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

ELP
Docket No. 8231-98
26 April 1999

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) DD Form 149 w/attachments
(2) Case Summary
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy applied to this Board requesting, in effect, that his naval record be corrected to show that he was not discharged on 22 December 1997 but continued to serve until eligible for transfer to the Fleet Reserve on or about 31 August 1988.

2. The Board, consisting of Messrs. Ms. Taylor, Mr. Carlson, and Mr. McCullough, reviewed Petitioner's allegations of error and injustice on 14 April 1999, 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 reenlisted in the Navy on 8 May 1995 for three years as an MS1 (E-6). At the time of his reenlistment, he had completed nearly 17 years of prior active service. During this period he generally served in an excellent manner. Although he received two nonjudicial punishments early in his career, he later received the Navy Achievement Medal. At the time of the events at issue, Petitioner was assigned to the Naval Hospital, Jacksonville, FL.

d. Petitioner served without incident until 25 April 1995. On that date, the Naval Criminal Investigative Service (NCIS) initiated an investigation into allegations that on 25 April 1995, Petitioner indecently assaulted a female AN (E-3) in the barracks by putting his hand inside her shorts and on her breast. Initially, Petitioner denied having any contact with the AN, however, on a second interrogation, he admitted putting his hand inside her shorts but denied placing his hand inside her shirt. Then, prior to the pre-test portion of a polygraph examination on 28 August 1995, he admitted placing his hand in her shirt and grabbing her breast.

e. On 27 October 1995, Petitioner was convicted, in accordance with his pleas, of two specifications of indecent assault by a military judge sitting as a special court-martial. The judge sentenced him to confinement at hard labor for 85 days, forfeitures of $100 per month for six months, and reduction in rank to MS3 (E-4). However, the military judge also recommended that the convening authority suspend the reduction in rate below MS2 (E-5). In this regard, it should be pointed out that the military judge could legally have sentenced Petitioner to a bad conduct discharge, confinement at hard labor for six months, and forfeitures of two-thirds of his pay for six months.

f. On 28 November 1995, the Enlisted Performance Division in the Bureau of Naval Personnel (Pers-83) advised the commanding officer (CO) that information contained in the NCIS report indicated that administrative separation processing was mandatory and requested the status of any pending disciplinary action. The CO advised Pers-83 on 6 January 1996 of Petitioner's conviction by court-martial and also opined that separation action was not deemed appropriate given Petitioner's more than 17 years of honorable service and since the court-martial did not adjudge a punitive discharge.

g. On 29 January 1996 the command judge advocate recommended that the convening authority approve the sentence as adjudged, but further recommended consideration of the military judge's recommendation for clemency. It was also noted that Petitioner had apologized to the victim, his wife, the court and the government for his actions. On 5 February 1996, the convening authority approved the sentence, but suspended the reduction in rate below MS2 for a period of 12 months from the date the sentence was adjudged. By the time of the convening authority's action, Petitioner had completed the adjudged period of confinement and been restored to duty.

h. On 27 February 1996, Pers-83 directed that Petitioner be processed for administrative separation by reason of misconduct due to commission of a serious offense. Pers-83 stated that such action was mandatory and appropriate given Petitioner's conviction of two counts of indecent assault. However, more than a year elapsed before such action was initiated. On 2 April 1997 Petitioner was notified that administrative separation action had been initiated by reason of misconduct due to commission of a serious offense. He was advised that he could receive a discharge under other than honorable conditions. On 12 May 1997, Petitioner elected to exercise his right to representation by counsel and presentation of his case to an administrative discharge board (ADB).

i. Meanwhile, another division within the Bureau of Naval Personnel approved Petitioner's request for transfer to the Fleet Reserve, effective 31 August 1998.

j. Petitioner appeared before an ADB with counsel on 29 May 1997. The ADB, consisting of a LCDR (O-4), a LT (O-3), and a PNC (E-7), found that Petitioner committed misconduct due to commission of a serious offense. By a vote of 2-1, the ADB recommended that he be separated with an honorable discharge, but that the discharge be suspended for a period of 18 months. The minority member recommended that he be retained in the Navy until he became eligible for transfer to the Fleet Reserve. The CO concurred with the ADB's recommendation, stating that discharge should be suspended for 18 months to allow Petitioner's transfer to the Fleet Reserve.

k. In a memorandum to the Chief of Naval Personnel (CNP), Pers-83 recommended that Petitioner be discharged by reason of commission of a serious offense and that separation not be suspended. The memorandum noted that Petitioner who was serving as the manager of a bachelor enlisted quarters (BEQ) when he sexually assaulted a junior female sailor in her BEQ room. Pers-83 also pointed out that Petitioner initially denied touching the victim and did not admit that he touched the victim's breast until the third interrogation. Pers-83 stated that while the CO's desire to retain Petitioner until his Fleet Reserve eligibility date was understandable, his misconduct and subsequent lies were not conducive to continued retention. Pers-83 also stated that since Petitioner had over 18 years of service, CNP was the separation authority.

l. On 16 October 1997, CNP, acting in his capacity as Deputy Chief of Naval Operations, directed an honorable discharge by reason of misconduct due to commission of a serious offense. Thereafter, the CO requested a flag officer review of Petitioner's case and strongly recommended his retention until eligible for transfer to the Fleet Reserve. However, CNP directed execution of the discharge and indicated that the case had already been reviewed by a flag officer, the Deputy CNP, with CNP acting as separation authority. Accordingly, no further flag review was warranted and the prior authorization to transfer to the Fleet Reserve was cancelled.

m. Petitioner was honorably discharged on 22 December 1997. At the time, he had completed more than 19 years and four months of active service. Any lost time incurred as a result of the special court-martial sentence to confinement is not shown in the record or on Petitioner's DD Form 214.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action on the grounds that Petitioner's misconduct did not warrant his administrative separation only months before he was eligible to transfer to the Fleet Reserve.

The Board first notes that by the time of Petitioner's discharge, his many years of excellent, though not exemplary, military service had brought him close to the point at which he could transfer to the Fleet Reserve. The Board is aware that

there is no right to be retained to accumulate sufficient service for retirement. An individual in that situation must adhere to Navy standards. Nevertheless, the Board is relucant to approve an administrative discharge for such an individual since it deprives the him of retirement benefits.

The Board also notes that the military judge who sentenced Petitioner did not adjudge a punitive discharge, and imposed far less than the maximum punishment. Additionally, he took the somewhat unusual step of recommending a partial suspension of the sentence; a recommendation that the convening authority approved. Consequently, it appears that the judge hoped, and maybe even expected, that Petitioner would be permitted to continue his service. The Board views the actions of the judge as significant since such an individual is extremely well-versed in the need for military discipline and would not make such a recommendation lightly.

The military judge was not the only one who thought Petitioner was worth saving, every member of the ADB thought so too. It is most important to note that although there was a split vote on the ADB's recommendation, in actuality, no member of the ADB wanted to see Petitioner discharged without an opportunity to serve out the brief period of time needed to transfer to the Fleet Reserve. Such a recommendation, coming from an ADB composed of two experienced officers and a chief petty officer, is entitled to considerable weight.

Of further significance are the efforts of the CO on Petitioner's behalf. Petitioner's CO was the commander of a naval hospital and was obviously an individual well aware of the need for military discipline and proper behavior. Based on its experience, the Board finds it very unusual for the CO to recommend against separation processing given the offenses of which he was convicted. Additionally, because of the nature of the offenses, the Board would expect that the CO would have recommended Petitioner's immediate separation despite the favorable recommendation of an ADB. The Board also believes that in very few cases would a CO ask for further review when separation had been directed by competent authority. Nevertheless, the CO never wavered in his support for Petitioner.

Finally it should be kept in mind that even after he was convicted and completed his confinement, Petitioner apparently served without incident for more than a year before administrative separation action was initiated, only months before his eligibility for retirement. The timing of such action was extremely unfortunate and constitutes an additional mitigating factor in the case.

Based on the foregoing, the Board has an abiding belief that administrative separation in this case is overly harsh, and that the recommendations of the ADB and the CO for retention should have been approved. Accordingly, the Board concludes that Petitioner's record should be corrected to show that he was retained in the Navy until he became eligible for transfer to the Fleet Reserve. In this regard, the Board would point out that even if such action is taken, the reduction in rate imposed at Petitioner's court-martial will constitute a continuing punishment since he will draw the retirement pay of an MS2 instead of an MS1, thus costing him many thousands of dollars over the years.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged on 22 December 1997 but continued to serve on active duty without interruption.

b. That the record be further corrected to show that on 7 May 1998, Petitioner extended his enlistment for six months.

c. That the record be further corrected to show that Petitioner continued to serve on active duty without interruption until first eligible to transfer to the Fleet Reserve and on that date, was so transferred. This should include the issuance of a new DD Form 214. The Board notes that the date of 31 August 1998 was originally selected for Petitioner's transfer to the Fleet Reserve, but that date may need to be changed if there was time lost due to confinement imposed at the special court-martial.

d. That a copy of 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 action of the Board is submitted for your review and action.

W. DEAN PFEIFFER

Reviewed and approved: JUL 2 1999

KAREN S. HEATH
Principal Deputy Assistant Secretary of the Navy
(Manpower and Reserve Affairs)