



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

AEG

Docket No. 4630-98

20 September 1999

Mr. [REDACTED]

Dear Mr. [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 15 September 1999. 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 affidavit from Major (MAJ; O-4) Jeffrey P. Co, USMC, dated 30 April 1999, a copy of which is attached.

The Board found that you first enlisted in the Navy on 26 March 1979. You then served in a generally satisfactory to excellent manner for about nine years, advancing in rate to builder first class (BU1; E-6) in 1987. Your performance then improved, as shown by the fact that you received no overall evaluation lower than 4.0 during the period from 1988 to 1995. You received another excellent evaluation in 1996 under the Navy's new performance evaluation system. You reenlisted for the last time, for four years, in August 1993. In October of 1993 you reported for duty to Navy Security Group Activity (NSGA), Hanza, JA. Your outstanding performance in this assignment was recognized by the award of the Navy Achievement Medal in 1995.

On 6 May 1997 Construction Electrician Second Class (CE2; E-5) O submitted a statement to Special Agent P of the Naval Criminal Investigative Service (NCIS) concerning events which occurred on an overnight camping trip with his wife and several co-workers and friends. This statement elaborated on a statement he wrote on the previous day and reads, in part, as follows:

I would say as the night went on, I probably drank a 12 pack of beer before starting to go to sleep with a good buzz. I would guess it was between 2300 and midnight, 18-

19Apr97, when people started filing away from the camp fire and going to their tents to go to sleep. During this time, I was laying down in a lawn chair next to the camp fire and started to fall asleep while others were still filing off to their tents.

Sometime between midnight and 0600, 19Apr97, I felt a pain in my genital and anal area while I was sleeping. I was in a real deep sleep at the time I first noticed this pain. I opened my eyes and thought I saw (you) laying in a lawn chair next to me with his hands down my shorts and masturbating me. Since I was in such a deep sleep prior to opening my eyes and still half asleep when I opened them, I thought I had just imagined or dreamed what I had just seen. I then felt another pain in my genital area and after feeling this strange discomfort . . . I crossed my legs and saw (you) pull his hand out of my shorts and look around the campfire to see if anyone was looking. I was seeing all this going on but I felt like I was still in that imaginary world between sleep and consciousness. I was confused if I was still sleeping or awake.

I fell back (to) sleep and again started to feel the strange discomfort in my genital and anal area. This time the discomfort was more rough and started to wake me up. I began to cross my legs to try and rid (myself of) the discomfort. I opened my eyes again and again saw (you) with his hand up my shorts. He was masturbating me, feeling my testicle, and trying to penetrate my rectum with his fingers. I was still trying to realize what was happening as he pulled his hand out of my shorts and smelled his fingers. (You) then quickly placed his hands back to my inner thigh and began masturbating me again. At this point I became aware of what was going on and that what was going on was real. I became awakened from my sleep and started to sit up in the lawn chair as (you) removed his hands from me and started apologizing.

I was in instant shock and I didn't know what to say or how to react. He began to apologize as I said to him "WHAT THE HELL ARE YOU DOING!" I told (you) that I also knew about the other guys he had done this to before. (You) admitted to me that he had masturbated (S) and (Ca) before. He then began to tell me how he had a "crush" on me when I first (transferred) here and how he also had a "crush" on (another servicemember). (You) started explaining to me how difficult it was being in the Navy yet still in the closet. At this point I got up from my lawn chair and went to a near by tree to urinate. As I returned to my lawn chair he began to tell me how difficult it was working with all of us . . . and living a lie. (emphasis in text)

During this conversation I was in disbelief and shock about what had just happened to me. I then laid on my lawn chair

and turned the other way so I could not look at or see (you) and I remember thinking to myself: "What is going to happen," "Do I tell somebody," "Did anyone see?" I stayed on the lawn chair for about 30 minutes of wonder(ing) what I should do.

I must have fallen asleep because the next thing I recall was waking up the next morning about 0600, 19Apr97, and realizing I had spent the night on the lawn chair. I got up and cooked breakfast for everyone . . .

For the past two weeks I have thought about what I should do about this situation. My mind was sickened by the thought of it. When I saw . . . (you) at work I got angry and very uncomfortable. Many thoughts ran through my mind. I didn't want to ruin the great working and off duty relationship we all had at (our) department. I didn't want to be the one who destroyed (your) 18 year career. I didn't want to tell my wife and maybe destroy my marriage. I didn't know where to turn, but I knew I was disgusted and full of anger that he had violated me while I was sleeping and with my wife and friends close by. On 2May97, I just could (not) keep this incident inside me anymore. The rage, disgust and anger just kept adding up inside me and I had to tell someone so I told my friend, . . . and he told me I should report this incident.

Elsewhere in his statement, CE2 O admitted he had heard about other incidents that convinced him that you were homosexual. He also mentioned an incident in which you "grabbed me and kissed me while putting his tongue down my throat." However, CE2 O also stated that one of the reasons he invited you on the camping trip was "he had never tried anything with me . . ."

On 7 May 1997 the NCIS agent obtained a statement from Cryptologic Technician Third Class (CTM3; E-4) Ca, one of the individuals referenced in CE2 O's statement. CTM3 Ca stated that two or three years ago, on New Year's Eve, while he was spending the night in your barracks room, you masturbated him while he was trying to sleep. CTM3 Ca also stated that he had heard rumors concerning a homosexual act between you and CTM1 S, the other individual mentioned in CE2 O's statement.

On 9 May 1997, after being interviewed by Special Agent P, you executed a sworn statement that reads, in part, as follows:

I can not say exactly when, but for a long time I have known that I am a bi-sexual. I was questioned . . . concerning my sexual involvement with three members of my command. I would like to start by saying that all three of these incidents occurred after I had consumed a large amount of alcohol.

I believe the first incident occurred on New Year's Eve two or three years ago. I was at the club . . . when I overheard (CTM3 Ca) say that he had no place to stay for the night. I offered to let him sleep in my room and he accepted so we left the club for my room. We arrived . . . and we both laid on the floor to go to sleep. I slept on the floor often for my back. (Ca) was in his underwear when he laid down on the floor to sleep. While we were on the floor, I reached over and touched (Ca's) penis through his underwear. As soon as I touched (Ca) he let me know that he was not that way and was not interested because he got up, put on his pants and left my room . . .

The second occasion was sometime around the summer of 1994 or 1995. I was at a party at CTM1 (S's) apartment out in town on Okinawa, Japan. While at this party, (S) went to bed and while he was sleeping in his bed, I went into his room and laid on his bed beside him. I think (S) was wearing a pair of shorts and a shirt at the time. While I was laying next to (S), I touched his penis through his shorts. When I touched (S), I think he was asleep or half asleep because he just rolled over away from me. This gave me the feeling that (S) was not interested so I did not touch him again or pursue the issue . . .

The last occasion was during the weekend of 18-19Apr97 I was invited on a camping trip . . . with a group of people from my work section. During the day and evening of 18Apr97, I had drank probably a 12 pack of beer and a bottle of sake (Japanese rice wine). After eating dinner for the evening, I was sitting around a campfire we had built and apparently I fell asleep in a lawn chair next to the fire. When I awoke (sometime between the evening of 18Apr . . . and 19Apr . . .) I noticed CE2 (O) was sleeping in a lawn chair near me by the camp fire. When I noticed (O) sleeping in the lawn chair he was just wearing a pair of shorts with no shirt on. While (O) was still sleeping I reached under his shorts and started touching his penis. I would estimate that I was touching (O's) penis for about 10-15 minutes before he woke up. When (O) woke up he just leaned over and started talking to me. (O) told me that he wasn't that way (meaning he was not gay) and told me that he understood that I was. (O) told me that he always suspect(ed) or knew that I was gay. I explained to him that I was not gay that I was bi-sexual. (O) never jumped away or freaked out when he woke up, but he let me know that he did not want me to touch him so I stopped. (O) and I stayed up for quite some time just talking about his sister and my sexual orientation. While we were talking, we both must have fallen asleep because when I woke up it was morning . . .

On 13 May 1997 you were placed on report for committing an indecent assault upon CE2 O on the night of 18-19 April 1997, in

violation of Article 134 of the Uniform Code of Military Justice (UCMJ). A preliminary investigating officer (PIO) took another statement from CTM3 Ca, who essentially reiterated his earlier allegation. The PIO then recommended nonjudicial punishment (NJP) for the incident with CE2 O, but not for the allegation pertaining to CTM3 Ca because of the expiration of the two-year statute of limitation for NJP. Accordingly, on 14 May 1997 the commanding officer (CO) of NSGA Hanza imposed NJP upon you consisting of a reduction in rate to BU2, forfeitures of pay and restriction.

On 20 May 1997 the CO of NSGA Hanza initiated administrative separation action by reason of "misconduct-commission of a serious offense as evidenced by CO's NJP 15 May 1997 for violation of the UCMJ, Article 134 (Indecent Assault); homosexual conduct-as evidenced by engaging in an unsolicited homosexual act." One day later, you elected to present your case to an administrative discharge board (ADB).

On 5 June 1997 CE2 O signed a statement in which he declined the opportunity to testify at the upcoming ADB because he was disgusted at your incident assault upon him and did not desire to be in the same room with you.

The ADB met on 6 June 1997. At that time, the recorder introduced documentary evidence including the written statements of CE2 O, CTM3 Ca and you. Your counsel, Captain (CAPT; O-3) Co, USMC, did not object to any evidence introduced by the recorder. He did introduce portions of your service record, which documented excellent performance over the years, and material pertaining to separation pay and veterans' benefits. The recorder then presented testimony from the NCIS agent, the PIO and CTM3 Ca. Your counsel presented testimony from a civilian co-worker.

At an ADB, a respondent may either testify under oath, like all other witnesses, or make an unsworn statement. If an unsworn statement is given, cross-examination is not permitted. This is the course of action you chose and your statement reads, in part, as follows:

. . . (I)f all of the victims of my misconduct were present I would apologize to them for my behavior. I mentioned to (Special Agent P) that I was bi-sexual. I think this stemmed from a rape that happened when I was about 10 years old after a teenager of my church group raped me. He repeatedly raped me and forced me to perform oral sodomy on him. Later he involved another friend. The first time I was beaten and bruised. I didn't tell anyone because I did not want anyone to know. This is the first time I've ever talked about it tot anyone.

Each of the incidents I'm here for occurred while I was under the influence of alcohol. I started drinking at a

young age. I've been involved in a few fights because of alcohol but I've never had any alcohol abuse treatment. I'm now receiving treatment for my alcohol problem and talking to counselors at the Family Service Center.

I understand this (ADB) can separate me from the service. However, my desire is to remain in the Navy to continue my career. I can't be 100% sure that conduct of this nature will ever (sic?) be repeated again but with counseling it helps to minimize the possibility. It will be hard but I would like to complete my career and retire . . .

After considering all of the evidence, the ADB unanimously found that you had committed misconduct and homosexual conduct as alleged, and unanimously recommended discharge under other than honorable conditions.

On 18 June 1997 you filed a formal sexual harassment claim against CE2 O, alleging that over a period of two years he had grabbed your penis and buttocks, committed similar abuse against other Sailors and Japanese nationals, and left obscene messages in your office. You also stated that "my military lawyer, CAPT (Co) asked me (has CE2 O) ever touch (sic) me, I say yes and told him about some of (O's) continue (sic) sexual harassment toward me." Elsewhere in the complaint, you also alleged that "I inform (sic) my lawyer about this and nothing was done."

In response to your sexual harassment complaint, the CO of NSGA Hanza directed an investigation, which was conducted by Lieutenant (LT; O-3) G. He interviewed a number of individuals and took written statements from your supervisor, CE2 O's supervisor and the NCIS agent. On 24 June 1997 LT G submitted his report which reads, in part, as follows:

. . . I learned that CE2 (O) is known for wrestling around and "horse play" in which physical contact is made with other male individuals. None of the co-workers whom I interviewed could cite a specific date or time, however, each one was sure that Petty Officer (O) had "horse played" with (you) at one time or another. When asked whether or not (you) had participated in the "horse play," all of the interviewees said that (you) had. Further, all interviewees said that at no time did they ever hear any comments by (you) stating that this behavior was unwelcome. Additionally, when I reviewed CE2 (O's) Division Officer's Record, I found no mention of poor personal behavior even though (you were) (CE2 O's) supervisor for a majority of this period. With regard to the alleged lewd messages written by (CE2 O), there was no physical evidence supporting this claim, and when I questioned (the individual) who (you) claimed translated some of the messages, he stated that he had never seen such a message.

I also interviewed Agent (P), an NIS agent who investigated (you) for the UCMJ violation Because the case involved a claim by (CE2 O) against (you), it seemed logical that the alleged sexually harassing behavior by (CE2 O) would have surfaced during that investigation. (The agent) stated that (you) made no such claims against (CE2 O) during the course of his investigation. When I contacted (your) defense counsel for that case, he would not answer any questions with regard to (your) statements to him, citing attorney-client privilege.

I attempted to interview (CE2 O) to discuss this investigation, however he would not discuss any matters pertaining to this case without legal assistance.

My findings are that this harassment claim is by and large unsubstantiated. It is probable that there was physical contact between (CE2 O) and (you) when "horsing around." However, considering (your) position of authority over (CE2 O), he had the opportunity to correct this behavior through counseling or other means, if indeed the "horse play" was unwelcome. Additionally, considering that this behavior was supposedly unwelcome for a period of about two years and that no written documentation exists until after the UCMJ conviction . . . , this claim has the appearance of a form of retribution against (CE2 O).

In my opinion, there are facts that support that horseplay did occur. Since horseplay may be considered as unwelcome to some, counseling should be conducted on (CE2 O). There is no substantiating evidence to suggest that any of the horseplay was unwelcome to (you) prior to filing a formal complaint. Therefore, in my opinion, this sexual harassment complaint is unjustified.

You were advised of the foregoing findings and conclusions on 7 July 1997 and requested a review by higher authority. The record does not disclose the results of that review.

Meanwhile, on 23 June 1997 the CO forwarded your case to the Bureau of Naval Personnel (BUPERS), recommending approval of the ADB's findings and recommendations. In his letter of that date, the CO stated as follows:

(You have) no potential for further useful Naval service. Additionally, (you), when asked, failed to provide any assurance that he would not again engage in similar misconduct.

(You) filed a formal sexual harassment charge against one of the victims on 19 June 1997. It appears this charge has no substantiation and one may reasonably infer that it is a spiteful attempt to bring the victim down out of retribution. Therefore, I approve the findings of the

(ADB) and recommend separation with an Other Than Honorable discharge.

On 10 July 1997 you submitted a letter to the Commander, Naval Forces Japan, addressing the sexual harassment complaint and the unfavorable action taken on it. In this regard, you said that LT G never should have been appointed to investigate your complaint since he and CE2 O both worked "in the same small compound." You also reiterated many of the specific allegations in the complaint, and specifically took issue with the statement of Agent P to the effect that you had not mentioned any harassment by CE2 in the interview. In this regard, you stated that "I also mention (sic) in conversation that (O) (had) been touching me." Concerning your failure to complain about CE2 O earlier than he did, you admitted, "I can't explain why I did not report this." You also criticized CAPT Co as follows:

I don't have much to say about my lawyer Captain (Co) because he inquired about (O). I informed him about (O) and he did nothing. I thought my lawyer was there to help me without prejudice. After my one of two meetings, the only thing he conveyed to me was I should have gone to jail. After hearing this a few times, I realized he did not have my interest in the case and the harassment would not be acted upon.

You also retained civilian counsel after the ADB and on 11 July 1997 she submitted a letter to BUPERS, essentially requesting that the findings and recommendations of the ADB be set aside. In her letter, she reiterated the allegations of sexual harassment made by Petitioner against CE2 O. She then criticized the performance of CAPT Co as follows:

. . . (The) instances of touching . . . by CE2 (O) and the things he did to (you) were all brought to the attention of (your) military counsel, then CAPT Jeff (Co) (now Major). None of this was brought out at the (ADB).

CE2 (O) did not desire to testify at the hearing and was not called to testify by the Government. His written statement was submitted to the (ADB) for consideration. Considering the importance of the testimony of CE2 (O) in this (ADB), Major (Co) could have demanded that CE2 (O) appear to testify. At that time, Major (Co) could have cross-examined him on his behavior toward (you), and the fact that he, over a two year period of time, inappropriately touched (you) and delivered explicit messages to him.

CE2 (O), over two years ago, began questioning others about (your) past, gathering information on him about any homosexual tendencies, then thereafter using this information against him to (sic) harassing him and making advances toward him, touching him in a sexual manner. This

information was brought to the attention of Major (Co); however, this information was not brought to the attention of the (ADB) in any manner whatsoever.

According to regulations, the respondent's counsel has the opportunity to submit a "letter of deficiency" to the Convening Authority . . . Given the opportunity to address the recommendation of the (ADB), and issues which occurred during the hearing, Major (Co) chose not to submit a letter of deficiency. As such, there was no input by Major (Co) for the Convening Authority to consider in making his decision.

Although (you) wanted to tell his side of the story to the (ADB), and answer any questions they had of him, Major (Co) directed (you) to make an "unsworn" statement. As such, only Major (Co) could question him. Major (Co) had not prepared (you) for testifying in any form, sworn or unsworn. (You) came across as being unable to assure the (ADB) that he would not again engage in similar misconduct. The answer he provided ("I can't be 100% sure that conduct of this nature will ever be repeated again but with counseling it helps to minimize the possibility.") was definitely an answer a client would give if that client's attorney had not prepared him to testify. However, according to (you), he was trying to convey that he could assure the (ADB) that this behavior would not continue, and that he was in counseling as well as attending AA to show that he is taking steps to address these issues, further ensuring that the behavior would not continue.

. . . Based on the above, the actions of (your) counsel preparing for and during the (ADB) were outside the range of professionally competent assistance. It is readily apparent that (your) counsel effectively denied him a fair day in the (ADB). As such, (you were) prejudiced . . .

Meanwhile, sometime between 7 and 10 July 1997, a memorandum was prepared by the Assistant Chief of Naval Personnel (CNP) for Military Personnel, Performance and Security recommending your discharge under other than honorable conditions by reason of misconduct due to commission of a serious offense. Several officials within BUPERS favorably endorsed the memorandum and, on 15 July 1997, such action was personally directed by CNP, acting in his capacity as Deputy Chief of Naval Operations for Manpower and Personnel. In this regard, it is unclear whether any of the endorsers or CNP reviewed civilian counsel's letter of 11 July 1997.

On 30 July 1997 you sent a letter to CNP requesting a new ADB due to the failure of CAPT Co to properly represent you. In that letter, you alleged as follows:

. . . I was assigned Captain (Co) . . . as my defense counsel. During my first interview with Mr. (Co) , he questioned me about Petty Officer (O) and if this individual ever done (sic) anything to me to give me the idea that he was interested in you. I told Mr. (Co) yes, that (O) has been grabbing me from behind and rubbing his genital(s) against my buttocks, trying to touch my genital(s) and leaving lewd sexual notes and messages on my white board in my office. I informed him that this behavior has been going on for nearly two years and that I told him to stop. Mr. (Co) was giving (sic) some names by me of people he could interview, but on my second meeting Mr. (Co) has not spoken to anyone about my claim. CAPT (Co) informed me that he was too busy with other cases. I could not believe this and my (ADB) was the next day at thirteen hundred hours. He said he would try and contact (an individual) that worked in the office where I work. He also instructed me to give an unsworn statement so he would be the only one . . . questioning me. My defense counsel did not question any witness and myself doing (sic) the (ADB) about (O's) behavior. During the (ADB) I was upset that the (ADB) member(s) did not get a chance to hear all the facts containing (sic) to my cases and that their decision would not be fair due to Captain (Co's) inability to present information.

However, on 1 August 1997, in accordance with the action of CNP, you were discharged under other than honorable conditions by reason of misconduct. At that time, you had about 18 years and 4 months of active service.

The Board first considered the contention that the NJP should be removed from your record because the evidence fails to reflect that you used force or violence in committing the act reported by CE2 O. It is well settled that an indecent assault occurs if an individual assaults a certain person with the intent to gratify his lust or sexual desire, and such conduct is prejudicial to good order and discipline. Para. 63b, Part IV, *Manual for Courts-Martial* (MCM). An assault is an attempt or offer, with unlawful force or violence, to do bodily harm to another, whether or not the attempt is consummated. It must be done without the victim's consent and any offensive touching, however slight, is sufficient to constitute bodily harm. Para. 54c(1)(a), Part IV, MCM. In applying this standard to your case, it is clear to the Board that you used unlawful force or violence against CE2 O because he never consented to your touching him. Along these lines, the Board noted that an individual who takes liberties with a sleeping individual is guilty of an indecent assault. *United States v. Briggs*, 46 M.J. 699, 701-02 (A.F.Ct.Crim.App. 1996). Accordingly, this contention lacks merit.

The Board next considered your contention that contrary to the dictates of the Sixth Amendment to the Constitution, you were denied your right to confront the witnesses against you at the

ADB. The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right . . .to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor." Since your case involves an administrative separation from the military and not a criminal prosecution, this contention is without merit. *Milas v. United States*, 42 Fed.Cl. 704 (1999).

The Board also rejected your contention that the Sixth Amendment was violated because you did not receive effective assistance of counsel from MAJ Co. In this regard, the Board first noted that a servicemember is guaranteed effective assistance of counsel not only by the Sixth Amendment but also UCMJ Article 27(b), which states that defense counsel detailed at a general court-martial must be "certified as competent." *United States v. Marshall*, 45 M.J. 268, 270 (1996). Articles 3640200.7 and 3620200.1v of the Naval Military Personnel Manual (MILPERSMAN) make this guarantee applicable to an ADB respondent by stating that such an individual is entitled to "qualified counsel," and defining that term as "counsel qualified under Article 27(b) of the UCMJ."

However, a two-part test must be met in order to prevail on a claim of ineffective assistance of counsel--the performance of the lawyer must be deficient and the client must be prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Polk*, 32 M.J. 150, 153 (CMA 1991). The deficient performance prong of this test requires that the lawyer's errors be so serious that he was not functioning as counsel. *Strickland*, at 687. Investigation is an essential part of the adversary process, and counsel has a duty to investigate or make reasonable decisions that make investigation unnecessary. *Wade v. Armontrout*, 798 F.2d 304 (8th Cir. 1986). However, a strong presumption exists that counsel is competent. An individual must rebut that presumption by pointing to specific errors by counsel which were unreasonable under prevailing professional norms. *United States v. Cronin*, 466 U.S. 648 (1984). The prejudice part of the test requires a showing that counsel's errors were sufficiently serious to deprive the client of a fair and reliable hearing. *Strickland*, at 690. *United States v. Scott*, 24 M.J. 186, 188 (CMA 1987). One must show that "a reasonable probability exists that but for counsel's errors, the result of the proceeding would have been different." A probability is reasonable only if it is "sufficient to undermine confidence in the outcome." *Strickland*, at 694.

After carefully considering your contentions of ineffective assistance of counsel, the affidavit of MAJ Co, and the responses of you and your counsel to that affidavit, the Board concluded that his assistance to you was not ineffective in that his representation was not deficient. The Board was unable to find that MAJ Co committed any procedural or substantive errors. To the extent that your version of events differs from that of MAJ C, the Board concluded that he was more credible and worthy of belief.

The Board also found no merit to your contention that since the Navy failed to comply with the provision of the MILPERSMAN Article 3610240.1e concerning rehabilitation and retention, your right to due process of law under the Fifth Amendment was violated. Along these lines, you allege both a property and a liberty interest in continued military service. However, the Board saw no need to determine whether you had such interests since it concluded that MILPERSMAN Article 3630400.1c(1)(a-e), and not Article 3610240.1e, provided the applicable guidance in your case. The former article required separation upon a finding that an individual committed homosexual acts unless those acts were a departure from the servicemember's usual behavior, unlikely to recur and not accomplished by the use of force; the member's continued service was consistent with good order and discipline; and the member had no propensity or intent to engage in such acts. This was buttressed by Article 3630400.3b, which stated that an ADB must recommend separation if it finds that an individual committed a homosexual act "unless the (ADB) finds that retention is warranted under the limited circumstances described (above)." Additionally, Article 3630400.3f stated that "the member shall bear the burden of proving . . . that retention is warranted under the limited circumstances . . ."

Consequently, the Board concluded that you failed to show, by a preponderance of the evidence, that retention was warranted under the limited circumstances set forth above. In your written statement to NCIS, you admitted to homosexual acts with three individuals during a three-year period. Accordingly, it could not be said that such acts were a departure from your normal behavior or unlikely to recur, or that you had no propensity to commit such acts in the future. Further, since you assaulted these individuals by committing homosexual acts while they were sleeping, the acts were accomplished through some degree of force. Finally, since these acts were committed with other servicemembers, your retention would not be consistent with good order and discipline. Accordingly, the Board concluded that given the applicable provision of the MILPERSMAN, no reasonable ADB could possibly believe that your retention was warranted.

The Board also rejected the contention that your administrative separation was barred by 10 U.S.C. § 1176(a). That provision of law states, in pertinent part, as follows:

(a) **Regular members.**--A regular enlisted member who is selected to be involuntarily separated, or whose term of enlistment expires and who is denied reenlistment, and who on the date on which the member is to be discharged is within two years of qualifying for . . . transfer to the Fleet Reserve . . ., shall be retained on active duty until the member is qualified for transfer . . . unless the member is sooner retired or discharged under any other provision of law.

10 U.S.C. § 1169(1) provides for discharge of a regular enlisted member prior to the expiration of his term of service, as prescribed by the service secretary. Secretary of the Navy Instruction (SECNAVINST) 1910.4B and the MILPERSMAN implement § 1169 by providing policy and guidance on enlisted administrative separations in the Navy such as yours. Accordingly, you were discharged "under any other provision of law" and the 18-year safety zone prescribed by § 1176(a) did not apply to you.

Additionally, the legislative history of § 1176(a) indicates that this provision of law was intended to "provide the same tenure protection to enlisted members that is afforded under current law to officers who have completed 18 but less than 20 years of active duty for retirement eligibility purposes." H.Conf. Rep. No. 102-966, 102nd Cong., 2nd Sess. 709, reprinted in 1992 U.S.C.C.A.N. 1636, 1800. Such protection is afforded for regular officers in 10 U.S.C. §§ 631 and 632, both of which provide for the involuntary discharge of officers who twice fail to be promoted unless they have 18 years of service, in which case they are retained until they attain retirement eligibility. However, both statutes state that the 18-year safety zone is inapplicable if an officer is "sooner retired or discharged under another provision of law." Accordingly, just as administrative separation of a regular officer for cause, as provided for in Chapter 60 of Title 10, is not precluded by §§ 631 or 632, your separation for cause under § 1169 and the implementing directives was not affected by § 1176(a).

The Board also found no merit in your assertion that characterization of your service as under other than honorable conditions was improper since your homosexual acts did not fall within any of the aggravating factors set forth in MILPERSMAN Article 3640300.5c(1-7). In this regard, the Board noted that you were processed for separation by reason of both homosexuality, under MILPERSMAN Article 3630400, and misconduct due to commission of a serious offense, under Article 3630605. The ADB found both reasons were substantiated and recommended discharge under other than honorable conditions. In directing discharge, CNP was governed by Article 3610220.2a which required him to "choose the most appropriate reason when affecting discharge," and stated that "normally, the . . . least favorable of the reasons . . . will be the reason for separation." Article 3630400 authorized characterization of service as honorable, general or other than honorable for members discharged due to homosexuality. Article 3630605 stated that members separated by reason of misconduct due to commission of a serious offense normally are discharged under other than honorable conditions. Accordingly, misconduct by reason of commission of a serious offense was the least favorable reason for separation. Therefore, CNP did not err in designating it as the reason for separation in your case, and characterization as under other than honorable conditions also might be deemed proper.

Whether the reason for separation in your case was homosexuality or misconduct due to commission of a serious offense, the underlying basis for discharge was a homosexual act. Most such acts constitute sodomy, a violation of UCMJ Article 125, or an indecent act or assault, both violations of Article 134. All are serious offenses, as that term is defined in MILPERSMAN Article 3630605. It seems clear, however, given the provisions of Article 3630400.5c (1-7), that the drafters of the MILPERSMAN did not intend that an individual be separated under other than honorable conditions because of homosexual acts unless the acts fell within one or more of the aggravating factors set forth therein. Accordingly, the Board concluded that if your homosexual acts did not fall within one of those factors, your discharge under other than honorable conditions would be improper or, at the very least, unfair. However, it is clear to the Board that your homosexual acts fell within Article 3630400.5c(1), since they involved "force, coercion or intimidation." Therefore, the Board concluded that your discharge under other than honorable conditions was not only proper but also appropriate.

Finally, the Board concluded that you are not entitled to "whistleblower" status under 10 U.S.C. § 1034. This statute is implemented by Department of Defense Directive 7050.6 and SECNAVINST 5370.7B. These directives provide specific procedural rights to military members who allege reprisal for making a protected communication. However, these directives make it clear that such procedures are only available if the individual makes a timely complaint of reprisal to the DOD or Navy Inspector General. Since you never filed such a complaint, you are not entitled to those procedural protections.

Turning to the substance of your complaint of reprisal, the Board concluded that it was without merit. In his letter of 23 June 1997, the CO of NSGA Hanza opined that your sexual harassment complaint was unsubstantiated and spiteful. It is the Board's belief that his recommendation for discharge under other than honorable conditions was not based on any desire for retaliation on his part, but solely on his belief that the findings and recommendation of the ADB were correct and appropriate. The Board found that he had no motive to retaliate against you since you made no allegations against him, but only against CE2 O. Further, he himself directed the investigation in your case, and his comments only echoed those of the investigating officer.

Accordingly, the Board concluded that no corrective action is warranted, and 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 a probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure