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

AEG
Docket No. 6829-00
8 June 2001

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 general discharge of 9 September 1999 and showing that he continued to serve on active duty until the date he was eligible to transfer to the Fleet Reserve and, on that date, was so transferred with an honorable characterization of service.

2. The Board, consisting of Messrs. Morgan, Shy and Mazza, reviewed Petitioner's allegations of error and injustice on 30 May 2001 and, pursuant to its regulations, determined that partial relief is warranted. 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 enlisted in the Navy on 4 June 1985 after about six years of prior active service in the Army. During the next ten years he received no disciplinary actions, was advanced to the rate of yeoman first class (E-6) and received four awards of the Navy Achievement Medal. He reenlisted for the last time, for four years, on 4 August 1995. He then continued to serve well for more than three years, receiving excellent enlisted performance evaluations with individual trait averages (ITA) well

in excess of those required for a fully honorable characterization of service.[1]

d. On 3 May 1999 the general court-martial convening authority (GCMCA) referred charges to trial alleging that Petitioner had committed a false official statement, three indecent acts with a minor, three instances of indecent language, and a solicitation to commit an indecent act. On that same day, Petitioner entered into a pretrial agreement that required him to plead guilty to two specifications of committing indecent acts in return for significant limitations on the sentence that could be approved. Specifically, the GCMCA was required to suspend most punishment for 12 months, conditioned upon Petitioner's remaining on active duty and participating in psychological treatment.

e. On 10 May 1999, in accordance with his negotiated plea, a military judge sitting as a GCM convicted Petitioner of the two indecent acts and sentenced him to confinement at hard labor for 89 days, 90 days of hard labor without confinement, forfeitures of $900 per month for three months, reduction in grade to yeoman seaman (E-3) and a reprimand. However, in accordance with the pretrial agreement, the GCMCA was required to suspend all punishment except for 45 days of confinement and the reprimand. The record reflects that Petitioner was confined from 10 May to 15 June 1999, thus extending his enlistment until 9 September 1999.

f. On 24 June 1999 Petitioner submitted a request to his commanding officer (CO) "to retire at HYT (high year tenure), Dec 99. My EAOS (expiration of active obligated service) is Aug99 and I will extend my enlistment to meet my retirement."[2] On 28 June 1999 the CO initiated administrative separation action against Petitioner by reason of misconduct due to commission of a serious offense. Two days later, Petitioner elected to consult counsel and to present his case to an administrative discharge board (ADB). On 6 July 1999 Petitioner reiterated his request to extend his enlistment in order to become eligible for transfer to the Fleet Reserve. However, on 7 July 1999 the staff judge advocate unfavorably endorsed the request and, on 12 July 1999, it was disapproved by the CO.

g. On 31 August 1999 the CO faxed a letter to the Commander, Navy Personnel Command (COMNAVPERSCOM) which stated as follows concerning Petitioner's request to extend his enlistment:

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[1] In order to be eligible for a fully honorable discharge at the expiration of enlistment, an individual's final ITA, compiled from all evaluations during the current enlistment, must be 2.0 or higher. *See* Naval Military Personnel Manual (MILPERSMAN) Article 1910-304

[2] As previously noted, Petitioner's EAOS had been extended to 9 September 1999 to make up for the lost time spent in confinement. Accordingly, he would not attain the 20 years of active service necessary for transfer to the Fleet Reserve until on or about 6 January 2000, thus requiring an extension of four months since all extensions must be in whole months. *See* MILPERSMAN 1160-040.

(Petitioner) was convicted, in accordance with his pleas, at a (GCM) of two specifications of . . . indecent acts with another. The underlying facts reveal that these were indecent acts with his 10 year old step-daughter. These acts included the accused being naked in front of his step-daughter, naked massages of the buttocks and other acts. After a long and drawn out pretrial process, a pretrial agreement was reached between the parties to relieve the victim from further trauma in this case and to prevent a very costly trial. The pretrial agreement in this case was in no way meant to guarantee (Petitioner) the ability to retire.

Upon arrival at our command after completion of his confinement sentence, (Petitioner) requested to extend his current enlistment to the 20 year point in order to retire. Mandatory administrative separation processing is required in cases of deviant sexual behavior. Consequently, Petitioner was notified of this command's requirement and intention to separate him for "Misconduct—Commission of a Serious Offense" vice allowing him to retire . . . (T)his command was not the convening authority in this case and had to wait to obtain the necessary information from trial counsel and convening authority in order to adequately represent the government's interests at an (ADB), especially considering the scope of the issues and the emotionally charged topic. This command was not able to complete (Petitioner's ADB) and receive separation authority prior to the expiration of his current obligated service.

The command requests that (Petitioner's) requests to extend his enlistment and retire be denied and that he be separated at his EAOS, which is 9 September 1999.

h. On 1 September 1999 the Head of the Enlisted Performance Branch (Pers-832) replied by message for COMNAVPERSCOM as follows:

(Petitioner) is permitted to voluntarily extend enlistment (maximum of 90 days) for administrative separation processing.[3] If he desires to extend enlistment, complete . . . Agreement to Extend Enlistment and execute the following (page 13) entry: (DATE): "I understand that by voluntarily extending my enlistment, I could be administratively separated with a misconduct discharge, I would lose all benefits under the Montgomery G.I. Bill and eligibility for separation pay." (MEMBER SIGNATURE)."

[3] An individual's enlistment may not be involuntarily extended for the purpose of administrative separation action. However, upon approval of Pers-83, an individual may voluntarily extend an enlistment for that purpose. *See* MILPERSMAN 1910-208.

If (Petitioner) does not want to extend his enlistment prepare (page 13) entry in (his) service record which states that (he) is not to be extended, reenlisted or recalled to active duty without the express consent of COMNAVPERSCOM (Pers-832). Separate (Petitioner) at EAOS and assign (reenlistment) code RE-4.

i. There are two page 13 entries in the record dated 2 September 1999. One entry states that Petitioner is not to be extended, reenlisted or recalled to active duty without permission of COMNAVPERSCOM, and the other states that he will receive a general discharge due to the court-martial conviction. On 7 September 1999 Petitioner's command sent a message to Pers-832 which stated that "(Petitioner) verbally elected . . . discharge at his EAOS. (He) refused to elect in writing and sign (the page 13) which is on file in (his) service record."

j. The Certificate of Release or Discharge from Active Duty (DD Form 214) in the record reflects that Petitioner was voluntarily separated[4] on 9 September 1999 with a general discharge by reason of completion of required active service. At that time, he had 19 years, 8 months and 3 days of active service. The record indicates that Petitioner did not receive separation pay.

k. Department of Defense Directive (DODDIR) 1332.14 of 21 December 1993 sets forth binding guidance for enlisted administrative separations in the armed forces. The regulation states that an individual separated at the expiration of enlistment will receive an honorable discharge unless a general discharge is warranted "on the basis of numerical scores accumulated in a formal, Servicewide rating system that evaluates conduct and performance on a regular basis."[5] In 1982, when the original DODDIR 1332.14 was originally published in the Federal Register, the sectional analysis stated that this provision should be read to authorize a general discharge "only when based on a formal rating system."[6] The corresponding provision in Secretary of the Navy Instruction (SECNAVINST) 1910.4B is virtually identical to that in the current DODDIR 1332.14.[7] However, the governing articles in the Naval Military Personnel Manual (MILPERSMAN) indicate that factors other than the ITA may be considered.[8] In such a situation, the courts have held that

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[4] Block 26 of the DD Form 214 shows a separation code of "KBK." Such a code is assigned when an individual is voluntarily separated. *See* Bureau of Naval Personnel Instruction (BUPERSINST) 1900.8, Part 4 of enclosure (2). Had Petitioner's discharge been deemed involuntary, a code of "JBK" would have been assigned. *Id.*, at Part 3 of enclosure (2).

[5] DODDIR 1332.14, Attachment 1 of Enclosure 3, ¶ 1.1.2.

[6] 47 Fed. Reg. 10163, 10164 (1982).

[7] SECNAVINST 1910.4B, Part 1 of Enclosure (2), ¶ A.2.

[8] MILPERSMAN 1910-104 and 1910-304

the directive from the highest authority will prevail, unless a lower source provides greater rights for the individual.[9]

l. SECNAVINST 1910.4B states that the Chief of Naval Operations is the separation authority for individuals involuntarily separated after more than 18 years of active service, but permits this authority to be delegated to the Chief of Naval Personnel (CNP).[10] The MILPERSMAN implements this delegation authority.[11]

m. 10 U.S.C. § 1174(b) states that a regular enlisted servicemember with between six and twenty years of active service, who is involuntarily separated or denied reenlistment, is entitled to separation pay unless the service secretary determines that the circumstances of the discharge do not warrant such pay. In the naval service, this statute is implemented by SECNAVINST 1900.7G. This regulation states that an individual discharged due to misconduct is ineligible for separation pay.[12] The regulation also limits an individual who is eligible for separation pay but "not fully qualified for retention," to one-half the normal rate of separation pay.[13] Chief of Naval Operations Instruction (OPNAVINST) 1160.5C states that individuals who do not meet minimum eligibility criteria for reenlistment will be assigned the reenlistment eligibility classification of "RE-4," which means they are not eligible for reenlistment.[14] This instruction goes on to state that individuals convicted by general court-martial within a year of the expiration of enlistment must receive such a classification.[15]

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

> **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 of qualifying for . . . transfer to the Fleet Reserve . . . shall be retained on active duty until the member is qualified for . . . transfer to the Fleet Reserve . . . unless the member is sooner retired or discharged under any other provision of law.

This provision of law applies only to individuals separated by reason of expiration of term of service since other

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[9] *United States v. Lopez*, 35 M.J. 39 (CMA 1992); *United States v. Davis*, 47 M.J. 484, 485 (1998); *See also Gilchrist v. United States*, 33 Fed.Cl. 800-01 (1995).
[10] SECNAVINST 1910.4B, Part 6 of Enclosure (2), ¶ A.3.
[11] MILPERSMAN 1910-706.
[12] SECNAVINST 1900.7G, ¶ 9m.
[13] *Id.*, ¶ 8a.
[14] OPNAVINST 1160.5C, ¶ 6e.
[15] *Id.*, at Enclosure (2).

administrative separations are authorized by an "other provision of law," specifically, 10 U.S.C. § 1169.

o. The Federal courts have held that a resignation or retirement is presumed to be voluntary.[16] This presumption endures even if the individual is forced to choose between two unpleasant alternatives.[17] However, if an individual can show that a government representative either intentionally or unintentionally provided misleading or deceptive information, and the individual justifiably and in good faith relied on the information to his detriment, the resignation or retirement will be deemed involuntary and invalid.[18] A mere failure to provide information unless an individual has been misinformed, and the agency has an obligation to correct the error.[19] The foregoing test should be an objective inquiry and not one grounded in either the individual's perceptions or the government's intentions.[20] The courts have used the foregoing analysis to determine whether a discharge from the military is voluntary.[21]

p. If a military discharge is found to be improper or unjust, the record should normally be corrected to show that the individual completed the last period of obligated service.[22] However, the courts have authorized a correction board to backdate a discharge and deny such constructive service if backdating "places the claimant where he would have been without the improper discharge."[23] However, a correction board's action to deny constructive service must not be based on "mere speculation."[24] Additionally, such a board may only recommend a correction in favor of the individual, and never against him.[25]

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[16] *Christie v. United States*, 518 F.2d 584, 587 (Ct.Cl. 1975); *Bergman v. United States*, 28 Fed.Cl. 580, 585 (1993).
[17] *Sammt v. United States*, 780 F.2d 31, 33 (Fed. Cir. 1985); *Clifton v. United States*, 31 Fed.Cl. 593, 597-98 (1994).
[18] *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1575 (Fed. Cir. 1983); *Covington v. Department of Health and Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984); *Colon v. United States*, 32 Fed.Cl. 481, 490 (1994).
[19] *Gaudette v. Department of Transportation*, 832 F.2d 1256, 1258 (Fed.Cir. 1987).
[20] *Taylor v. United States*, 591 F.2d 688, 692 (Ct.Cl. 1979); *Scharf*, 710 F.2d at 1575.
[21] *Tippet v. United States*, 185 F.3d 1250, 1255 (Fed. Cir. 1999); *Adkins v. United States*, 68 F.3d 1317, 1321 (Fed. Cir. 1995); *Carmichael v. United States*, No. 99-958C (Fed.Cl. Oct. 31, 2000).
[22] *Bray v. United States*, 515 F.2d 1383 (Ct.Cl. 1975); *Maier v. Orr*, 754 F.2d 973 (Fed.Cir. 1985); *Thomas v. United States*, 42 Fed.Cl. 449 (1998).
[23] *Denton v. United States*, 204 Ct.Cl. 188, 200 (1974); *Cf. Carter v. United States*, 509 F.2d 1150, 1156 (Ct.Cl. 1975) (denial of constructive service permissible if it would rest on absurd premises).
[24] *Carter v. United States*, 213 Cl.Ct. 727, 731 (1977) (order).
[25] *Doyle v. United States*, 599 F.2d 984 (Ct.Cl. 1979).

q. An individual such as Petitioner is entitled to an ADB if he is facing discharge by reason of misconduct due to commission of a serious offense as evidenced by indecent assault.[26] When considering the case of someone such as Petitioner who has been convicted by court-martial, the ADB is bound by the conviction and may not enter a contrary finding.[27] Since Petitioner had over 18 years of active service, had an ADB recommended him for suspended or unsuspended separation, such action could be approved by CNP.[28] Even if an ADB recommends retention, SECNAV may disapprove such a recommendation and direct separation.[29]

r. In an attachment to Petitioner's application, his counsel explained as follows his client's actions after the Pers-832 message of 1 September 1999:

> (Petitioner) was required to execute a statement that would have permitted his separation from the Naval service with a misconduct discharge and that he acknowledged that he would lose all benefits under the Montgomery G.I. bill and eligibility for separation pay (and, presumably, retired pay) . . . As the . . . message was not responsive to the request he had made—to extend his enlistment to retire, (Petitioner) took no action and refused to sign any entries relating to his discharge.

s. Counsel then goes on to cite § 1176(a) for the proposition that Petitioner's discharge was improper and he should have been retained on active duty until he was eligible for transfer to the Fleet Reserve. Counsel further contends that Petitioner's discharge was involuntary and therefore improper because it was approved only by Pers-832 and not CNP. Counsel also avers that since Petitioner's evaluations were satisfactory and he was separated upon completion of required active service, a fully honorable characterization of service was required. Finally, counsel states that given Petitioner's length of service and since he was denied further service, he should have received separation pay upon his involuntary discharge.

t. The Board received an advisory opinion and legal analysis, dated 6 April 2001, from the office of the Judge Advocate General (JAG). JAG agrees with counsel that based on the final ITA, Petitioner should have received an honorable discharge. In this regard, JAG essentially states that the guidance in DODDIR 1332.14 and SECNAVINST 1910.4B which requires such a

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[26] MILPERSMAN 1910-142. This article also states that separation processing is mandatory in such cases, as noted by the CO in his letter of 31 August 1999.

[27] MILPERSMAN 1910-514

[28] *Supra*, note 10.

[29] MILPERSMAN 1910-706. Based on its review of other cases, the Board is aware that in actuality, SECNAV has delegated this authority to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA).

characterization "trumps" those sections of the MILPERSMAN which indicate that the ITA is not determinative.

u. JAG also concludes that since Petitioner was offered the opportunity to extend his enlistment and declined to do so, he was voluntarily separated. Since § 1176(a) only applies to individuals who are involuntarily separated, the sanctuary provisions of the statute did not apply and Petitioner's discharge was proper. JAG elaborates on this conclusion as follows:

> (§ 1176[a]) creates a "sanctuary" for enlisted members, protecting them form being "selected" for involuntary separation . . . Obviously, the statute would not apply when a member voluntarily left active service at EAOS (expiration of active obligated service).
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> . . .
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> . . . Petitioner was within two years of qualifying for transfer to the Fleet Reserve, and would have been protected by the sanctuary provisions of the statute if he had been selected for involuntary separation. It is plainly clear that Petitioner was not "selected" for involuntary separation . . . (B)ecause he was offered the opportunity to extend his enlistment, it is clear that his extension request was not denied. Accordingly, the sanctuary provisions of the statute never applied to Petitioner.
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> . . . (T)he offer to extend Petitioner's enlistment afforded (him) the same protection offered by the statute . . . (T)he sanctuary provisions of the statute do not preclude administrative separation. As such, the response by Pers-832 authorizing an extension for "administrative separation processing" was not incorrect . . . Had Petitioner extended his enlistment and been retained after administrative processing, he would have been entitled to remain on active duty until such time as he qualified for transfer to the Fleet Reserve . . . No evidence indicates that Petitioner's decision not to extend his enlistment was anything other than a voluntary one. There was no requirement in the statute, or any applicable regulation, to counsel Petitioner that, if retained after administrative processing, he would be eligible for retention until he was eligible for transfer to the Fleet Reserve . . .

JAG goes on to state that if the Board believes Petitioner was entitled to sanctuary under § 1176(a), appropriate corrective action would consist of allowing him to return to active duty and complete 20 years of active service, instead of a correction to the record to show completion of such service. In this regard,

JAAG opines that the latter course of action would provide Petitioner with "a windfall."

v. Petitioner's counsel responded to the advisory opinion by letter of 10 May 2001, in which he continues to contend that Petitioner's separation was barred by § 1176(a). Along these lines, counsel points out that Petitioner was within two years of qualifying for transfer to the Fleet Reserve and, on two occasions, requested an extension of his enlistment for a sufficient period to establish eligibility to be so transferred. Counsel further notes that there is no provision in law or regulation which permits an extension for administrative separation processing. Finally, counsel states that Petitioner's separation violated the pretrial agreement since its purpose was to avoid separation, and virtually all punishment was suspended for twelve months to permit him to participate in psychological treatment for his problem.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that partial relief is appropriate. Although there is no merit to Petitioner's request to set aside his discharge and show sufficient constructive service for transfer to the Fleet Reserve, the record should be corrected to show that he was involuntarily discharged with an honorable characterization of service.

In determining whether Petitioner's discharge should be set aside, the Board must first decide whether that discharge was voluntary or involuntary. As JAG notes in its advisory opinion, if the separation was voluntary, it was proper and should not be disturbed. On the other hand, if the discharge was involuntary, there was noncompliance with 10 U.S.C. § 1176(a) and consideration should be given to voiding the discharge and establishing Petitioner's eligibility for transfer to the Fleet Reserve. After carefully considering all of the facts and circumstances, the Board believes that although Petitioner's discharge was deemed voluntary the time of its issuance it was, in fact, involuntary and thus constituted a violation of § 1176(a).

In reaching this decision, the Board initially notes that on two occasions prior to his discharge, Petitioner requested that his enlistment be extended for a sufficient period to attain 20 years of active service and transfer to the Fleet Reserve. The command denied these requests but guidance was later sought, and was received from Pers-832 in its message of 1 September 1999. This message denied Petitioner's request and authorized only a 90 day extension for administrative processing—an insufficient period for Petitioner to attain 20 years of active service. The message also directed that Petitioner be informed that if he elected such an extension and was separated due to misconduct, he would lose

eligibility for separation pay and benefits under the Montgomery G.I. Bill. From counsel's submissions and the material of record, the Board believes that Petitioner was so informed. It also very much appears to the Board that Petitioner relied on the information in the message when he decided to forego such an extension and be discharged. Clearly, such reliance was reasonable since it came from a representative of NAVPERSCOM—the office responsible for the Navy's personnel matters.

If the Pers-832 message simply gave Petitioner a "Hobson's choice" of two distasteful alternatives, such a choice would not render his discharge involuntary. However, the Board believes that the message was actively misleading. It implied, although it did not actually state, that he was not entitled to be extended to attain eligibility to transfer to the Fleet Reserve when, in accordance with § 1176(a), just the opposite was true. Given the fact that on more than one occasion Petitioner clearly and specifically requested such action, the Board believes the Navy had an obligation to inform him of the provisions of that statute. Along these lines, the Board rejects the contrary conclusion in the JAG opinion. The Board might agree with JAG if the extension proposed by Pers-832 would have carried him to 20 years of active service. JAG correctly notes that § 1176(a) does not preclude administrative separation processing for misconduct. Clearly, if Petitioner had voluntarily extended his enlistment in accordance with § 1176(a), administrative separation action could have continued and might have resulted in discharge prior to his attaining 20 years of service. JAG also points out that had such action resulted in retention, Petitioner then would have been covered by the statute. However, he was never so advised and had no reason to be aware of that fact.

The message was also misleading concerning Petitioner's eligibility for separation pay. In stating that if he voluntarily extended his enlistment and was discharged for misconduct, he "would lose . . . eligibility for separation pay," Pers-832 implied that by foregoing the proffered extension and electing separation, he would retain this eligibility. Of course, such was not the case since the applicable statute and implementing directive did not permit the award of separation pay to Petitioner since his separation was "voluntary." In fact, Petitioner was not going to receive separation pay no matter what course of action he chose. Since his discharge on 9 September 1999 was deemed voluntary, no such payment was made. If he had extended his enlistment, a discharge for misconduct prior to reaching the 20-year point would have made him ineligible, and if he had attained 20 years, he would have been transferred to the Fleet Reserve and received retainer pay.[30]

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[30] The advice in the message pertaining to the loss of eligibility for Montgomery G.I. Bill benefits was also erroneous, but apparently irrelevant since there is no indication in the record to show that Petitioner was a participant in that program.

In short, the Pers-832 message makes it appear that Petitioner had little to gain and everything to lose by extending when, in actuality, exactly the opposite was true. Had he been given the opportunity to extend his enlistment for the four months necessary to establish eligibility for transfer to the Fleet Reserve as envisioned by § 1176(a), he did run the risk of being discharged under other than honorable conditions for misconduct. However, even if that eventuality came to pass, resulting in no separation pay and no Fleet Reserve eligibility, he would have been in essentially the same position as he was when he elected to be discharged. On the other hand, if he extended, there was always the possibility, however remote, that the ongoing administrative separation process would result in retention and sufficient service for transfer to the Fleet Reserve.

Accordingly, the Board believes that Petitioner's discharge was involuntary. Since § 1176(a) precludes such a discharge in the case of an individual such as Petitioner with over 18 years of active service, it was improper. However, this conclusion does not end the Board's inquiry since another issue must be resolved, specifically, does the evidence indicate that even without the improper discharge, Petitioner would have been in about the same situation? Put another way, even if Petitioner had been extended in accordance with his request and in compliance with § 1176(a), would he have been discharged by reason of misconduct before attaining 20 years of active duty? The Board believes the answer to this question is yes.

In reaching this conclusion, the Board first notes that Petitioner was convicted by GCM of two especially reprehensible indecent acts, committed on his young stepdaughter. These acts could have resulted in a sentence of up to 10 years of confinement and a dishonorable discharge.[31] Although the military judge did not impose anything resembling such a severe sentence, the Board emphatically rejects the notion that the judge's leniency or the terms of the pretrial agreement indicated an expectation that Petitioner would not be subject to administrative separation. In fact, since part of the pretrial agreement was conditioned upon his retention on active duty for 12 months, it appears that the parties to the agreement realized that he might not be retained.

Additionally, had separation processing continued, an ADB would have been bound by the finding of the GCM that Petitioner had committed misconduct. A recommendation for retention by the ADB would have been extremely unlikely given the nature of Petitioner's offenses and the fact that processing for separation was mandatory. The Board realizes that mandatory processing does not mean mandatory separation, and an ADB may still recommend retention in such a case. However, the requirement to process individuals such as Petitioner for separation indicates that the

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[31] *Manual for Courts-Martial, United States,* pt. IV, ¶ 90e (1998).

drafters of the MILPERSMAN view their continued service as a matter of grave concern.

Even if an ADB recommended retention, that recommendation is not binding since SECNAV or his alter ego, the Assistant Secretary for Manpower and Reserve Affairs, may override the recommendation and direct discharge. Whether an ADB recommended separation or not, the Board believes that the discharge authority, either CNP or SECNAV would surely have directed Petitioner's discharge. In coming to this conclusion the Board is mindful of Petitioner's many years of good service and how close he was to attaining eligibility for transfer to the Fleet Reserve. However, just because he escaped severe punishment at the court-marital does not in any way mean that the administrative process would have resulted in an equally favorable outcome.

Based on the foregoing, the Board believes that even if Petitioner's enlistment had been extended for four months to give him the opportunity to attain 20 years of active service and transfer to the Fleet Reserve, he would have been discharged for misconduct during this four-month period. However, the Board cannot backdate a discharge by reason of misconduct to the actual date of Petitioner's discharge, or to some other appropriate date during that period, because such a correction to the record would be unfavorable and thus impermissible given the fact that the record now shows a discharge at the expiration of enlistment. The Board also considered leaving Petitioner's record as it is. However, since the record now reflects a voluntary discharge and the Board is convinced that the separation was, in fact, involuntary, inaction is an unsatisfactory option.

The Board is thus faced with a conundrum of reconciling Petitioner's improper discharge with the windfall that would accrue by setting aside the discharge and granting sufficient constructive service to allow transfer to the Fleet Reserve. After careful consideration, the Board concludes that the best course of action is a correction to the record to show that the discharge of 9 September 1999 was involuntary and not voluntary. The Board is aware that such action could be viewed as violations of § 1176(a) and the MILPERSMAN requirement that such a separation be approved by CNP. However, the Board believes the corrective action is nonetheless appropriate given the fact that it puts Petitioner in a more favorable situation than he was before the action. The action is beneficial because, given his length of service and reason for separation, it will entitle him to separation pay. However, since the court-martial conviction rendered him ineligible for reenlistment, he is limited to one-half the normal amount of such pay.

The Board completes its analysis of this case by resolving an issue about which there now appears to be little, if any, dispute. Given counsel's contention, the conclusion of the JAG advisory opinion, and the pertinent regulations and case law, it is clear that since Petitioner was separated at the expiration of

his enlistment and his final ITA was satisfactory, the general discharge was improper and should be changed to an honorable discharge.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was involuntarily separated on 9 September 1999 with an honorable discharge instead of the voluntary general discharge actually issued on that date.

b. That the record be further corrected to show that upon his discharge on 9 September 1999, Petitioner was authorized one-half separation pay.

c. That no further relief be granted.

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

W. DEAN PFEIFFER

Reviewed and approved: