



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

CRS

Docket No: 3487-98

14 April 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) DD Form 149 w/attachments
(2) Case Summary
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy, filed an application with this Board requesting, in effect, that his naval record be corrected to show that he was not discharged on 20 October 1997. Further, he requests that his RE-4 reenlistment code be changed.

2. The Board, consisting of Mr. Cali, Mr. Mathews, and Ms. Madison, reviewed Petitioner's allegations of error and injustice on 9 February 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 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. Enclosure (1) was filed in a timely manner.

c. Petitioner reenlisted in the Navy for three years on 21 October 1994 in the rate of MM1 (E-6) after more than 16 years of prior active service.

d. On 27 September 1996 Petitioner was arrested by civil authorities for fondling his 15 year old stepdaughter. On 27 November 1996 he refused further sexual abuse treatment.

e. In February 1997 both the Case Review Committee and the

Family Advocacy Program substantiated a case of child sexual abuse against Petitioner.

f. On 16 October 1997 the commanding officer recommended that Petitioner's enlistment not be extended due to the continuous extensions of his civil trial. The following day the Bureau of Naval Personnel (BUPERS) directed separation on the date his enlistment expired, 20 October 1997. BUPERS also recommended that Petitioner receive a general discharge because of his admission of child sexual abuse to civil authorities, and due to the lack of time to process him for administrative separation. Accordingly, Petitioner received a general discharge by reason of expiration of term of service on 20 October 1997. At that time he was assigned an RE-4 reenlistment code. At that time, he had 19 years, 10 months, and 21 days of active service.

g. In his application, Petitioner contends that he was innocent of the allegations of child abuse, and it was unfair of BUPERS to deny his request for a brief extension to make him eligible for transfer to the Fleet Reserve. Petitioner's counsel contends that an administrative discharge board was directed, but Petitioner's command failed to do so.

h. An advisory opinion was requested from BUPERS concerning the contentions of Petitioner and his counsel. In response, the Enlisted Performance Branch recommended denial of the application citing the "egregious allegations of the victim" and Petitioner's "quasi admissions".

i. A second advisory opinion was obtained from the Office of the Judge Advocate General. The opinion states, in effect, that in accordance with 10 U.S.C. 1176(a), Petitioner should have been retained on active duty until the date on which he would have been eligible for transfer to the Fleet Reserve. The opinion recommends that Petitioner be returned to active duty in order to complete the required active service for transfer to the Fleet Reserve.

j. 10 U.S.C. 1176(a) states, in part, as follows:

(a) Regular members.--A regular enlisted member who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years for qualifying for transfer to the Fleet Reserve, shall be retained on active duty until the member is qualified for retirement or transfer to the Fleet Reserve, unless the member is sooner retired or discharged under any other provision of law.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief. In this regard, the Board concurs with the advisory opinion from the Office of the Judge Advocate General that Petitioner's retention on active duty was mandated by 10 U.S.C. 1176(a). The Board notes, however, that little would be gained in ordering Petitioner back to active duty for one month and 9 days, the amount of time Petitioner needs to become eligible for transfer to the Fleet Reserve. Given the circumstances, the Board concludes that the record should be corrected to show that Petitioner was not discharged on 20 October 1997 but continued to serve until the date he first became eligible for transfer to the Fleet Reserve. This date would appear to be 29 December 1997, but the actual date will be determined by the Naval Personnel Command.

Concerning Petitioner's request for a change in his RE-4 reenlistment code, the Board believes that such a code is appropriate given the evidence of child sexual abuse.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged on 20 October 1997 but continued to serve without interruption until the date he first became eligible to transfer to the Fleet Reserve and, on that date, was so transferred.

b. That no further relief be granted.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

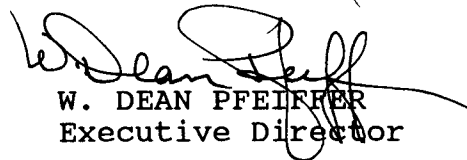
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.



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