



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

TRG
Docket No: 8320-01
7 August 2002

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 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 filed an application with this Board requesting that his record be corrected to show an RE-1 reenlistment code and to eliminate the adverse monetary consequences caused by his improper discharge such as the recoupment of the unearned portion of his reenlistment code.

2. The Board, consisting of Mr. Pfeiffer, Mr. Beckett and Ms. McCormick, reviewed Petitioner's allegations of error and injustice on 23 July 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 initially enlisted in the Navy for four years on 3 August 1988. He reenlisted for three years on 13 April 1994 and then for six years on 13 February 1997. The record shows that he served in an excellent manner during his entire period of service.

d. On 11 August 1999, a warrant was issued for Petitioner's arrest. He was charged with committing a felony based on an accusation of sexual abuse by his 16 year old stepdaughter. He appeared in court on 21 October 1999 and pled nolo contendere to a reduced charge of simple assault. The court sentenced him to 60 days in jail which was suspended conditioned upon good

behavior, payment of fines and costs and having no contact with the victim. On 24 February the Family Advocacy Program (FAP), case review committee recommended a psychosexual evaluation and that he attend a sex offender treatment program.

e. On 7 March 2000 Petitioner was notified of separation processing under other than honorable conditions by reason of misconduct due to his commission of the serious offense of sexual perversion as evidenced by the sexual battery of his stepdaughter. On 10 March 2000 Petitioner submitted a conditional waiver of an administrative discharge board (ADB) in exchange for the issuance of an honorable discharge. The commanding officer stated in his endorsement on this request, in part, as follows:

(Petitioner) has performed his duties with great distinction. His service record contains 11 1/2 years of exemplary performance. I am not alone in expressing faith in his character; he has the highest possible support from his chain of command. (He) was trusted as a Midshipman running mate while onboard USS SOUTH CAROLINA (CGN 37) and he served as a recruiter for over two years.

I find his explanation of events to be credible. His character as demonstrated by his current and prior years of service as well as the willingness of Virginia Beach to plea bargain support (his) version of events. I believe that (when he was) confronted with his options, (he) acted in a manner consistent with what he believed at the time to be in the best interest of his entire family. He choose (sic) to plead "no contest" to a lower charge.

In view of the nature of this case, (he) is not recommended for further naval service. However, given his exemplary military performance over eleven and a half years of distinguished service, I strongly recommended discharge with a characterization of honorable.

On 31 March 2000 the general court-martial convening authority (GCMA) denied Petitioner's request for a conditional waiver because it was not authorized by the regulations which required processing because it involved substantiated child sexual abuse. GCMA directed that Petitioner be reprocessed for discharge by reason for misconduct due to commission of a serious offense and misconduct due to a civil conviction.

f. Petitioner was notified of separation processing on 31

March 2000 and requested that his case be heard by an ADB. In a letter to the ADB, dated 13 April 2000, the commanding officer strongly recommended an honorable discharge. An ADB convened on 4 May 2000 at the Transient Personnel Unit (TPU), Norfolk, VA and found by a unanimous vote that Petitioner had not committed misconduct due to commission of a serious offense but found that he had committed misconduct due to a civil conviction and that the misconduct warranted a general discharge. On 19 June 2000, the commanding officer of the TPU informed the Navy Personnel Command that Petitioner had been issued a general discharge by reason of misconduct on 26 May 2000 and stated that he concurred with the finding of the ADB.

g. Petitioner submitted an application to the Naval Discharge Review Board (NDRB). At that time, he stated, in part, as follows:

On July 1st 1999 my daughter ran away from home and left a note that if (I) contact(ed) the police things would only get worse, well they certainly did. She made statements to her friends and the police that I was sexually abusing her. She had made this kind of threat in the past but later retracted it. This time the police and Social Services got involved and this false claim took on a life of its own. The police and Social Services completely took what my daughter was saying as fact without interviewing all parties involved. I was to have a hearing on the charge on the 21st of October but a week before my lawyer called me up and told me that the prosecution has serious doubts about her telling the truth and this charge would not hold up in court. They asked my lawyer if I would plead guilty to simple assault and (I) told my lawyer that I (would) not plead guilty to anything. He then explained what nolo contendere was. I agreed to this because I did not want to have the rest of my family and friends testify against my daughter and I knew that (she) would realize what she did and would want to come back home. Also the financial and emotional costs of continuing this was starting to impact my family

Petitioner concluded his statement by pointing out that the Military Personnel Manual (MILPERSMAN) Article 1910-144 only allows for discharge due to a civil conviction when the Manual for Courts-Martial (MCM) authorized a punitive discharge for the same or closely related offense, the specific circumstances warrant discharge, or the civil sentence includes confinement for six or more months without regard to suspension, probation or early release. The MCM does not allow the issuance of a punitive discharge following a conviction of simple assault. Petitioner

concluded his statement to NDRB stating that his stepdaughter spent a period of time with her natural father and then resumed a normal family life with Petitioner and her mother. On 10 July 2001, the NDRB agreed that the discharge was improper and directed an honorable discharge and a change in the reason for discharge to "Secretary Plenary Authority". Petitioner's record has been corrected to reflect this change. NDRB had no authority to make any other corrections to the record.

h. Petitioner's points out in his application to this Board that NDRB agreed that he was improperly discharged. He now requests corrections to his record that will stop recoupment of the unearned portion of his reenlistment bonus, will allow the payment of separation pay and a change in his reenlistment code.

i. When an individual has been improperly discharged and no other basis for discharge is available, the record should be corrected to show that the individual was not discharged but remained in the military until either the expiration of the enlistment or until a discharge date is properly determined. This is known as constructive service. The regulations require that any pay that becomes due as a result of this service be offset by civilian earnings. A discharge prior to the expiration of enlistment, in cases such as this, is for the "best interest of the service" or as set forth in the current regulations as "Secretarial Authority".

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. The Board agrees with the conclusions of NDRB that Petitioner was improperly discharged. He has not requested a return to active duty but only those benefits that would flow from a proper discharge. Since the discharge of 26 March 2000 is improper, it should be cancelled and the record should show that he continued to serve until he was properly discharged. Since he does not desire to return to active duty, the record should show that he was honorably discharged by reason of Secretarial Authority on 23 July 2002, the date the Board acted on his case. Concerning the reenlistment code, the Board believes that if he had served the additional two years he would have earned a recommendation for reenlistment and concludes that the RE-4 reenlistment code should be changed to RE-1. The discharge should be considered to be involuntary for the purpose of the payment of separation pay.

The Board notes that Petitioner's conviction by civil authorities has not been set aside and the ADB found that he had committed misconduct due to that conviction. Although, the misconduct did

not warrant discharge, the Board believes that documentation concerning the misconduct should remain in the record. Accordingly, the Board concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future reviewers will understand the facts of this case and the reason for the corrective action taken by NDRB and this Board.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged on 26 March 2000 but continued to serve on active duty until 23 July 2002 when he was involuntarily discharged with an honorable characterization of service and an RE-1 reenlistment code.

b. That 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.

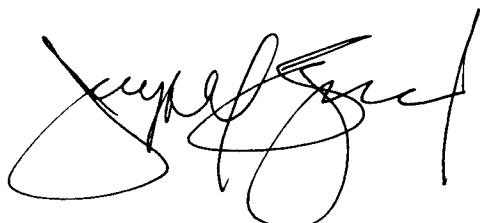
ROBERT D. ZSALMAN
Recorder


ALAN E. GOLDSMITH
Acting Recorder

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


W. DEAN PFEIFFER

Reviewed and approved: SEP 6 2002



JOSEPH G. LYNCH
Assistant General Counsel
(Manpower and Reserve Affairs)