



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

AEG
Docket No. 6136-01
16 January 2002

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
(2) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, applied to this Board requesting that his naval record be corrected by setting aside the dishonorable discharge of 19 January 1999.
2. The Board, consisting of Messrs. McPartlin and Novello and Ms. Hare, reviewed Petitioner's allegations of error and injustice on 15 January 2002 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the 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 to the Board was filed in a timely manner.
 - c. Petitioner first enlisted in the Navy on 15 October 1980. For nearly sixteen years, he served in a generally excellent manner. During this period he was advanced to aviation electronics technician second class (AT2; E-5) and had a spotless disciplinary record. He also was awarded two Navy Achievement Medals, three Good Conduct Medals and the Combat Action Ribbon. His final reenlistment, for five years, occurred on 2 December 1994.
 - d. From 19 to 23 August 1996, Petitioner was tried by general court martial (GCM) on charges of rape, burglary and adultery, in violation of Articles 120, 129 and 134 of the Uniform Code of

Military Justice (UCMJ). Petitioner's defense was that the sexual activity was consensual and initiated by the alleged victim, and the defense counsel attempted to elicit testimony that when the woman accused Petitioner of raping her, he immediately replied, "you grabbed me first." However, the military judge ruled that this testimony was inadmissible since it did not fall within the "excited utterance" exception to the hearsay rule. Petitioner was then convicted of rape and unlawful entry and sentenced to a dishonorable discharge, total forfeitures, reduction in rate to ATAR (E-1) and confinement at hard labor for one year. On 6 March 1997 the GCM convening authority (GCMCA) approved the sentence. Petitioner was released from confinement on 9 June 1997 and placed on appellate leave the following day.

e. On 20 October 1998 the Navy-Marine Corps Court of Criminal Appeals (NMCCA) approved the findings and sentence and rejected Petitioner's contentions that the evidence against him was insufficient to show his guilt beyond a reasonable doubt, and the military judge erred in failing to characterize the comment "you grabbed me first," as an excited utterance. On 19 January 1999, apparently believing that appellate review was complete, the separation authority executed the adjudged dishonorable discharge. However, one day later, the Court of Appeals for the Armed Forces (CAAF) accepted Petitioner's request for review. Subsequently, CAAF granted review on the issues decided by NMCCA.

f. In its decision of 14 July 2000, CAAF concluded that the testimony pertaining to Petitioner's statement, "you grabbed me first," fell within the excited utterance exception to the hearsay rule, and should have been admitted. The court then went on to conclude that given the particular circumstances of the case, the judge's decision to exclude this testimony was prejudicial. Accordingly, CAAF set aside the findings and sentence, but authorized a rehearing. In a footnote, the court noted the government had conceded that NMCCA applied the wrong standard for factual sufficiency, but deemed the issue moot. *United States v. Moolick*, 53 M.J. 174 (2000).

g. The case was then returned for further action in accordance with the CAAF opinion. On 28 November 2000 the GCMCA determined that due to the passage of time, the unavailability of witnesses, and the limited punishment that would be available upon a subsequent conviction, a rehearing was "impracticable." Accordingly, the GCMCA dismissed the charges and directed restoration of "all rights, privileges and property" of which Petitioner was deprived by the findings and sentence of the GCM. In this regard, Petitioner's record has been purged of all records pertaining to the GCM conviction, except for a court memorandum of 23 September 1996 reflecting compliance with the automatic forfeiture and reduction provisions of the UCMJ.

h. UCMJ Article 71(c) states, in pertinent part, that a punitive discharge may not be executed unless and until it is

approved by CAAF. Article 75 provides for restoration of all rights, privileges and property affected by the executed part of a court-martial sentence that has been disapproved, if no rehearing is ordered.

i. The Department of Defense Financial Management Regulation (DODFMR) sets forth the general rule that time spent in confinement is not creditable service. However, such time is creditable if the sentence is set aside or disapproved. Additionally, 10 U.S.C. § 707(a) and the DODFMR state that time spent on appellate leave is creditable if an adjudged punitive discharge is reversed upon appellate review and no rehearing is held, or the accused is acquitted or not sentenced to a discharge upon rehearing.

j. In accordance with 10 U.S.C § 6330, an individual may transfer to the Fleet Reserve upon attaining 20 years of active naval service. Applicable directives state that such transfer is mandatory for an individual such as Petitioner serving in paygrade E-5.

k. 10 U.S.C. § 1176(a) essentially states that a regular enlisted servicemember who is within two years of attaining eligibility for transfer to the Fleet Reserve must be retained until he becomes eligible for such transfer unless he is discharged under another provision of law such as 10 U.S.C. § 1169, which authorizes the separation of an enlisted member prior to the expiration of enlistment.

l. Within the Naval service, 10 U.S.C. § 1169 is implemented by Secretary of the Navy Instruction (SECNAVINST) 1910.4B, which states that in the case of a member with over 18 years of active service, separation may only be directed by the Chief of Naval Personnel (CNP). Further, nothing in this directive or the Naval Military Personnel Manual would appear to clearly authorize a separation for cause given the facts of Petitioner's case.

m. Petitioner's case was referred for an advisory opinion to the Office of Legal Counsel (Pers-0612) of the Navy Personnel Command. In its opinion of 7 January 2002, Pers-0612 recommends that Petitioner's record be corrected by setting aside his dishonorable discharge, granting sufficient constructive service to establish eligibility for transfer to the Fleet Reserve, and so transferring him on the date he became eligible to do so.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that corrective action is warranted. In this regard, the Board concurs with the Pers-0612 advisory opinion.

Initially, the Board notes that since the GCM conviction and sentence have been set aside by CAAF, no entries should remain in the record pertaining to that conviction. Accordingly, the court

memorandum of 23 September 1996 should be removed, along with any other entries reflecting the GCM conviction or sentence.

Turning to the more significant aspects of Petitioner's case, it is clear to the Board that Petitioner's dishonorable discharge is improper because it was executed prior to the completion of appellate review and, more important, since CAAF set aside both the findings and sentence of the GCM. Given this favorable action and the provisions of applicable statutes and the DODFMR, the four-year period during which Petitioner was either confined or on appellate leave now counts as creditable service.

Ordinarily, corrective action in a case such as this would consist of substituting another form of discharge as of the expiration of Petitioner's last five-year enlistment on 1 December 1999 or at the time the charges were dismissed in November 2000. However, since Petitioner's record will now show that he attained 18 years of creditable active duty on 14 October 1998, the Navy was required to continue Petitioner on active duty until he reached 20 years of active duty and became eligible for transfer to the Fleet Reserve, unless he was administratively separated for cause at the specific direction of CNP. Given that no such action was taken, and since grounds may not have existed for an administrative separation, the Board concludes that the record should show that Petitioner served on active duty until first eligible for transfer to the Fleet Reserve and, on that date, was so transferred.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all references to the GCM conviction of 23 August 1996. This action should include, but not necessarily be limited to, removal of the Court Memorandum (NAVPERS 1070/607) of 23 September 1996.

b. That the record be further corrected by removing all references to the dishonorable discharge of 19 January 1999. Such action should include, but not necessarily be limited to, removal of the Certificate of Release or Discharge from Active Duty (DD Form 214) issued on that date.

c. That the record be further corrected to show that Petitioner continued to serve without interruption in the rate of AT2 until the date he first became eligible for transfer to the Fleet Reserve and, on that date, was so transferred.

d. 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.

e. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of 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.

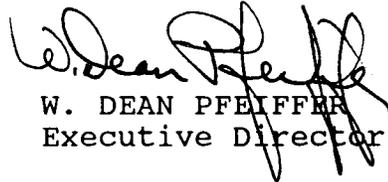
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 5e of the Procedures for the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6[e]), and having ensured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the provisions of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director