



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

TRG
Docket No: 4176-02
28 August 2003

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member in the Marine Corps, filed an application with this Board requesting that his record be corrected by reinstating him on active duty in the grade of staff sergeant (SSGT; E-6), and affording him remedial promotion consideration.
2. The Board, consisting of Mr. Cooper, Mr. Pfeiffer and Mr. Adams, reviewed Petitioner's allegations of error and injustice on 19 August 2003 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.
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. Petitioner's application was filed in a timely manner.
 - c. Petitioner reenlisted in the Marine Corps on 3 September 1997 after about 12 years of active duty on prior enlistments. On 13 January 1998 he was notified of separation processing by reason of misconduct due to commission of serious offenses, specifically, sexual harassment and fraternization. An administrative discharge board (ADB) convened on 17 December 1998 and recommended discharge under other than honorable conditions. The president of the ADB stated in his report, in part, as follows:

After ... discussions with the recorder and the counsel for the respondent, the (ADB) decided not to consider sexual harassment of LCPL (M) as a basis for

separation. No witness testimony was received on that issue, and we did not consider any of the documents given us by either counsel relation to that issue in reaching our findings.

... Based on a preponderance of the evidence considered, the (ADB) did find that a factual basis exists for separation by reason of misconduct due to sexual harassment and misconduct due to the commission of a serious offense, specifically fraternization. While we had originally agreed with counsel for both parties not to consider separation (on) the basis of sexual harassment, it was the unanimous opinion of the board that (Petitioner) had engaged in sexual harassment of CPL D, in addition to his fraternization with her.

The commanding officer (CO) recommended disapproval of the sexual harassment finding because Petitioner and his counsel did not receive notice of that allegation, and the initial charge of sexual harassment was removed after it was agreed that it would not be a basis for separation. However, the CO recommended discharge under other than honorable conditions by reason of misconduct due to fraternization. In a subsequent review, the staff judge advocate (SJA) found that Petitioner was properly notified of the charges against him and that the evidence supported the finding that he was guilty of sexual harassment and fraternization of CPL D. However, the SJA recommended disapproval of the sexual harassment charge as a matter of fairness. Subsequently, the commanding general disapproved the sexual harassment charge but directed discharge under other than honorable conditions by reason of misconduct. Petitioner was so discharged on 7 April 1999. At that time, he was administratively reduced in rank from SSGT to lance corporal (LCPL; E-3).

d. Attached to enclosure (1) is a decisional document prepared by the Naval Discharge Review Board (NDRB). In the discussion portion of the decisional document, the NDRB stated, in part, as follows:

In the application's first issue, (NDRB) unanimously found the Administrative Discharge Board (ADB) exceeded its original mandate by finding not only fraternization, but also the more serious charge of sexual harassment. Rather than remanding the case for another hearing on the sole issue of fraternization before a new, untainted (ADB) (the appropriate remedy), the Command attempted to cure the defect by merely disapproving the finding of sexual harassment. The

Command made no attempt to reassess the sentence or type of discharge (an OTH), thereby irrevocably tainting the proceedings and prejudicing the ultimate findings. In the (NDRB's) view, this lack of administrative, procedural due process is neither proper, nor equitable.

(NDRB) also noted that, by failing to refer the applicant's case to Nonjudicial Punishment (NJP) prior to referral to an (ADB), the command effectively curtailed the applicant's ability to contest procedural and evidentiary irregularities such as the subsequent, unexpected expansion of the charge sheet by the (ADB) to include sexual harassment. Similarly, (NDRB) noted that serious charges, such as sexual harassment, are normally referred to NJP or Court-martial to ensure the constitutional due process is scrupulously observed, thereby avoiding the impasse posed by the current case.

(NDRB) also noted with interest and considered the manifold (and allegedly conflicting) roles that the Staff Judge Advocate played in the proceedings. Again, (NDRB) noted the appearance, if not reality, of a lack of procedural due process in the proceedings.

Finally, (NDRB) noted with interest and considered the applicant's submission of four other similarly situated cases of alleged fraternization/sexual misconduct aboard MCAS Iwakuni. The administrative disposition of these four cases provided useful background to the (NDRB) in arriving at its equitable and proportional decision in the current case. (Examples included a warrant officer who received NJP for adultery but was retained, a colonel who was fraternizing with an enlisted Marine but was only relieved of his command, and a SSGT who was convicted by court-martial of sexual harassment and fraternization and was reduced in grade but retained in the Marine Corps.)

(NDRB) is of the unanimous opinion that, due to the lack of fundamental fairness and procedural due process permeating this case, the command failed to observe even minimal administrative due process, thereby vitiating the findings in this case. Additionally, due to the serious conflicting nature of the sworn statements adduced against the applicant, the (NDRB) has reservations as to the ultimate credibility of the female accuser. Indeed, had the applicant been offered the rights afforded by court-martial, the testimony and evidence presented would likely not have been

sufficient to support a findings of guilty. Therefore, the (NDRB) grants full relief and changes the character of the discharge to honorable by reason of secretarial authority.

NDRB advised Petitioner to apply to this Board for reinstatement in the Marine Corps.

e. Also attached to enclosure (1) is an advisory opinion the Board obtained from the Military Law Branch, Headquarters Marine Corps (HQMC) on the foregoing issues discussed by the NDRB. A copy of the opinion was provided to Petitioner's attorney. The advisory opinion analyzes all the findings of the NDRB and concludes, in effect, that despite the opinion of the NDRB, the administrative discharge proceedings were conducted in accordance with regulations. The opinion also recommends that Petitioner not be reinstated in the Marine Corps and states, in part, as follows:

(The governing regulations) authorizes separation for both sexual harassment and fraternization following (an ADB) process and approval of the Commanding General. As stated above, Petitioner was recommended for administrative separation by a properly convened (ADB). He was represented at his (ADB) by both military and civilian counsel. The fact that Petitioner was not able to litigate the alleged misconduct at a different forum is irrelevant. A CO may, at his discretion, use one or more administrative or judicial measures to dispose of alleged misconduct. In Petitioner's case, upon reviewing the evidence, the CO decided that administrative processing was preferable over other measures including NJP or courts-martial. Following the (ADB's) decision, the results were reviewed by a staff judge advocate for legal error and none were found. Noteworthy is the fact that even though the CO was authorized to disapprove the (ADB's) recommendation to separate Petitioner, he choose (sic) to endorse and support his separation. Ultimately, Petitioner's commanding general concurred with the decision to separate Petitioner and approved his discharge from the U. S. Marine Corps due to his substantiated misconduct. Whether separation was by reason of sexual harassment, fraternization, or both, is irrelevant since either or all are permissible bases to separate Petitioner from the U. S. Marine Corps.

.... Any procedural irregularities raised by Petitioner were corrected by NDRB when they upgraded his characterization of service, however, returning

Petitioner to the U. S. Marine Corps would in effect, condone his misconduct. Most importantly, Petitioner does not dispute that misconduct occurred nor does he offer a defense to the substantiated misconduct. We note that the President of the (ADB) felt compelled to point out in his report his concerns that Petitioner and his fellow staff noncommissioned officers "were in fact lying" about events surrounding his misconduct.

f. Concerning the issue of Petitioner's grade on discharge, the advisory opinion states that reduction to lance corporal (LCPL; E-3) is only authorized when an individual is discharged under other than honorable conditions. Since he now has an honorable discharge, the advisory opinion recommends that the record be corrected to show that he was not reduced and was discharged in the grade of SSGT.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants partial favorable action.

Concerning the issue of reinstatement, the Board agrees with the HQMC advisory opinion that the action taken by the NDRB to upgrade the discharge and change the reason for discharge was more than sufficient relief for Petitioner, and discharge from the Marine Corps was warranted. Accordingly, the Board concludes that there is no merit to Petitioner's request for reinstatement, and his discharge should not be set aside.

However, the Board also agrees with the conclusion in the advisory opinion, that the NDRB action now makes the reduction to LCPL inappropriate. Therefore, the record should be corrected to show that Petitioner was not reduced upon separation, but was discharged in the grade of SSGT.

The Board further concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future reviewers will understand that he was discharged in the grade of SSGT.


RECOMMENDATION:

- a. That Petitioner's naval record be corrected to show that he was not reduced to LCPL but was discharged in the grade of SSGT.
- b. That the remainder of his requested be denied.
- c. That this Report of Proceedings be filed in Petitioner's

naval record.

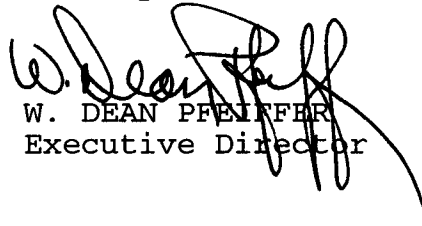
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

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.



W. DEAN PFEIFFER
Executive Director