

#### **DEPARTMENT OF THE NAVY**

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

CRS

Docket No: 5149-99 30 August 2000



Dear

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 30 August 2000. 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 opinions furnished by Headquarters, Marine Corps dated 2 November and 18 November 1999, copies of which are enclosed. The Board also considered your rebuttal statement of 15 February 2000.

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 opinions. 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

Enclosures



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

IN REPLY REFER TO:

1070 JAM2 **02** NOV 1999

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

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF FORMER

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- 1. We are asked to provide an opinion on Petitioner's request for upgrade of the characterization of his discharge to Honorable, and for assignment of a "reentry code" that will not preclude successful pursuit of a career in military aviation.
- 2. We recommend that the requested relief be denied. Our analysis follows.

### 3. Background

- a. On 12 February 1999, Petitioner received nonjudicial punishment (NJP) for a single violation of Article 134, UCMJ, for fraternizing with a female Navy petty officer while he was a student pilot assigned to Marine Aviation Training Support Group, Corpus Christi. He was awarded a letter of censure, and did not appeal.
- b. On 31 March 1999, the Deputy Chief of Staff for Manpower and Reserve Affairs (DC/S M&RA), as the Show Cause Authority for the Marine Corps, initiated adverse administrative separation processing using the notification procedure. Petitioner responded in writing on 14 April 1999, opposing both the use of the notification procedure and the proposed discharge.
- c. On 15 June 1999, DC/S M&RA recommended to the Secretary of the Navy that Petitioner be discharged with a General (Under Honorable Conditions) characterization of service based on his inappropriate relationship with the female petty officer. DC/S M&RA noted specifically that Petitioner's relationship with the petty officer was sexual in nature. On 23 June 1999, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN(M&RA)) directed Petitioner's discharge with a General (Under Honorable Conditions) character of service.

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IN THE CASE OF FORMER
U.S. MARINE CORPS

### 4. Analysis

- a. With respect to Petitioner's request for assignment of a more favorable "reentry code," we note that, as a commissioned officer, Petitioner was not assigned a reenlistment code upon his separation. Accordingly, this relief is neither available nor necessary.
- b. Petitioner supports his request for an honorable characterization of service with essentially four arguments: one, his discharge was improper because it was not based on an offense punishable by more than six months of confinement where the offense was resolved at NJP; two, his discharge was unfair because it was based upon an NJP that he would not have accepted had he been charged with sexual fraternization; three, his discharge was inequitable based upon all the facts and circumstances of his case; and, four, his discharge was improper because it was based on a sexual relationship where there was no direct evidence that the relationship ever progressed to sexual activity. None of these arguments, singly or in concert, warrant granting the requested relief.
- c. The statutorily authorized maximum punishment for fraternization includes forfeiture of all pay and allowances, confinement for two years, and a dismissal; this far exceeds the required threshold. The fact that Petitioner's command elected to show leniency by resolving the offense at NJP, rather than by prosecuting it before a general court-martial authorized to impose the maximum punishment, is irrelevant.
- d. Petitioner was processed for separation not because he received NJP, but because he engaged in an improper relationship with a female petty officer. Accordingly, neither DC/S M&RA nor ASN(M&RA) were obliged to limit their review of Petitioner's misconduct to the specific allegations of the charge for which NJP was imposed. Both authorities were free to conclude, based upon all available evidence, that Petitioner's fraternization included sexual activity. Moreover, even had Petitioner refused NJP and been acquitted of the offense at court-martial, he still would have been subject to separation for the underlying misconduct. In such instance, ASN(M&RA) would still have been free to conclude by a preponderance of the evidence that Petitioner engaged in a sexual relationship, notwithstanding a court-martial finding that such a relationship was not proven beyond reasonable doubt.

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- e. Petitioner's generalized complaint that his discharge was inequitable -- because he committed no other misconduct during his active service, because the petty officer was not in his chain of command, because other people committed similar misconduct in a permissive command environment, and because he effectively turned himself in -- is unpersuasive. Whether Petitioner's misconduct disqualified him from holding a commission is a determination left to ASN(M&RA)'s sound discretion. Petitioner made these same arguments to ASN(M&RA), who weighed and rejected them.
- Petitioner correctly asserts that there is no direct evidence that he engaged in sexual activity with the petty In her 13 December 1998 statement, the petty officer characterized her relationship with Petitioner as "dating."1 also stated that she had engaged in sexual intercourse during the several days leading up to 13 December. She did not explicitly state, however, that she and Petitioner had engaged in sexual intercourse. The 8 January 1999 affidavit given by Naval Criminal Investigative Service Special Agent Reed does assert that the petty officer claimed to have had sexual intercourse with Petitioner. That affidavit, however, is not based upon a first-hand conversation; it merely paraphrases -imprecisely, in this specific regard -- the 13 December statement. It is clear from the latter statement, however, that Petitioner engaged in a wholly inappropriate relationship with the subordinate. That statement, combined with the fact that Petitioner was the first person the subordinate called in the middle of the night after her alleged sexual assault, provides persuasive circumstantial evidence of a sexual relationship between the two, i.e., that Petitioner was the unnamed sexual partner referred to in the statement. Accordingly, DC/S M&RA could fairly conclude that the relationship was sexual in nature and could advise ASN(M&RA) of that conclusion. ASN(M&RA) could also reach the same conclusion, and could separate Petitioner

We note as an aside that Petitioner's reliance on the letter from Ms.

is misplaced. Petitioner mischaracterizes the letter as a affidavit," and argues that its contradiction of the petty officer's s

<sup>&</sup>quot;affidavit," and argues that its contradiction of the petty officer's sworn statement renders the latter unreliable. It does not. A sworn statement given by a person subject to prosecution for making a false complaint is not outweighed by an unsworn statement given nearly four months later. The probative value of the letter is further compromised by its intemperate tone.

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with a General (Under Honorable Conditions) characterization as a result.

5. <u>Conclusion</u>. Accordingly, for the reasons noted, we recommend that the requested relief be denied.

Head, Military Law Branch Judge Advocate Division



# DEPARTMENT OF THE NAVY HEADQUARTERS UNITED STATES MARINE CORPS 3280 RUSSELL ROAD QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1741 MMSR-6 18 Nov 99

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

Subj: BCNR APPLICATION IN THE CASE OF FORMER

Ref:

- (a) MMER Route Sheet of 9Sep99, Docket No. 5149-99.
- (b) JAM-2 Advisory Opinion 1070 of 2Nov99
- 1. Reference (a) requests an advisory opinion on former First petition to correct his record to change the characterization of his discharge and his reenlistment code.
- 2. Former was discharged under proper authority in accordance with current regulations and policy. He was not assigned a reenlistment code when discharged.
- 3. We, therefore, must regretfully concur with reference (b) and recommend that former First petition not be granted favorable consideration.

Head, Separation and

Retirement Branch
By direction of the Commandant
of the Marine Corps