



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

CRS
Docket No: 5158-00
11 April 2001

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 11 April 2001. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by Headquarters Marine Corps dated 28 February 2001, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:

1070

JAM4

28 FEB 2001

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]

1. We are asked to provide an opinion on Petitioner's request that the reduction from sergeant to corporal he was awarded at his non-judicial punishment (NJP) on June 15, 2000 be suspended and that he be reinstated to the grade of sergeant.

2. We recommend that the requested relief be denied. Our analysis follows.

3. Background.

a. On 8 January 2000, Petitioner, then a sergeant, was approached by a junior Marine in the barracks and informed that several Marines were having group sex with a female in a nearby room. Petitioner accompanied the Marine to the barracks room where the group sex was occurring and upon entering the room, observed one Marine having sexual intercourse with a 19-year old female, a second Marine receiving oral sex from the same female, and a third Marine watching the activity. Rather than put a stop to an ongoing violation of the UCMJ, Petitioner decided to participate, approached the female, and placed his penis in her mouth as another Marine was engaged in sexual intercourse with her. Petitioner then exhorted the other Marine to get off the woman so that he could have sexual intercourse with her. Petitioner then attempted to have sexual intercourse with the woman, stopping only when she began to cry and told him to get off.

b. After investigation by NCIS non-substantiated rape and forcible sodomy charges, Petitioner received NJP, on 15 June 2000, for sodomy and committing an indecent act with another, in violation of Articles 125 and 134 of the Uniform Code of Military Justice (UCMJ). Petitioner was awarded reduction in grade from sergeant to corporal, forfeiture of \$780.00 pay per

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month for 2 months, and 60 days restriction. The forfeiture and restriction for 60 days were suspended for 2 months. Petitioner appealed the punishment as excessive, arguing that he had the most passing sexual contact with the woman, but received the greatest punishment. Petitioner's appeal was denied.

4. Analysis.

a. Petitioner's claim that the punishment he received was disproportionate to the offense is without merit. The punishment he was awarded at NJP was within the commanding officer's authority, and was also appropriate. Instead of stopping the ongoing group sex with an apparently intoxicated female, Petitioner engaged in sodomy, and attempted to engage in sexual intercourse with her, all in the company of Marines junior in rank to himself.

b. Relief is not warranted based on Petitioner's claim that he received disparate treatment. Disparate treatment exists only where cases are factually indistinguishable, where the treatment of co-accused is widely disparate, and where there is a showing that the disparate treatment resulted from improper motive on the part of the authority who jointly disposed of the offenses. None of these factors are present in this case. First, Petitioner's case is not factually indistinguishable because, as the senior Marine involved, Petitioner was not similarly situated with the other Marines. Second, Petitioner received NJP from a different squadron commander than his co-actors. Third, the treatment of the Marines involved was not widely disparate, as all received NJP rather than a court martial. Finally, Petitioner has made no showing that an impermissible motive influenced the outcome in his case. Accordingly, the fact that the other Marines involved in the incident did not receive a reduction in rank does not provide grounds for relief.

5. Conclusion. For the reasons noted, we recommend that the requested relief be denied.

[REDACTED]
Assistant Head, Military Law Branch
Judge Advocate Division