



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

TRG
Docket No: 3310-01
15 May 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 by removing the nonjudicial punishment (NJP) and related documentation from his record, and by setting aside his discharge and reinstating him on active duty.

2. The Board, consisting of Mr. Agresti, Mr. Harrison and Ms. Hare, reviewed Petitioner's allegations of error and injustice on 14 May 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. Petitioner's application was filed in a timely manner.

c. Petitioner initially enlisted in the Navy on 19 May 1986 and served in an excellent manner for many years. He reenlisted on 8 March 1996 for six years as a Fire Controlman First Class (FC1; E-6). On 26 February 1999 he reported aboard the USS HARRY S TRUMAN (CVN 75).

d. On 1 August 2000 Petitioner received NJP for indecent assault and violation of a lawful general order. The punishment imposed was a reduction in rate from FC1 to FC2 (E-5), and 45 days restriction and extra duty. Specifically it was alleged that Petitioner assaulted a female FC3 J, while they were performing maintenance on a gun mount by rubbing her buttocks and

shoulders, and caressing her breast. In his appeal of the NJP, Petitioner contended that no indecent assault Sailor never told him to stop, but during the NJP she stated that he was touching her against her will. Further she did not report the incident, but only confided in another Sailor. Petitioner also asserted that since this incident was consensual the punishment was unjust.

e. In his endorsement on Petitioner's appeal the commanding officer stated, in part, as follows:

.... I am convinced that the incident occurred as alleged by FC3 (J). (Petitioner) when interviewed by NCIS, admitted to the conduct. He corroborated many details of FC3 J's allegations. At the Captain's Mast, (he) originally pled not guilty, however, he stated that he had touched FC3 J's buttocks and breast without permission. After further discussion about the elements of the offense and testimony of FC3 J, (he) said he was guilty of indecent assault. (He) also admitted that he was guilty of fraternization with FC3 J. He was (her) immediate supervisor and this incident occurred in the work center. This was clearly an unduly familiar relationship between a senior and a subordinate.

... (His) assertion that the conduct was permissible because it occurred between two consenting adults is both incredible and ignorant of the fraternization policy. The evidence presented portrayed a situation where this supervisor preyed on an unsuspecting and unwilling junior. I do not believe (his) implication that FC3 J was a willing participant nor would this fact matter for the charge of fraternization.

... Given the deleterious nature of this offense on the good order and discipline of this command nothing short of the maximum punishment seemed warranted. I did, however, forego awarding any forfeitures for the benefits of (his) wife and children. The punishment was not unjust given the aggregious (sic) circumstances surrounding the offenses.

On 15 August 2000, the Commander, Carrier Group TWO denied the NJP appeal, finding that the evidence was sufficient to show that Petitioner had committed an indecent assault. Subsequently, the commanding officer set aside the charge of violating a lawful general order, but found the punishment appropriate for the remaining charge of indecent assault. Petitioner also submitted a subsequent appeal in which he

alleged that contrary to the applicable provision in the Manual for Courts-Martial, he had not been permitted to examine the evidence against him.

f. On 17 August 2001 Petitioner was notified of separation processing due to his commission of a serious offense. An administrative discharge board (ADB) convened on 15 November 2000. During the ADB, Petitioner's counsel requested a continuance because FC3 J was unable to testify. Page 2 of the ADB transcript states as follows concerning this matter:

.... FC3 (J) was admitted to Portsmouth Psychiatry Ward 14 November 2000. The recorder responded that both sides had a chance to interview FC3 (J) and that the government would provide a sworn statement from FC3 (J) and statement from NCIS. The recorder also stated that (Petitioner) had pled guilty and was found guilty at Non-Judicial Punishment and that FC3 (J) may never be available to testify as per statement made by treating physicians at Portsmouth Naval Hospital.

Both Petitioner's and FC3 J's statements were exhibits at the ADB. In addition, Petitioner's civilian counsel testified concerning his prior interview with FC3 J and said that she told him that she had been molested as a child and had continuing issues resulting from this, and couldn't communicate her wishes of "no". Several enlisted men testified that there were rumors about FC3 J having been an exotic dancer, she was very flirtatious, and she was considered untrustworthy. Nevertheless, the ADB unanimously concluded that Petitioner had committed misconduct due to commission of a serious offense. However, the ADB recommended a general discharge and that the separation be suspended for 12 months.

g. Petitioner's detailed defense counsel submitted a letter of deficiencies concerning the ADB. He believed that Petitioner's rights were violated when FC3 J was not made available to testify and be cross-examined because the entire case rested on the issue of whether the touching was consensual. Subsequently, the commanding officer recommended an unsuspended general discharge. After some initial confusion concerning the appropriate discharge authority, the case was forwarded to the Navy Personnel Command, which directed an unsuspended general discharge by reason of misconduct. Petitioner was so discharged on 6 April 2001 with an RE-4 reenlistment code. At that time he had completed 14 years, 10 months and 18 days of active service.

h. In an attachment to his application, Petitioner makes a number of contentions of error. He reiterates his assertion that

he was denied the right to examine the evidence against him and alleges that the evidence against him was flawed given the mental state of FC3J. Petitioner's application wand all attachments are included in enclosure (1).

i. Petitioner's application was forwarded to the Commanding Officer, USS HARRY S TRUMAN (CVN 75) for his input. He addressed Petitioner's contentions of error in detail in a five page response of 25 June 2001 and concludes that none of them had merit. Concerning FC3 J's mental capacity the commanding officer, stated, in part, as follows:

... The mental capacity of the accuser in this case did not become an issue in the Non-Judicial proceedings. (Petitioner) ... admitted to touching the victim "on her butt and breast." He was then asked if the victim asked for him to touch her or gave him permission to do so, to which he responded that she did not. (He) subsequently pled guilty to the indecent assault. The victim's mental capacity greatly diminished after the incident occurred, and because (he) admitted to the offense, the victim's mental capacity was not considered as a matter relating to (his) guilt or innocence. (He) attempted during his administrative board, to call into question the victim's mental state during the incident in question because she was unavailable to testify. The Administrative Board was not persuaded. Although the victim has a history of personal and psychological issues it did not excuse (his) actions. The victim's testimony at NJP and the statements to the Naval Criminal Investigative Service Agent were credible and therefore provided a reliable statement of the facts of the case.

.... Petitioner states, "My accuser (The government's only witness) was self-admitted to the Portsmouth Naval Hospital on 14 November 2000 to avoid being questioned by my lawyers at the admin separation hearing and was discharged days after the Board adjourned ..." The victim's admission to Naval Hospital Portsmouth was not to avoid questioning; her mental capacity diminished after the incident and she was admitted only after the medical professionals determined she should be admitted. ... The victim was present at Captain's Mast and testified before me. I found her statement regarding the incident to be credible. (He) was, therefore, given the right to be confronted with the witness against him and his rights under the Sixth Amendment were not violated. The government did not object to the introduction of any statement made by

the victim to (his) attorney;

j. Petitioner submitted a rebuttal to the commanding officer's input stating, in part, as follows:

... FC3 (J) lied to enlist in the Navy, lied about the events between us being against her will, lied to the XO at XOI about being an exotic dancer and a prostitute, and lied to the CO at mast. The (USS TRUMAN) command did nothing to change the mast conviction due to lack of credibility of their only witness. The command also had the option of setting aside the charge of indecent assault and letting the fraternization charge stand, but the charge of fraternization does not require an admin board

Both the commanding officer's input and Petitioner rebuttal are attached to enclosure (1).

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants partial favorable action. Concerning the NJP, the Board believes that based on FC3 J's statement and Petitioner's admission, the evidence at the NJP was sufficient to support the commanding officer's conclusion that an indecent assault had occurred. Therefore, the Board concludes that there was no abuse of discretion in this matter and the NJP should not be removed from the record. The Board also substantially concurs with the input of the commanding officer pertaining to the NJP in the letter of 25 June 2001

Concerning the ADB, the Board believes that the NJP was sufficient to support processing for discharge due to commission of a serious offense. In addition, the Board substantially concurs with the commanding officer in his letter that Petitioner's rights were not violated and, therefore, the ADB properly found misconduct occurred. It is clear that given the circumstances, Petitioner could not continue as a supervisor, especially as a supervisor of female enlisted personnel. Therefore, the commanding officer's decision not to recommend suspension of the discharge cannot be considered an abuse of discretion since Petitioner was in a position of leadership and should have been setting a better example. The Board concludes that Petitioner was properly discharged and reinstatement in the Navy is not warranted.

However, the Board weighed his many years of excellent service against the isolated nature of the offense and concludes that an

honorable characterization of service is more appropriate rather than the general discharge now of record.

RECOMMENDATION:

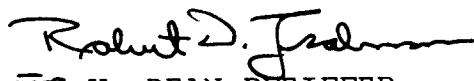
- a. That Petitioner's naval record be corrected to show that on 6 April 2001 he was issued an honorable discharge by reason of misconduct vice the general discharge now of record.
 - b. That the remainder of Petitioner's requests for corrective action be denied.
 - c. That this Report of Proceedings 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. 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.



For W. DEAN PFEIFFER
Executive Director