



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

CRS
Docket No: 2511-01
8 November 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) 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 Navy, filed enclosure (1) with this Board in which he appears to request reinstatement in the Navy or a change in his reenlistment code.

2. The Board, consisting of Messrs. Milner, Caron, and Novello, reviewed Petitioner's allegations of error and injustice on 2 October 2002 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 on 3 October 1990 for five years after about eleven years of prior active service.

d. On 3 May 1995 Petitioner's command apparently notified the Family Advocacy and Prevention Branch of the Navy Personnel Command (PERS 661) that Petitioner had sexually abused his 15 year old stepdaughter. On 18 May 1995 PERS-661 advised that he might be a candidate for the Family Advocacy Program (FAP) and requested that additional information be provided within 90 days, including a psychosexual evaluation.

e. Petitioner was arrested by civil authorities on 19 May 1995 and charged with forcible sodomy and indecent liberty with his stepdaughter.

f. On 29 August 1995 the Case Review Subcommittee (CRS) of FAP substantiated sexual abuse of his stepdaughter and recommended sex offender treatment.

g. On 13 September 1995 civil authorities added a second charge of indecent liberty with his stepdaughter. Also on this date, Naval Medical Center (NAVMEDCEN), Portsmouth, notified the command of the CRS action, recommended a psychosexual evaluation and stated that NPC had "flagged" his case. Additionally, Petitioner extended his enlistment for 24 months on this date.

h. On 7 November 1995 Petitioner was transferred to the Transient Personnel Unit at Naval Base Norfolk based on the need for kidney treatment and a testicular disorder. He was subsequently assigned to the local Naval Legal Service Office (NLSO) for limited duty.

i. Although it is not in the record, it appears that a psychosexual evaluation was prepared on or about 16 December 1995. The record does reflect that Petitioner began receiving treatment from a civilian psychologist in January 1996, and made good progress in treatment during the next 21 months.

j. On 18 January 1996 Petitioner pled guilty to the three civil charges and was convicted of the offenses. The court sentenced him to two years probation. This was based on the ongoing treatment for sexual offenders he was receiving. Also on this date, the NAVMEDCEN reported to the TPU that the Case Review Committee (CRC) recommended further sexual offenders treatment.

k. On or about 31 August 1996 Commander, Naval Base (COMNAVBASE) Norfolk finally responded to the PERS 661 request for information of 16 May 1995. In its response, COMNAVBASE forwarded the psychosexual evaluation and two favorable progress reports and, based on a favorable recommendation from the commanding officer of the NLSO, recommended Petitioner's enrollment in the FAP.

l. On 21 October 1996, after being found physically fit for duty, the Engineering/Hull Assignment Branch of the Navy Personnel Command (PERS-402) issued orders, effective 15 December 1996, transferring Petitioner to the local Shore Intermediate Maintenance Activity (SIMA). The reporting date was later changed to 28 February 1997.

m. On 24 January 1997 Petitioner was advised he would have to

extend or reenlist so he would have sufficient obligated service to accept the orders transferring him to the SIMA. Accordingly, on 27 February 1997 Petitioner was reenlisted for two years by COMNAVBASE Norfolk.

n. On 17 April 1997 NPC denied the recommendation for Petitioner's entrance into the FAP. The letter further stated that even though he had been erroneously reenlisted, he would be allowed to remain on active duty until December 1997 in order to complete the ongoing program of sexual offender treatment.

o. On 23 April 1997 the SIMA's command master chief (CMC) reported that Petitioner had admitted that COMNAVBASE did not know about his case, and that he also denied any civil conviction for sexual offenses.

p. In an undated statement, an officer from NLSO refuted the CMC's statement and alleged that NLSO and COMNAVBASE had worked together on Petitioner's situation, and that Petitioner's civil conviction was well known by COMNAVBASE.

q. On 8 January 1998 an administrative discharge board (ADB) recommended that Petitioner be separated with an honorable discharge by reason of erroneous enlistment. It was acknowledged at the ADB that COMNAVBASE was aware of the open FAP case, and allowed Petitioner to reenlist. It was also believed that the FAP personnel at NPC had agreed to the issuance of orders to SIMA.

r. On 15 April 1998 the Chief of Naval Personnel (CNP) approved the recommendation of the ADB and directed separation. Accordingly, on 1 May 1998 Petitioner received an honorable discharge by reason of erroneous enlistment. The DD Form 214 issued on that date shows a total of 18 years, 9 months, and 3 days of active service. At that time, he was assigned a reenlistment code of RE-4.

s. On 9 January 2002, in response to a request from this Board, the Assistant Legal Counsel for NPC acknowledged that even though Petitioner apparently met the eligibility criteria for the FAP, the Deputy CNP "had discretion to formally accept or deny member's entry into the program."

t. The directive governing the FAP states that once the command notifies PERS-661 of allegations of child abuse, the member is ineligible to transfer or reenlist until the case is resolved. Administrative separation directives state that an individual may be separated by reason of erroneous enlistment if a reenlistment would not have occurred if appropriate regulations had been followed, and the reenlistment did not result from fraud by the member.

u. The 15-Year Early Retirement/Fleet Reserve Program was implemented in fiscal year (FY) 1994. It was not an entitlement, but a temporary early retirement authority (TERA), authorized to help facilitate the drawdown of personnel. The TERA authorized the Secretary of the Navy to offer early retirement at a reduced monthly stipend to servicemembers who completed at least fifteen but less than twenty years of active service. This was authorized by law through December 2001. However, throughout its existence, TERA was offered only to individuals in certain rates, and members being processed for administrative separation were presumptively ineligible.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. The Board's action is based on Petitioner's rehabilitative efforts and the unwarranted and unexplained delays which resulted in his discharge only a year or so before attaining 20 years of active service and entitlement for transfer to the Fleet Reserve.

It appears from the record that Petitioner's command became aware of his child abuse in May 1995, and reported it to PERS-661 in a timely manner. That office rather quickly directed that certain action be taken and that the results be forwarded within 90 days. However, no response was made until August 1996--about 15 months after the direction of PERS-661. It then took cognizant authorities another 8 months--until April 1997--to make a determination concerning the recommendation to enroll Petitioner in the FAP. Accordingly, a decision that apparently should have taken about four or five months took nearly two years--from May 1995 to April 1997.

All of this might not be so troubling to the Board if Petitioner committed further misconduct, performed poorly or was less than conscientious in his efforts at rehabilitation. However, this was not the case. On the contrary, Petitioner did exactly what the Navy and the civil authorities wanted him to do--continue to perform well and work on his rehabilitation. Although the Board in no way wishes to minimize child abuse, the Board does note that the civil authorities were content to place Petitioner on probation.

Given these circumstances, the Board is very troubled by the decision not to enroll Petitioner in the FAP. The Board realizes that meeting the minimum eligibility criteria does not and should not necessarily mandate acceptance into the program, and senior officials need to have some discretion. Nevertheless it believes that Petitioner's efforts at rehabilitation warranted some sort of explanation, either at the time of the decision or in the advisory opinion furnished to the Board. Nevertheless, no such

explanation has been put forth.

On the other hand, Petitioner was subject to discharge by reason of erroneous enlistment. In this regard, separation is appropriate for that reason only if enlistment or reenlistment would not have occurred if the relevant facts had been known, and if there was no fault on the part of the member. It certainly appears that Petitioner was not at fault, and PERS-402 directed reenlistment or extension only because it was unaware that Petitioner was still in limbo concerning his status in the FAP, and therefore ineligible to reenlist.

Since Petitioner's separation was technically proper, the Board cannot justify a period of constructive service to attain 20 years of service and entitlement to transfer to the Fleet Reserve. The Board nevertheless believes that his discharge only about a year away from such entitlement was unfair. Accordingly, the Board believes that the most appropriate course of action is to recommend Petitioner's transfer to the Fleet Reserve under the provisions of TERA.

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 1 May 1998 but instead transferred to the Fleet Reserve on that date under the provisions of TERA.

b. 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.

c. 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 references 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