

DEPARTMENT OF THE NAVY

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



Docket No:

4272—04

5 October 2005

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

Subj: REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

End: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Marine Corps filed an application with this Board requesting, in effect, changes in the reason for discharge and reenlistment code. be changed.

2. The Board, consisting of Mr. [REDACTED] reviewed Petitioner's allegations of error and injustice on 28 September 2005 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 enlisted in the Marine Corps on 26 August 2003 at age 18. At that time, he answered "no" to all questions concerning a police record on the Questionnaire for National Security Positions. He indicated that he had never been charged with or convicted of any felony offense; there were no charges pending; and he had never been arrested, charged with or convicted of any other offense(s) not listed in the other categories. He completed recruit training and in January 2004 he reported to [REDACTED] for further training.

d. A police report reveals that on 10 December 2003, a social worker called the local police department in [REDACTED] and stated that she had learned that a 13 year old girl that had been raped, apparently in 2001. Petitioner was named as one of the perpetrators Based on this report, an investigation was initiated. Subsequently, Petitioner's alleged co-actor admitted they had had sex with the girl and, at some point, the girl had been handcuffed. The victim, who was then living in [REDACTED], was interviewed and stated that the incident occurred in 2002, and she was handcuffed and raped by Petitioner and his friend. Based on this information, an arrest warrant was

issued charging Petitioner with rape, conspiracy to commit rape and kidnapping. Bail was set at \$250,000. On 8 January 2004, the local police presented the arrest warrant to the staff judge advocate at [REDACTED]. Petitioner was interviewed by the Naval Criminal Investigative Service (NCIS) and admitted to having sex with the girl while she was handcuffed, but stated that it was consensual.

e. On 9 January 2004, Petitioner was notified of discharge processing by reason of fraudulent enlistment and misconduct due to commission of a serious offense. In connection with this processing, he elected to waive the right to have his case heard by an administrative discharge board. He was then returned to [REDACTED] and was incarcerated. On 26 January 2004, the discharge authority directed an uncharacterized entry level separation by reason of fraudulent enlistment and he so separated on 10 February 2004. At that time he was not recommended for reenlistment and was assigned an RE-4 reenlistment code.

f. On 2 March 2004 the district attorney submitted a motion to dismiss the charges against Petitioner because of the mental health of the victim. He submitted letters from mental health providers confirming that compelling her to participate in the prosecution would be detrimental to her emotional health. This motion was approved and the charges were dismissed without prejudice. Petitioner was then apparently released from confinement.

g. Petitioner's counsel states that there is absolutely no way that her client could have known that criminal charges would be brought against him after he enlisted in the Marine Corps. She points out that there is some confusion as to whether the offense occurred in 2001 or 2002, and states that Petitioner told the NCIS that he thought the sexual activity had occurred in 2000. She also alleges that Petitioner told the NCIS that the sexual activity was consensual, he thought the girl was older than she actually was and he had refused to have continued contact with her. The attorney contends that the girl's mother was aware of the incident and insisted that she have a pregnancy test. Counsel also points that her family did not and has not filed any charges.

h. Petitioner states he was told that if the charges were

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dismissed, he could return to the Marine Corps. He states that he did so only to be told that he had been discharged.

i. Regulations allow for discharge by reason of Secretarial Authority when a discharge is warranted but no other reason for separation fits the circumstances.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. The Board agrees that at the time of enlistment, Petitioner truthfully answered the questions on the security questionnaire. Since there was no fraud, the Board concludes that separation by reason of fraudulent enlistment is not appropriate.

However, the statement from the co-actor and Petitioner's own statement confirm that they had sex with a handcuffed 13 year old girl, and at the very least it appears that his actions constituted statutory rape. Given these facts, the Board believes that the Marine Corps could reasonably have concluded that Petitioner's further service was not desirable and discharge was appropriate. Since discharge was appropriate, but he did not commit fraud, the Board concludes that the reason for discharge should be changed to secretarial authority. Given the circumstances, the Board also concludes that the record supports the assignment of an RE-4 reenlistment code and a change in that code is not warranted.

The Board further concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future reviewers will understand the reason for the change in the reason for discharge.

RECOMMENDATION:

- a. That Petitioner's naval record be corrected to show that on 10 February 2004 he was separated from the Marine Corps with a reason for discharge of Secretarial Authority vice the reason for separation now of record.
 - b. That Petitioner's request for a change in the reenlistment code 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

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complete record of the Board's proceedings in the above entitled matter.

[REDACTED]

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.

