graduation from an inferior boot camp unit (R. 89);
- b. drinking excessive amounts of alcohol (R. 89-90); and
- c. failing to appear for mandatory treatments for alcoholism (R. 90).

**Plaintiff's Statement No. 33:** Defendants accepted the written statements of King and Poore. Compl., || 83; Ans., || 83.

**Plaintiff's Statement No. 34:** During plaintiff's administrative discharge proceedings, the administrative discharge board ("ADB") concluded that King was not a reliable witness and that his accusations against plaintiff could not be credited and that Poore's alleged assault did not occur. R. 158-59.

**Plaintiff's Statement No. 35:** In April 1994, Maurer reported to the ship's Executive Officer, Commander Michael D. Palatas, for questioning. R. 104; Compl., || 87; Ans., || 87.

**Plaintiff's Statement No. 36:** When Maurer reported for questioning, Executive Officer Palatas directly asked him whether there was anything "strange" about plaintiff. R. 104.

not provide Palatas with an accusation or statement against plaintiff. R. 104.

**Plaintiff's Statement No. 37:** After Maurer did not provide Executive Officer Palatas with a statement and stated that there was nothing strange about plaintiff, Maurer was told to report to Chief Clanahan for further questioning. R. 104.

**Plaintiff's Statement No. 38:** Maurer reported to Chief Clanahan and was questioned by him. During the questioning, Maurer felt as if he was being "interrogated" and treated as a suspect. R. 104. Chief Clanahan took Maurer into a room, turned off the lights, turned on a single light, took his shirt off, and kicked his feet on the table. Id.

**Plaintiff's Statement No. 39:** Chief Clanahan directly questioned Maurer regarding his sexual orientation and regarding whether he had engaged in any sexual acts with plaintiff. R. 104-05. In response, Maurer denied being a homosexual. R. 105.

**Plaintiff's Statement No. 40:** Maurer ultimately provided a written statement concerning plaintiff on April 29, 1994. R. 50, 105.

**Plaintiff's Statement No. 41.** The Board for the Correction of Naval Records ("BCNR") concluded that Maurer's "testimony clearly indicates that he would not have made a statement [against plaintiff] had he not been ordered to report to [Clanahan]." R. 612.

**Plaintiff's Statement No. 42:** Maurer's allegation included three events. First, Maurer alleged that, on or about February 11 or 12, 1994, while on a recreational gambling trip with plaintiff in Laughlin, Nevada, he woke up naked in the hotel room that he was sharing with plaintiff, and "panic went though [sic] [his] mind because [plaintiff] may have undressed [him]."

R. 50. Maurer further alleged that he had consumed 12-14 hard-liquor drinks during the previous night and that he did not "recall anything" due to this intoxication, and he further alleged that, "at no time, " did he ever ask plaintiff "if anything had occurred. " Id.

**Plaintiff's Statement No. 43:** Second, Maurer alleged that, on or about February 15, 1994, while he was riding in plaintiff's car after sharing a meal with him at a pizza place, plaintiff asked to perform oral sex on Maurer. Maurer alleged that he refused this request. Third, Maurer alleged that, on or about April 16, 1994, plaintiff approached him while he was working in the ship's scullery and offered to perform oral sex on him for \$40.00. Maurer alleged that he refused this request and walked away. R. 50.

**Plaintiff's Statement No. 44:** On or about May 2, 1994, the ANTIETAM's command decided to initiate two administrative proceedings against plaintiff: (1) a non-judicial punishment ("NJP") proceeding to impose punishment and (2) an administrative discharge proceeding to effect his involuntary discharge. R. 1349.

### C. **PLAINTIFF'S NONJUDICIAL PUNISHMENT**

**Plaintiff's Statement No. 45:** On the morning of May 3, 1994, prior to the initiation of the NJP, defendants provided plaintiff with several forms and documents. Compl., || 111; Ans., || 111.

**Plaintiff's Statement No. 46:** *First*, Chief Clanahan handed plaintiff a "Military Suspect's Acknowledgement and Waiver of Rights" form. Compl., || 112; Ans., || 112. This form advised plaintiff, *inter alia*, that he (a) "ha[d] the right to consult with a lawyer prior to any questioning" and (b) had the right to have his lawyer "present during this interview.

**Plaintiff's Statement No. 47:** After reviewing this document, plaintiff signed the form at 9:18 a.m. on May 3, 1994, indicating that he "desired to remain silent [and] consult with a retained or appointed-lawyer, or have a lawyer present at this time" and that he understood that he "had the right to consult with a lawyer prior to any questioning." R. 47.

**Plaintiff's Statement No. 48:** In a message dated May 4, 1994 to the Naval Central Command, the Staff Judge Advocate for the commander of the ship's cruiser-destroyer group reported that plaintiff "did not desire to consult with counsel prior to electing rights." R. 896.

**Plaintiff's Statement No. 49:** Nearly one year later, on or about April 18, 1995, Captain Frank admitted that his command "denied legal counsel" to plaintiff in connection with his NJP proceeding despite plaintiff's election of that right on his acknowledgment of rights form. R. 43. In explaining this denial, Captain Frank claimed that a lawyer was not available at the time, in part, because the ship was at sea. *Id.* However, on May 3, 1994, the same day on which the NJP occurred, the Navy transferred plaintiff off the ANTIETAM by helicopter to Bahrain to visit with his appointed military lawyer in connection with the noticed ADB proceeding, and on May 4, 1994, plaintiff met with that lawyer. Compl., || 116; Ans., || 116.

**Plaintiff's Statement No 50:** *Second*, on May 3, 1994, shortly before the conunencement of the NJP proceeding, Chief Clanahan handed plaintiff the three typed statements of King, Poore and Maurer along with a NAVPERS 1626/7 form, on which the top portion of the back entitled "Preliminary Inquiry Report" was completed. Compl., || 117; Ans., || 117; R. 48-50, 54. On the Preliminary Inquiry Report, under the section entitled

**Plaintiff's Statement No. 51:** Third, on May 3, 1994, before the commencement of the NJP proceeding, Chief Clanahan handed plaintiff a document entitled "Report and Disposition of Offenses. Compt., || 119; Ans., || 119. The document charged plaintiff with the following offenses.

- 1 . two specifications of "indecent assault," in violation of Article 139 of the UCMJ;
2. four specifications of "indecent language," in violation of Article 134 of the UCMJ;
3. one specification of "sodomy," in violation of Article 125 of the UCMJ; and
4. four specifications of "soliciting another to commit an offense," in violation of Article 134 of the UCMJ; and
5. one specification of submission of a "false official statement," in violation of Article 107 of the UCMJ.

R. 51-52.

**Plaintiff's Statement No 52:** Plaintiff contends, and the BCNR agreed (R. 610), that defendants changed these charges after the NJP proceeding commenced by deleting the original "sodomy" charge and adding two new charges: (1) "assault with intent to conunit sodomy" and

(2) "conduct of a nature as to bring discredit [upon the armed forces]." R. 51-52.

**Plaintiff's Statement No. 53:** After NJP, Plaintiff signed the Executive Officer's revised Report and Disposition of Offenses that listed the new charges -- which is marked "Rough Draft, MAC" -- underneath both his prior signature and the handwritten revisions. R. 51-52. Chief Clanahan also presented plaintiff with a retyped version of the Report and Disposition of Offenses. R. 55-56.

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**Plaintiff's Statement No. 54:** The BCNR concluded the following with respect to defendants' list of charges:

"The majority cannot determine on the face of the evidence whether the additional handwritten charges on the 'draft copy' were done prior to, during, or after the NJP hearing. However, the majority believes if the amendments had been made prior to the hearing they would have, or should have been, retyped prior to the hearing, and that any changes made during the hearing would have been only for minor corrections and to delete any charges that were dismissed. While there was no requirement to retype the charges and specifications if they were valid, the majority believes the retyping of the charges and specification lends credence to Petitioner's contention that additional charges were improperly added after NJP proceedings began.

R. 610.

**Plaintiff's Statement No. 55:** The Navy considered the offenses against plaintiff to be serious offenses and initially desired to convene a court-martial. R. 1349.

Defendants repeatedly referred to these offenses as serious offenses throughout the administrative proceedings. R. 61-63, 66-68, 164-65, 570, 888-90, 1233, 1349, 1350.

**Plaintiff's Statement No. 56:** Fourth, before the NJP on May 3, 1994, Chief Clanahan handed plaintiff a form entitled " Captain's Mast Accused Acknowledgment of Appeal Rights Plaintiff signed this form. R. 46; Compl., || 122; Ans., || 122.

**Plaintiff's Statement No 57:** During the NJP proceeding, Captain Frank asked Messrs. King, Poore and Maurer if they stood by their written statements. Compl., 1 126; Ans., 1 126. The Navy presented no other testimony or evidence at the NJP proceeding to support any of its charges against plaintiff. Compl., || 125; Ans., || 125.

**Plaintiff's Statement No. 58:** After the Navy presented its case, individuals in plaintiff's direct chain of command aboard the ANTIETAM below the ranks of Captain Frank

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and Executive Officer Palatas testified. Compl., || 128; Ans., || 128.

**Plaintiff's Statement No. 59:** Upon the advice of a lawyer whom plaintiff was able

to reach, very briefly, by satellite telephone several days before the NJP proceeding and on his own initiative, plaintiff invoked his right to remain silent. R. 135-136.

**Plaintiff's Statement No. 60:** The BCNR found that plaintiff's "silence at the NJP worked to his detriment not only at the NJP but at the ADB as well. " R. 61 1.

**Plaintiff's Statement No. 61:** At the conclusion of the NJP proceeding, Captain Frank found against plaintiff for all of the offenses charged excluding the sodomy charge. Compl., || 136; Ans., || 136. Captain Frank then imposed punishment upon plaintiff, ordering plaintiff to "forfeit" \$644.00 in pay per month for two months and reducing his rank to the next inferior pay grade (i.e., OS3). R. 54.

**Plaintiff's Statement No. 62.** After the conclusion of the NJP proceeding, Captain Frank provided plaintiff with official written notice that he had initiated involuntary discharge proceedings against plaintiff, and Captain Frank took steps to convene an ADB aboard the ANTIETAM. Compl., || 142, 143; Ans., || || 142, 143; R. 164.

**D. PLAINTIFF'S ADMINISTRATIVE DISCHARGE BOARD**

**Plaintiff's Statement No. 63:** On May 3, 1994, plaintiff was transferred by helicopter from the ANTIETAM to see his appointed military counsel, Lt. Andrew J. Waghorn, at the Navy's base in Bahrain. Compl., || 139; Ans., || 139.

**Plaintiff's Statement No. 64:** On May 21, 1994, the Navy flew plaintiff and his counsel, Lt. Waghorn, back to the ANTIETAM in preparation for the ADB proceeding.

Compl., || 148; Ans., || 148. After Lt. Waghorn learned that the ADB was scheduled to begin "within a matter of hours" of their arrival on the ANTIETAM, Lt. Waghorn requested that the ADB be postponed. R. 583-84. The ADB was postponed, but only

until the following day,

May 22, 1994. Id. -

**Plaintiff's Statement No. 65:** On May 22, 1994, plaintiff's ADB proceeding took place before a panel composed of three members of the ANTIETAM's crew. Each member of the panel was under the direct command of Captain Frank and was accountable to Captain Frank. Compl., || 150; Ans., || 150. Before the ADB proceeding began, each member of the panel had heard rumors surrounding plaintiff's NJP and alleged sexual misconduct; and each member of the panel knew that plaintiff was already found, by Captain Frank, to have committed these same offenses at his NJP proceeding and had been punished for them. R. 72-73.

**Plaintiff's Statement No. 66-:** At the commencement of the ADB proceeding, on May 22, 1994, the Navy first called Poore to testify. R. 83. In his written declaration, Poore stated that he thought plaintiff "was horseplaying" at first, although he then determined that plaintiff was serious. R. 49. In his live testimony to the ADB, Poore stated the opposite: that, at first, he did not think plaintiff was kidding; that he felt "mixed up" and "really didn't know;" and that, over time, he began to feel that plaintiff "might have been kidding." R. 86. He further testified that he only "decided that [plaintiff] was not joking around" (and thus, elected to come forward with his allegation) after hearing the allegations of King and Maurer -- at least seven months after the fact. R. 88.

**Plaintiff's Statement No. 67:** The Navy next called Seaman Barnett in an effort to

corroborate Poore's allegations. R. 91. Barnett testified that, as he had understood the

incident from Poore, Poore himself had participated in the horseplay, saying "okay" when plaintiff allegedly jested that the loser of the card game had to perform oral sex on the winner. R. 93.

**Plaintiff's Statement No. 68:** The Navy next called Seaman Maurer to testify. R. 96.

Maurer also contradicted Poore's written statement, stating that, as he understood Poore's allegation from prior discussions with Poore, Poore himself uttered the alleged statement and did so in jest. R. 101-103.

**Plaintiff's Statement No 69:** In testifying about his own allegations, Maurer admitted that he made no allegation against plaintiff when originally asked and that he only presented his allegations after Chief Clanahan had interrogated him and had treated him like a suspect.

R. 104.

**Plaintiff's Statement No. 70:** After he received his early separation from the Navy, Maurer later wrote the following to plaintiff by e-mail:

"Any way [sic], I'm going to see a lawyer sometime this week. basicly [sic] to insure that I will be protected against any inconvence [sic]. i.e. repercussions [sic] of the law, press all that bullshit. Well, the Navy wanted to send me up too. I know this.

However, guilt by association doesn't stand up to shit. I am not gay or bi. I Know [sic], you know that. It is bullshit what they did to you. well [sic] after I talk with a lawyer, I [will] know exactly where I stand in this big pile of shit somebody created.

R. 14.

**Plaintiff' s Statement No. 71:** The Navy next called King to testify. R. 110. In his

testimony, King confessed to a variety of misconduct and admitted that he was regarded

as "off the wall" by many aboard the ship and had engaged in misconduct to be, in his own words, "off the wall." R. 115-16.

**Plaintiff's Statement No. 72:** The Navy next called Petty Officer Nishon Barnes. R. 118. The Navy asked Barnes to corroborate one of King's allegations -- specifically, King's assertion that, on April 12, 1994, plaintiff had improperly touched King's "groin." R. 48, 119. Barnes testified that he did not see plaintiff touch King's groin. R. 119.

**Plaintiff's Statement No. 73:** After the Navy presented its case, plaintiff presented several witnesses from the ANTIETAM's crew who testified before the ADB that King was well known as "not credible" and was thought of as a "troublemaker." R. 121, 126, 129, 131.

**Plaintiff's Statement No. 74:** Plaintiff also presented several crew members who testified about plaintiff's skills and his history of excellent and reliable professional conduct. R. 121, 126, 129, 131-32.

**Plaintiff's Statement No. 75:** For example, Operations Specialist First Class Craig Drumwright, plaintiff's immediate supervisor, identified plaintiff as an "outstanding operations specialist" and stated that he believed plaintiff to be "the best [ASTACI we had on board]." R. 129.

**Plaintiff's Statement No. 76:** Operations Specialist Third Class James M. Kelly similarly testified that plaintiff is "outstanding" and "knows his rate better than any OS we have." R. 126.

**Plaintiff's Statement No. 77:** Aviation Electronics Technician, Second Class Davis A. Stacconi testified that plaintiff was "extremely valuable to the Navy" and that he had "never come across anyone with more experience and better handling of things, both when the aircraft is up or [during] any of the other exercises we do." R. 131. Stacconi also noted Chief Clanahan was an "aggressive investigator, interrogator" and had "bragg[ed]" that "he was able to get [people] to implicate others." R. 132.

**Plaintiff's Statement No. 78:** Plaintiff also testified in his own defense at the ADB proceeding. R. 134. Plaintiff denied the allegations of King, Poore, and Maurer. R. 135-147. Plaintiff also noted that, when he was 23 years-old, his fiancée had been murdered, and after that incident, he had buried himself in his work. R. 140.

**Plaintiff's Statement No. 79:** Plaintiff also submitted supporting character statements from several individuals with whom he worked aboard the ANTIETAM. Compl., || 169; Ans., || 169. For example, Petty Officer First Class Michael Pauli's statement read, in part: "Turner has shown himself to be an excellent operations specialist" who has "never in my 9 mos. aboard acted improperly toward me, nor ever given me cause to question his behavior at any time. R. 203-04.

**Plaintiff's Statement No. 80:** Petty Officer Frank Cabral, who worked with plaintiff every day and often up to ten hours per day, stated in relevant part: "In my opinion, Petty Officer Jim A. Turner is bar none the finest ASTAC I have had the pleasure of serving with in my 13 1/2 year career. He is the example of professionalism. " R. 202.

**E. FINDINGS OF THE ADMINISTRATIVE DISCHARGE BOARD**

**Plaintiff's Statement No. 81:** At the conclusion of the proceeding, at 3:45 p.m. on May 22, 1994, the ADB adjourned to deliberate. It returned with its findings, less than two hours later, at 5:05 p.m. that afternoon. R. 156-57.

**Plaintiff's Statement No. 82-** Using the command's retyped "Report and Disposition of Offenses" from the NJP proceeding as its guide, the ADB found, by a vote of 3-0, that plaintiff had not committed misconduct due to the commission of a serious offense involving sexual perversion. R. 157-59.

**Plaintiff's Statement No. 83:** By the same unanimous vote, the ADB found that plaintiff had committed misconduct due to the commission of a serious offense involving sexual harassment. The ADB recommended that plaintiff be discharged under an "other than honorable" characterization. R. 157.

**Plaintiff's Statement No. 84:** Specifically, with respect to all of King's allegations, the ADB found for plaintiff. The ADB determined that King was an "uncredible witness," and it refused to credit any of his allegations or testimony against plaintiff: "Anything that had to do with [King] was thrown out. " R. 158.

**Plaintiff's Statement No. 85:** With respect to Seaman Apprentice Poore's allegation of indecent assault, the ADB also found for plaintiff. The ADB determined that Poore's testimony was inconsistent and unreliable and that the evidence did not show that plaintiff had indecently assaulted Poore. R. 158-59.

**Plaintiff's Statement No. 86:** With respect to Seaman Maurer's allegation that he

"woke up naked" in plaintiff's presence on or about February 11 or 12, 1994, the ADB similarly found for plaintiff. The ADB determined that there was no evidence that plaintiff had committed an indecent assault in connection with this alleged incident. R. 159.

**Plaintiff's Statement No. 87:** The ADB found insufficient evidence or declined to consider Charges IV, V, and VI -- which charged plaintiff with False Official Statements, Assault with Intent To Commit Sodomy, and Conduct of a Nature to Bring Discredit upon the Armed Forces, respectively. R. 159.

**Plaintiff's Statement No. 88:** The ADB found plaintiff guilty of indecent language and soliciting another to commit an offense. R. 160. It is unclear from the ADB's explanation of its decision whether it found that plaintiff had engaged in indecent language in connection with Seaman Apprentice Poore in or about September 1993. R. 158-59.

F. **PLAINTIFF'S APPEAL OF HIS NONJUDICIAL PUNISHMENT**

**Plaintiff's Statement No. 89:** On May 14, 1994, prior to his ADB proceeding, plaintiff filed an administrative appeal of his NJP with the Commander of the ANTIETAM's cruiser destroyer group, Rear Admiral V.E. Clark, the designated NJP appeal authority. R. 59. On May 22, 1994, in response to plaintiff's NJP appeal, Captain Frank submitted a letter to Admiral Clark. R. 61.

**Plaintiff's Statement No. 90:** On or about May 28, 1994, the Staff Judge Advocate for the NJP appeal authority, Lieutenant Commander Eric Geiser, sent a memorandum to Admiral Clark to summarize the NJP proceedings and to recommend a disposition of the NJP appeal. R. 1233.

**Plaintiff's Statement No. 91:** In his letter, Geiser incorrectly stated that plaintiff "was taken to NJP for two instances of offering other service members \$50 to let [him] perform oral sex on them." R. 1233. This statement understates the charges that the command brought against plaintiff at the NJP proceeding. Geiser also informed the NJP Appeal Authority, Admiral Clark, about the results of plaintiff's separate ADB proceeding. Id.

**Plaintiff's Statement No 92:** On May 29, 1994, Admiral Clark denied plaintiff's NJP appeal. R. 64-65.

**G. PLAINTIFF'S DISCHARGE**

**Plaintiff's Statement No. 93:** On June 4, 1994, in a Naval message to Washington, D.C., Captain Frank requested that plaintiff be promptly transferred from the ANTIETAM, pending the decision of the Chief of Naval Personnel on whether to accept the ADB's discharge recommendation. R. 909. Captain Frank stated that plaintiff's continued presence aboard the ANTIETAM threatened to cause an " international incident." Id.

**Plaintiff's Statement No. 94:** On August 25, 1994, defendants discharged plaintiff from the Navy under other than honorable conditions. Compl., || 196; Ans., || 196. On September 6, 1994, Rear Admiral H. C. McKinney affirmed plaintiff's administrative separation under other than honorable conditions. Compl., || 197; Ans., || 197.

**H. PLAINTIFF'S PETITION TO THE BCNR**

**Plaintiff's Statement No. 95:** On December 29, 1994, Plaintiff petitioned the BCNR to intervene. Plaintiff asked the BCNR to review the records of his NJP and ADB proceedings and

to remedy the injustices that had occurred in those proceedings. R. 283-93.

**Plaintiff's Statement No. 96:** Nearly two years later, on April 9, 1996, the BCNR issued its decision. R. 593-615. The BCNR found in favor of plaintiff and rejected the Navy's arguments that it had acted properly in its proceedings against plaintiff. Id.

**Plaintiff's Statement No. 97:** By a vote of 2-1, the BCNR recommended that plaintiff's record be corrected by (a) overturning his NJP, (b) restoring his naval enlisted classification code, (c) voiding the discharge of August 25, 1994, (d) showing that he served on active duty until his normal expiration of enlistment of June 16, 1996, (e) showing that he was honorably discharged upon the expiration of his enlistment, (f) assigning him an RE-1 reenlistment code.

R. 612-13.

**Plaintiff's Statement No. 98:** The BCNR found, in part, that there was insufficient evidence to support the discharge recommended by the ADB:

[U]nsubstantiated allegations supported only by suspicion and rumor generated within the command do not constitute a preponderance of the evidence.... The majority finds it extremely disturbing that an individual can be found guilty and labeled a homosexual without a modicum of corroborative evidence ... and believes that suspicion and rumors may have greatly influenced the decisions of both the CO and ADB in this case. Based on all of the foregoing, the majority firmly believes a preponderance of evidence did not support the imposition of NJP and the findings of the ADB which resulted in Petitioner's discharge from the service.

R. 612.

**Plaintiff's Statement No. 99:** Recognizing that the ADB had based its decision on

Seaman Maurer's testimony, the BCNR further noted:

[T]here is a strong implication that [Seaman Maurer's] allegation that he was solicited by Petitioner was made out of a fear that his early separation would not be approved if he did not so allege. Further, [Maurer's] testimony clearly indicates that he would not have

made a statement had he not been ordered to report to CMAA [Clanahan]. His testimony also indicates that the portion of his statement to the effect that he was offered money for sexual favors, came only after the CMAA asked if such had happened.

R. 612.

**Plaintiff's Statement No. 100:** In a brief separate statement, one member of the BCNR dissented from the majority opinion, citing his agreement with a military JAG staff member's analysis of the case. R. 614-615.

**Plaintiff's Statement No. 101:** On May 30, 1996, defendant Dalton's designee, Deputy Assistant Secretary Karen S. Heath, stamped and approved the dissenting BCNR member's recommendation and rejected the BCNR majority's decision. R. 615. The Deputy Secretary provided no explanation or reason for rejecting the decision of the BCNR majority other than the reasons articulated by the dissenting member. Id.

1. **DEFENDANT'S DOCUMENT PRODUCTION**

**Plaintiff's Statement No. 102:** In response to discovery ordered by the Court, on June 26, 1998, defendants produced a copy of MILPERSMAN || 3620100, which was attached to Original PSUMF as Exhibit B. R. 1980-83. MILPERSMAN || 3620100 indicates, in relevant part, that "[the] Deputy Chief of Naval Operations ... may authorize or direct the separation of enlisted or inducted members prior to the expiration of their active obligated service or expiration of service" where, *inter alia*, (a) "a servicemember ... voluntarily request[s] consideration for [such] discharge; (b) 'the Navy is in an authorized period of reduction;" (c) "the commanding officer is willing to gap the billet; " and (d) the "early separation will not effect [sic] the mission of the command."

MILPERSMAN|| 3620100.1(a)(1). To obtain an early

release under this provision, "[t]he member must submit an official letter of request via the commanding officer or the officer in charge to [the Chief of Naval Personnel]," and "[t]he endorsement may not be signed 'By direction' of the commanding officer. " Ex. B; R. 1980.

**Plaintiff's Statement No. 103:** Attached hereto as Exhibit E is a true and correct copy of relevant portions of Part IV of the Manual for Courts-Martial ("MCM"). In its entirety, Part IV of the MCM sets forth the elements of offenses under the punitive articles of the Uniform Code of Military Justice maximum imposable punishments for each offense thereunder.

**Plaintiff's Statement No. 104:** In response to discovery ordered by the Court, on June 26, 1998, defendants produced a true and correct copy of Part V of the MCM, which was attached to Original PSUMF as Exhibit F. R. 2128-2137. Part V sets forth the procedures governing nonjudicial punishment.

**Plaintiff's Statement No. 105:** In response to discovery ordered by the Court, on June 26, 1998, defendants produced a true and correct copy of DoD Directive No. 1332.14 (Mar. 3, 1994), which was attached to Original PSUMF as Exhibit G. R. 1897-1952. This DoD Directive sets forth the regulations governing homosexuality with respect to enlisted military personnel under 10 U.S.C. § 654 (commonly known as the "Don't Ask, Don't Tell, Don't Pursue " law).

**J. JUDICIAL PROCEEDING**

**Plaintiff's Statement NO . 106** Plaintiff subsequently filed suit in this Court, alleging violations of federal law and Navy regulations under the Administrative Procedure Act ("APA") and violations of the United States Constitution.

**Plaintiff's Statement No. 107.** On December 23, 1998, the Court granted partial summary judgment in favor of Plaintiff and against Defendants. The Court held that the Navy did not comply with the APA when it issued a ruling in the administrative proceeding involving Plaintiff. The Court further found that Plaintiff had presented arguments to the Court that called into question certain underlying evidence and charges brought by the Navy against Plaintiff.

**Plaintiff' s Statement No. 108** While retaining jurisdiction over the case, the Court remanded the matter to the Secretary for clarification and reconsideration of the Secretary's position. See December 23 Opinion at 17-18; *see also* Order dated December 23, 1998 at 2. The Court instructed that: "After considering all non-frivolous arguments [presented by Turner] and the record evidence afresh, the Secretary must decide how he assessed the record and whether to accept or reject the argwnents presented and then articulate reasoned bases for his ultimate decision. " *Id.* at 18 (citations omitted).

**K. DECISION ON REMAND**

**Plaintiff's Statement No. 109:** Despite Plaintiff's requests, on remand, the Secretary did not entertain any argument or meet with Plaintiff.

**Plaintiff's Statement No. 110:** On August 20, 1999, nine months after the Court's order of remand, the Secretary of the Navy's designee, Assistant Secretary Carolyn H. Becraft, issued

a Memorandum Decision affirming the Navy's rejection of the BCNR majority decision. *See* Exhibit A attached to Plaintiff's Cross-Motion for Summary Judgment (hereinafter "Becraft Decision").

**Plaintiff's Statement No.111:** In her decision, despite the Court's order to assess the record anew to determine whether it supported the actions against Plaintiff, Assistant Secretary Becraft upheld the adoption of the BCNR minority recommendation based on the presumption of regularity set forth in 32 C. F. R. Part 723. 3(e)(2) (1998). *See* Becraft Decision at 3, 4, 5 and 6. (emphasis added).

**Plaintiff's Statement No. 112:** Relying on this presumption, Assistant Secretary Becraft did not reassess the factual record anew, but instead upheld the original assistant secretary's adoption of the minority report.

**Plaintiff's Statement No. 113:** Defendants conducted no fact-finding inquiry or investigation, whether formal or informal, following the Court's order of remand, and no new non-privileged documents were presented to Assistant Secretary Becraft in connection with the remand. *See* Defendants Opposition to Plaintiff's Motion to Compel Supplemental Discovery at 3-4.

**PART II**  
**MATERIAL FACTS STILL IN DISPUTE**

Plaintiff submits that the following material facts, which are material to defendants' motion for summary judgment (but not necessarily to plaintiff's cross-motion for summary judgment) remain in dispute:

1. what information was expressly considered by the ANTIETAM's command during the NJP proceeding and whether defendants have produced the complete NJP record;
2. what information defendants considered or failed to consider in assessing whether they had "credible information," within the meaning of DoD Directive No. 1332.14, to pursue their charges against plaintiff;
3. to what extent the ANTIETAM's command suggested, coerced, or unduly influenced the allegations or testimony of Seaman Maurer (or plaintiff's other two accusers) -- whether by threats, intimidation, cajoling, or improperly promising favorable treatment (e.g., in the handling of Maurer's request for an early separation from the Navy, R. 2315);
4. whether the ANTIETAM's command intentionally misrepresented the facts and state of the record to the NJP Appeal Authority, the ADB, or the BCNR (*see, e.g.*, R. 1233);
5. whether defendants or the ANTIETAM's command excluded from the record material evidence that properly should be considered part of the record;

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Dated: December 15, 1999.