



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

AEG

Docket No. 2442-99

5 November 1999

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

Encl: (1) Case Summary

1. Pursuant to the provisions of reference (a), Petitioner, a former midshipman at the Naval Academy, applied to this Board requesting, in effect, that his naval record be corrected to show that he was not required to reimburse the government for the cost of his education at the Academy.

2. The Board, consisting of Messrs. Brezna, Dunn and Taylor, reviewed Petitioner's allegations of error and injustice on 2 November 1999 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 enclosure, midshipman records, documentation from the Navy Inspector General, 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 to the Board was filed in a timely manner.

c. Petitioner began his service at the Naval Academy in July 1993, but a medical discharge in November 1993 required that he be readmitted in July 1994, thus making him a member of the Class of 1998. At the time of his admission and readmission, Petitioner signed an agreement to serve which reads, in part, as follows:

In accordance with Title 10 U.S. Code, Section 6959 and 2005, I hereby agree:

that I will complete the course of instruction at the Academy (which includes, but is not limited to, satisfactorily achieving the required standards of

performance in Academics, Conduct, Honor, and Military Performance [aptitude] until the time of appointment as a commissioned officer) . . .

Furthermore, if the Secretary of the Navy (SECNAV) determines that I breached this agreement, (SECNAV) may transfer me . . . to the Naval Reserve or Marine Corps Reserve, and may order me to active duty for . . . not to exceed four years . . . Additionally, if I voluntarily or because of misconduct fail to complete a period of active duty specified above, I will . . . be required to reimburse the United States for the cost of education provided me.

d. Petitioner then served satisfactorily at the Academy for nearly three years. It appears that at the time of the events at issue, Petitioner was serving as the president of his class, had been detailed as a company commander for the upcoming Plebe Summer, and was to be a battalion commander during the first semester of his first class year.

e. On 9 April 1997 a Midshipman (MIDN) W submitted a statement alleging that Petitioner had made homosexual advances to him and several other midshipmen. One day later, the Commandant of Midshipmen appointed a Lieutenant (LT; O-3) McM to conduct a preliminary inquiry into these allegations.

f. During this investigation, Petitioner secured the assistance of military counsel, LT Ha. On 5 May 1997 LT Ha submitted a letter alleging improprieties on the part of the Commandant's legal advisor, Lieutenant Commander (LCDR; O-4) McC. That letter reads, in part, as follows:

I respectfully request that LCDR (McC) be removed from providing legal advice in this case. (He) has become personally involved in this case and as a result can no longer objectively evaluate the completed investigation. LCDR (McC) has made numerous statements in support of the position that (Petitioner) will be separated as a result of these allegations. These statements regarding separation were made before the conclusion of the investigation, before any matters were submitted on behalf of (Petitioner), and before any separation hearing was held in this case. Clearly, these statements suggest that a decision has already been made by LCDR (McC) prior to the conclusion of the investigation and prior to the presentation of evidence at a proper hearing. Accordingly, I request that a new legal advisor be appointed to represent the interests of the Commandant's Office in this case. This action will ensure that the rights of (Petitioner) are protected with respect to the on-going conduct investigation.

Additionally, on or about 29 April 1997, LCDR (McC) contacted CDR (Commander; O-5) (S) of the Counseling Center

regarding the case of (Petitioner). LCDR (McC) had information to believe that CDR (S) was providing personal counseling to (Petitioner). CDR (S) is the head of the Midshipman Counseling Center . . . Although the intent of this telephone call is unknown, the perception is that LCDR (McC) contacted CDR (S) in an attempt to influence the decision of (Petitioner) regarding the issue of a resignation. In a conversation I had with CDR (S) on 1 May 1997 CDR (S) stated that in his opinion LCDR (McC) called in an attempt to influence the advice he gave to (Petitioner) regarding the issue of a resignation. This contact is particularly troubling because of the protected nature of the counseling relationship between CDR (S) and (Petitioner). Once again, it is clear that LCDR (McC) has already reached a conclusion in this case that (Petitioner) should be separated or resign from the Naval Academy. Although these actions have not resulted in any undue influence being exerted on (Petitioner), continued involvement (sic) by LCDR (McC) will likely prejudice the rights of (Petitioner) with respect to the administrative conduct system.

The record reflects that counsel's request was granted and a LT Ho, the Staff Judge Advocate of Naval Station, Annapolis, was designated to provide legal advice to the Commandant on Petitioner's case.

g. LT McM's inquiry took longer than expected and on 6 May 1997, at the request of LCDR McM, he submitted an interim report in which he ventured a "current, but preliminary, legal opinion" that sufficient probable cause existed to justify further action against Petitioner. The record indicates that on or about 22 May 1997, Captain (CAPT) F, the Deputy Commandant, removed Petitioner from his positions of responsibility, pending disposition of his case.

h. On 27 May 1997 LT McM submitted the report of his preliminary inquiry, which stated that many of the allegations of MIDN W were substantiated and further action was warranted. Specifically, LT McM found probable cause that Petitioner had solicited sodomy on three occasions and solicited two indecent acts, committed an indecent act and used indecent language, all in violation of Article 134 of the Uniform Code of Military Justice (UCMJ); used provoking speech on two occasions, in violation of UCMJ Article 117; committed two incidents of assault and battery or indecent assault, in violation of UCMJ Article 128 or 134; made a false official statement, in violation of UCMJ Article 107; committed sexual harassment, in violation of UCMJ Article 92; and had disobeyed various Academy regulations on four occasions. However, on 29 May 1997 LT Ho advised the Commandant that in his opinion, sufficient evidence existed only to support indecent language, one specification of provoking speech, two instances of assault and battery, false official statement,

sexual harassment and three instances of failure to obey Academy regulations.

i. On 27 May 1997, the same day LT MCM submitted his report of investigation, Petitioner submitted a voluntary resignation form the Academy. The only stated reason for such action was his belief that "my educational needs and goals would be better met by attending a civilian institution." In his letter of resignation, Petitioner neither mentioned the allegations of homosexuality nor admitted that he is a homosexual. As part of the resignation package, Petitioner executed a Statement of Understanding which reads, in part, as follows:

As a result of commencing their second or first class academic years, midshipmen may, at the election of (SECNAV), be required to serve . . . active enlisted service . . . to satisfy their obligation. If (SECNAV) determines that the midshipman's misconduct renders him unsuitable for service, (SECNAV) may require the midshipman to reimburse the government for the cost of education received at the Naval Academy.

By separate correspondence, Petitioner acknowledged that the cost of his education at the Academy was \$66,717.68, and requested a waiver of both the active duty service obligation and the reimbursement requirement.

j. During the period 29 May to 6 June 1997 a number of Academy officials in Petitioner's chain of command submitted informal recommendations concerning the appropriate disposition of his resignation request. Several of these individuals cited the investigation as a significant factor in their decision not to recommend further military service or officer training. Additionally, the Deputy Commandant recommended against accepting the voluntary resignation in favor of the less favorable qualified resignation normally submitted when a midshipman is facing charges of misconduct. However, the Commandant recommended acceptance of the voluntary resignation "for sensitivity reasons." Accordingly, on 12 June 1997 the Superintendent of the Academy recommended to the Chief of Naval Personnel (CNP) that Petitioner's resignation be accepted, and that he be required to reimburse the government for the cost of his education in lieu of active enlisted service. Subsequently, the Chief of Naval Operations and CNP favorably endorsed these recommendations.

k. On 14 July 1997 Petitioner submitted a letter to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA) in which he elaborated on his request for waiver of monetary recoupment. He stated that he was innocent of the allegations made against him, but "the actions taken by the administration at the Naval Academy and the lack of objectively shown in my case made it impossible for me to overcome the untrue allegations regarding the issue of homosexuality." He further

alleged that regardless of the outcome of a hearing on the charges against him, "the clear feeling of 'homophobia' demonstrated by the Commandant's Staff . . . make it impossible for me to continue to be a midshipman." He then alleged as follows that his resignation had been coerced:

The Commandant's legal advisor, LCDR (McC) initially tried to convince me, against my better judgment, to resign prior to the conclusion of (LT McM's) investigation. LCDR (McC) stated I would be separated from the Naval Academy as a result of the allegations of homosexuality. I told LCDR (McC) on or about 18 April 1997, I would consider resigning. He stated to me the Administration would accept my voluntary resignation and would support a recommendation that recoupment be waived and the investigation would be concluded because they considered me an asset to the Brigade (of Midshipmen) . . .

After speaking with my counselor, CDR (S), and the midshipman legal advisor LT (Ha), I decided not to resign. Upon receiving the news that I was having a change of heart, LCDR (McC) made two telephone calls to LT (H) and CDR (S). The telephone call to CDR (S) was made in an attempt to pressure me into resigning by influencing the advice given to me by CDR (S). A request was then made by LT (Ha) to have LCDR (McC) removed from the case because of his lack of objectivity.

LCDR (McC) stated in order to get the support to have the recoupment waived I would have to write in my resignation that I was homosexual. When I stated on or about 24 April that I did not want to leave the Naval Academy and would not resign because I am not homosexual, he insisted that the investigation would continue and that I was wrong not to resign . . .

Petitioner also alleged that he was relieved of certain positions of responsibility on the basis of the allegations of homosexuality prior to the completion of the investigation, and without any sort of due process. He also contended that "because of the issue of homosexuality, it was impossible for me to receive a fair and impartial conduct hearing at any level."

1. On 14 August 1997 ASN/M&RA responded to Petitioner's letter, in part, as follows:

After a preliminary review, I am not inclined to grant your request for waiver of monetary recoupment. Per federal statute, recipients of advanced educational assistance are required to reimburse to the United States the monetary assistance if they either voluntarily, or because of misconduct, fail to complete the required active-duty period specified in the written agreement signed by the recipient. Because you have submitted a voluntary

resignation request of your own accord, recoupment in your case is warranted . . .

The fact that there are "issues of homosexuality" in your case, is not, in itself, sufficient grounds for waiver of recoupment. Like other separation cases, recoupment is authorized in cases involving homosexual conduct when the member has failed to complete his service either voluntarily or because of misconduct. A statement by a member declaring his homosexuality would not alone constitute a basis for recoupment; however, recoupment would be appropriate if the statement was voluntarily made for the purpose of seeking separation from the naval service. Recoupment under misconduct grounds would be appropriate where the homosexual conduct would warrant a discharge characterization of Under Other Than Honorable Conditions, or the conduct is punishable under the UCMJ.

If, as stated in your letter, you believe your resignation was "forced," you may at this time submit a request asking that your resignation be withdrawn . . . The charges against you will be handled under the Academy conduct system, and despite your reluctance to have your case adjudicated by Academy officials, I can assure you that you would receive a fair and impartial hearing. The conduct system is the established process in which to consider the charges against you; it would not be proper for me to circumvent this process absent clear evidence that your case would not receive a fair review.

Accordingly, ASN/M&RA stated that Petitioner's case would be held in abeyance for 30 days to give him an opportunity to withdraw his resignation. Petitioner was advised that if no such request was received by that time, a final determination would be made regarding the resignation and request for waiver of recoupment. Additionally, Petitioner was notified that his allegations against Academy officials would be investigated by the Navy Inspector General (NIG), but that a decision in his case would not be postponed pending completion of the investigation.

m. On 10 September 1997 Petitioner sent another letter to ASN/M&RA requesting waiver of recoupment. In this letter, he once again argued that he could not get a fair hearing at the Academy on the charges against him. He also continued to protest his innocence of these charges, stating that they "were not serious in nature," and the alleged victims of his behavior "took it in a joking manner." He further contended that MIDN W "committed equal and more egregious acts and he is still a Midshipman." Petitioner also requested that if a payback was appropriate, he be permitted to serve in an enlisted status since he was not homosexual.

n. On 23 September 1997 ASN/M&RA approved the recommendation that Petitioner's resignation be accepted and he be required to

reimburse the government for the cost of his education. Accordingly, Petitioner was honorably discharged from the Academy on 25 September 1997.

o. On 16 October 1997 ASN/M&RA replied to Petitioner's 10 September 1997 letter. In his response, ASN/M&RA reiterated some of the comments in his earlier response and also stated, in part, as follows:

. . . You were provided ample opportunity to withdraw your resignation request and confront the allegations made against you . . . When you elected not to withdraw your request, I approved your resignation. Because of the voluntary nature of your request, recoupment is warranted.

Monetary recoupment is the predominant method imposed to repay incurred educational expenses in cases involving a midshipman's conduct. Based on my review of the complete circumstances surrounding your case, I have determined that fulfillment of your obligation through active enlisted service is considered not in the best interest of the U.S. Navy.

p. On 24 November 1997 NIG completed its report on Petitioner's case. The report documented as follows an interview with LCDR McC concerning the allegation that he attempted to pressure Petitioner into resigning from the Academy:

LCDR (McC) said that he had known (Petitioner) for about a year before he became the subject of the allegations of MIDN (W). . . After MIDN (W) made his allegations and (Petitioner) knew that he was under investigation, (Petitioner) began visiting LCDR (McC) as often as several times a day, wanting to know what was going to happen.

LCDR (McC) had been monitoring the progress of the investigation, and by 18 April 97, he knew that the investigating officer had obtained (Petitioner's) incriminating e-mail and that (Petitioner) had made three separate sworn statements to the investigating officer. Further, in one of those statements, (Petitioner) admitted that he had not been kidding when he told MIDN (W) that he wanted to perform oral sex on him. Thus, when (Petitioner) visited LCDR (McC) on 18 April and said that he wanted to resign, LCDR (McC) agreed that that was a good decision. LCDR (McC) told (Petitioner) that given the evidence in hand, the "handwriting was on the wall," and it could only get worse as the investigation continued, i.e., other individuals and incidents would probably come to light. He emphasized that there were more options available to (Petitioner) before the investigation was completed and charges were referred. In addition, he told (Petitioner) that he was viewed as a "good guy" and that there was support for waiving recoupment in his case.

LCDR (McC) went on leave right after his 18 April meeting with (Petitioner). When he returned, he learned that recoupment could not be waived unless (Petitioner) admitted homosexuality. He called (Petitioner) in and gave him this information. (Petitioner) then went to see LT (Ha), who called LCDR (McC) and told him that they were going to fight the case against (Petitioner). LCDR (McC) told LT (Ha), "attorney to attorney," that the evidence was clear, that (Petitioner) had already admitted his homosexual conduct in one of his statements, and that it would be in (Petitioner's) best interest to work something out.

The same day, (Petitioner) told LCDR (McC) that he wasn't going to resign and that he had met with CDR (S) in the Midshipman Counseling Center. LCDR (McC) back-briefed the Commandant and Deputy Commandant on developments in the case. They were concerned that (Petitioner) had changed his mind, as they believed resigning was the best course of action. Afterward, LCDR (McC) called CDR (S) to discuss the case. They had spoken many times before. CDR (S)'s involvement with Midshipmen had a degree of confidentiality, so the transmission of information was only one-way, from LCDR (McC) to CDR (S). LCDR (McC) didn't know what (Petitioner) had told CDR (S), but wanted CDR (S) to know what the evidence was against (Petitioner) and to let him know that it would be in (Petitioner's) best interest to resign, before the investigation was completed and while that option was still available.

When LT (Ha) subsequently lodged his request that LCDR (McC) be removed from his advisory role, LCDR (McC) stepped aside and had no further involvement with the case.

LCDR (McC) stated that while serving as Legal Advisor, he always tried to do what was right for the school and the Midshipman. If the evidence indicated that charges would be brought and most likely sustained, he advised Midshipmen to resign in advance of the conduct action, while that option was still open. He stated that he wasn't trying to intimidate them, nor was he doing so due to a lack of objectivity. When he expressed an opinion as to someone's guilt, he was speaking on knowledge of the evidence in the case.

g. Also in connection with the allegation against LCDR (McC), NIG discussed recoupment as follows:

Recoupment is the norm when a First (Senior) or Second Class (Junior) Midshipman voluntarily resigns. Waivers are granted on a case by case basis and are a matter within the discretion of the Secretary of the Navy (whose delegated authority in these matters is normally ASN [M&RA]). In a memo of 17 May 1994, the Deputy Secretary of Defense

(DEPSECDEF) issued guidance for recoupment in cases involving homosexual conduct, which was defined to include homosexual acts, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

. . . .

. . . (Petitioner) was separated by reason of his voluntary resignation and not by reason of homosexual conduct. As a result, recoupment was authorized. (Petitioner) made his decision with the benefit of advice from counsel and with full understanding of the implications of his request. His decision not to trust the (Academy) administrative process, with the knowledge that recoupment was likely, was made voluntarily and was not the product of any improper influence by LCDR (McC).

r. NIG recorded as follows the response of CAPT F to the allegation that Petitioner was improperly of his leadership positions without due process:

CAPT (F) . . . stated that the decision to relieve (Petitioner) of his various duties was reached in consultation with the Commandant and the Legal Advisor. (Petitioner) was a very visible Midshipman, and they were concerned for his privacy as well as for the well being of the rest of the brigade. Their primary concern was that given the very serious findings of the preliminary investigation, they were anticipating preferring charges and switching over to a conduct case involving additional investigation, as well as an effort by (Petitioner) to defend against the charges. He held several very sensitive leadership positions which they did not believe he would be able to be effective in, once charged, because he would be too busy trying to defend himself. In particular, they did not believe he should be allowed to serve as a Plebe Company Commander . . . during the upcoming Summer Detail, given the pressures that he and the new Plebes would be under during Plebe Summer and the distraction that his conduct problems would be with respect to his ability to be effective in such a position.

CAPT (F) stated that relieving a Midshipman of duties in cases such as this was standard operating procedure in his experience at (the Academy) . . .

NIG found that the allegation against CAPT F was unsubstantiated since he had acted within his authority. NIG also noted that "it is not unusual for the subject of an investigation involving allegations of serious misconduct to be temporarily relieved of duties pending the outcome of the investigation."

s. On 25 November 1997 NIG submitted a memorandum to ASN/M&RA with the report of investigation into Petitioner's allegation. In its memorandum, NIG stated that Academy officials "acted appropriately and within the scope of their authority in (Petitioner's) case."

t. In April 1994, about three years prior to Petitioner's discharge, the Secretary of the Navy (SECNAV) directed that 24 members of the class of 1994 be discharged from the Academy. These midshipmen were involved in a cheating scandal in which they received illicit advance copies of the Fall 1992 Electrical Engineering (EE) examination. Additionally, many of them lied about their misconduct during the ensuing investigations. However, because of the length of time it took to complete the investigations and discharge processing, SECNAV waived the requirement that these individuals either serve in an enlisted status or reimburse the government. Senior Navy officials cautioned, however, that waiver "should not be looked at as something that will happen again in the future." John Fairhall, *Final Decision Made: 24 Mids to be Expelled*, Baltimore Sun, Apr. 29, 1994, at 1B, 9B.

u. About a year after Petitioner was discharged, in 1998, the national media reported that SECNAV had reversed an earlier action and waived monetary recoupment in the case of a former midshipman discharged for using LSD. It was further reported that this reversal occurred after a United States Senator held up the confirmation of a civilian official for another position because of the Senator's belief that recoupment was inappropriate.

v. The DEPSECDEF memorandum of 17 May 1994 which was cited in the NIG report of 24 November 1997, states, in part, as follows:

Questions have been raised regarding how the . . . current policy on homosexual conduct effects recoupment under the various statutes . . . such as section 2005 of title 10 . . . that provide for recoupment where the member "voluntarily or because of misconduct" fails to complete his or her term of service . . .

. . .

Homosexual conduct is grounds for separation under the current policy . . . Not all homosexual conduct, however, constitutes a basis for recoupment under provisions such as section 2005 . . . Homosexual conduct constitutes a basis for recoupment under such provisions if a characterization of Under Other Than Honorable Conditions (UOTHC) . . . is authorized or the conduct is punishable under the (UCMJ) . . . This is the case whether or not the member is actually separated (UOTHC) or is actually convicted under the (UCMJ), but a specific written finding must be made

. . . that, during the current term of service, the member engaged in homosexual conduct that constitutes a basis for recoupment, as defined above.

. . .

(D)ecisions on recoupment in cases involving homosexual conduct should be made in accordance with the guidance in this memorandum.

w. In support of his application, Petitioner argues that monetary recoupment should be waived in his case because of the unfair treatment he received at the Academy from LCDR McC, the Commandant and other high-ranking officers. He further cites an 18 August 1994 memorandum from ASN/M&RA to support his assertion that monetary recoupment in his case was contrary to SECNAV policy. However, that memorandum only proposes an "interim policy" on all recoupment cases, and indicates that further discussions would be held prior to the actual implementation of such a policy. Petitioner further contends that it was unfair to direct such action in his case given the waivers in certain other cases, including but not limited to the individuals discharged in connection with cheating on the EE-311 examination and the midshipman separated for using LSD. He also asserts that none of his advances toward MIDN W were unwelcome.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. Specifically, the Board concludes that requiring monetary recoupment was contrary to the DEPSECDEF memorandum of 17 May 1994. Further, the Board cannot reconcile the decision to direct recoupment in Petitioners' case with the waiver of such action for the individuals discharged for cheating on the EE-311 examination and using LSD.

The Board finds no merit in Petitioner's contention that he was prejudiced by unfair treatment from officials at the Academy. Although the record shows that individuals at the Academy treated Petitioner fairly, certain actions of LCDR McC during the processing of his case are troubling. However, any possible prejudice from LCDR McC's involvement in the case was cured when ASN/M&RA offered Petitioner the opportunity to withdraw his resignation and contest the allegations against him through the Academy's administrative conduct system.

However, the Board agrees with Petitioner that the real reason for his resignation and ensuing discharge was his homosexuality and, accordingly, requiring him to reimburse the government for the cost of his education at the Academy violated the DEPSECDEF policy letter of 17 May 1994. In this regard, the Board initially notes that both the service agreement Petitioner signed

and 10 U.S.C. § 2005 authorize recoupment in the form of enlisted service or monetary payback for individuals who fail to complete the course of instruction at the Academy. Further, such action is normally directed in the case of an individual who resigns from the Academy and is discharged after beginning the second class year.

It is also clear to the Board that the charges against Petitioner were based mainly on alleged homosexual conduct. Further, he obviously resigned due to those allegations, even though his letter of resignation does not specifically mention those charges or his homosexuality. However, the DEPSECDEF memorandum indicates that an individual discharged for homosexuality should be subject to recoupment only if certain aggravating factors exist. Such factors are not present here. No action under the UCMJ was taken or even contemplated against him. Additionally, not only was Petitioner discharged honorably and not UOTHC, he was permitted to submit the most favorable kind of resignation, which resulted in the former characterization. There was no finding of any aggravated homosexual behavior. Accordingly, the Board believes that directing recoupment was inappropriate in Petitioner's case. In this regard, the Board relies on the DEPSECDEF memorandum and not the memorandum of 18 August 1994 from ASN/M&RA since the latter only proposes a possible interim policy.

The Board also takes the position that Petitioner was treated unfairly when compared to the midshipmen discharged in 1994 for cheating on the EE examination, and the individual discharged in 1998 for drug use. Concerning the cheaters, the Board notes that their misconduct was aggravated due to the premeditation involved in using illicitly obtained copies of an examination, and because at least some of them lied about their actions during the subsequent investigations. Such misconduct strikes at the heart of the honor system at the Academy since these midshipmen were involved in lying, cheating and stealing, all honor offenses. The Board is also aware of recoupment was waived for the cheaters because of the length of time it took to complete the investigation and not because the misconduct did not warrant such action. However, the Board concludes that although this rationale may explain the disparate treatment, it does not justify that treatment. Likewise, the Board is aware that political considerations may have caused the decision to waive recoupment in the case of the individual discharged due to LSD use. However, such misconduct is a blatant violation of the Navy's "zero tolerance" policy on drug abuse, and routinely results in a UOTHC discharge for officers and enlisted personnel. Accordingly, the Board does not believe that political considerations justified an exception to policy in that case. In sum, the Board cannot justify recoupment in Petitioner's case given the favorable action in these other cases.

In view of the foregoing, the Board finds the existence of both error and injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 23 September 1997 ASN/M&RA accepted Petitioner's resignation and directed his discharge from the Academy, but waived the requirement that he reimburse the government for the cost of his education at the Academy.

b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

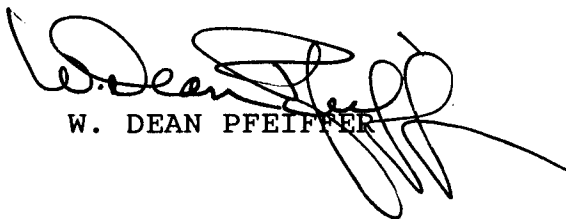
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Reviewed and approved:



DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

MAR 13 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

I have considered the recommendation of the Board for Correction of Naval Records (BCNR) that petitioner's record be corrected to waive the requirement that he reimburse the government for the cost of his education at the U.S. Naval Academy. For the reasons stated below, the recommendation is disapproved and relief is denied.

The BCNR based its recommendation in favor of relief on two considerations. First, the BCNR determined that recoupment in petitioner's case would violate the 17 May 1994 Under Secretary of Defense memorandum on recoupment in homosexual conduct cases. Second, the BCNR concluded that it would be unfair to recoup expenses from petitioner in light of prior SECNAV actions waiving recoupment in the 1994 EE 311 cheating scandal cases and in a 1998 case involving drug use.

With respect to the first point, recoupment in this case is entirely consistent with the 17 May 1994 USD memorandum. That memorandum restates the rule that recoupment is authorized when an individual voluntarily or through misconduct fails to complete a period of obligated service. The record before the BCNR makes it abundantly clear that petitioner left the Academy voluntarily and elected to forego his right to contest the charges against him. Even after petitioner submitted his resignation, my predecessor offered petitioner an additional opportunity to challenge the Academy's charges, but he declined to do so. Under these circumstances, petitioner's separation from the Academy can only be deemed to be voluntary. Consequently, the limitations on recoupment set out in the 17 May 1994 USD memorandum do not apply.

Second, the fact that the Department of the Navy waived recoupment in certain other Naval Academy cases does not require that it waive recoupment in this case or any other cases. The determination whether to recoup educational expenses is based upon the individual circumstances of each case, considering the individual's situation and the interests of the Department. The

circumstances in petitioner's case were not at all comparable to the cases cited by the BCNR. The Department has consistently applied a policy of recouping educational expenses when a midshipman leaves the Academy voluntarily or a result of misconduct and of waiving recoupment only in exceptional circumstances. Petitioner's case was decided in a manner consistent with that policy and it was a proper exercise of discretion to conclude that a waiver of recoupment was not warranted. Accordingly, I find no error or injustice warranting relief.



Assistant Secretary of the Navy
(Manpower and Reserve Affairs)



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

AEG:jdh
Docket No: 2442-99
22 March 2000

MR. [REDACTED]

ATTORNEYS AT LAW
196 DUKE OF GLOUCESTER STREET
ANNAPOLIS MD 21401

Dear Mr. Ferris:

This is in reference to your interest, as Attorney, in the case of Mr. [REDACTED]

Enclosed is a copy of a letter to Mr. [REDACTED] informing him that his application has been denied. It is requested that you transmit the denial letter to him, a copy of which is enclosed for your records.

It is regretted that a more favorable reply cannot be made.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures