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

AEG
Docket No. 7091-99
19 July 2000

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) Case Summary
(2) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Marine Corps, applied to this Board requesting that his naval record be corrected by removing the nonjudicial punishment (NJP) of 18 March 1998. He further requests revocation of the 30 June 1999 general discharge and reinstatement in the Marine Corps or, alternatively, retirement under the provisions of the Temporary Early Retirement Authority set forth in Public Law 102-484, as amended.

2. The Board, consisting of Messrs. Pfeiffer and Morgan and Ms. Humberd, reviewed Petitioner's allegations of error and injustice on 12 July 2000 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 to the Board was filed in a timely manner.

c. Petitioner first enlisted in the Marine Corps on 26 May 1981. For most of the next 17 years, he served in an excellent to outstanding manner, as shown by his fitness reports, unblemished disciplinary record, his promotion in due course to staff sergeant and two awards of the Navy-Marine Corps Achievement Medal. Petitioner's final reenlistment, for four years, occurred on 4 October 1996. Shortly thereafter, Petitioner reported for duty to Headquarters and Headquarters

Squadron (HQHQRON), Marine Corps Air Station (MCAS), Iwakuni, Japan.

d. In February 1998 allegations of sexual harassment were filed against Petitioner. As a result, an officer was appointed to conduct a preliminary inquiry, and his report of 24 February 1998 set forth the following findings:

> Between 1 Dec 97 and 31 Jan 98 in the evening following a pre-inspection for field day in Bks (barracks) 313, (Petitioner) while in the head area . . . offered PFC (Private First Class; E-2) (P) a bet . . . that he could touch her breasts without touching her shirt.
>
> PFC (P) told (Petitioner) that he needed to stop, and she departed his presence . . .
>
> On or around the same date in Bldg. 240, (Petitioner) offered to AKAN (aviation storekeeper airman; E-3) (R) a bet . . . that he could touch her breasts without touching her shirt.
>
> (Petitioner) grabbed AKAN (R's) breast. AKAN (R) then struck (Petitioner's) arm and departed his immediate presence.
>
> Sometime after (Petitioner) offered that "bet" to AKAN (R), he approached her concerning her fiancee, inquiring how long they were going to be separated and offering to be with her if she were lonely and to just let her know. AKAN (R) believed this to be an offer for sex . . .
>
> Both PFC (P) and AKAN (R) believed (Petitioner's) comments (and) actions were unwanted.
>
> Both PFC (P) and AKAN (R) were unaware of each other's circumstances and had personally decided not to report their circumstances involving (Petitioner). During conversation at (a) forum on 13 Feb 98, they realized that they had had very similar circumstances. The (sic) felt that they needed to report these incidents to prevent reoccurence . . .
>
> (Petitioner) was seen by MAJ (Major; O-4) (W) around 1720 (on 13 February 1998). (Petitioner) described the events to MAJ (W). The accounting of that conversation given in (MAJ W's) statements corroborates the statements of both PFC (P) and AKAN (R) . . .

In one of her statements during the inquiry, AKAN R said that when Petitioner allegedly propositioned her, he "said it would be safe because neither one of us could tell anyone because he's married." In her statement to the inquiry officer (IO), PFC P

said, "AKAN (R) and I neither one wanted to destroy Petitioner's life (as a father/husband) or career (as a Marine)"

e. On 16 March 1998, as a result of the IO's report, NJP action was initiated against Petitioner. At that time, he was advised that the commanding officer (CO) was considering the imposition of NJP for "violation of Articles 92x2 and 134x2 of the UCMJ (Uniform Code of Military Justice)." The specifications laid under UCMJ Article 92 alleged violations of a general regulation, and it appears that those charged under Article 134 alleged indecent assault and solicitation to commit adultery.

f. On 18 March 1998, the CO of HQHQRON held an NJP hearing in Petitioner's case and, after considering all of the evidence, dismissed the specifications alleged under Article 134. However, the CO found that he had committed the following violations of UCMJ Article 92:

> At HQHQRON, MCAS Iwakuni, Japan did, violate a lawful regulation, to wit: SECNAVINST (Secretary of the Navy Instruction) 5300.26B para. 4(b) by attempting to touch a female Marine's breast.
>
> At HQHQRON, MCAS Iwakuni, Japan did, violate a lawful regulation, to wit: SECNAVINST 5300.26B para. 4(b) by touching a female Sailor's breasts.

At NJP, Petitioner signed the Unit Punishment Book which set forth these allegations and the CO imposed punishment of a letter of reprimand.

g. On 5 April 1998 Petitioner appealed the NJP to the CO, MCAS Iwakuni, essentially contending that imposition of punishment was unjust given his fine record of service, the dismissal of the assault and adultery charges, and since "(n)either victim wanted anything other than the Informal Resolution System to resolve this matter." In support of this contention, AKAN R submitted a statement that reads as follows:

> (I)t was not my intention for this situation to go before the CO. It was originally agreed upon by myself and PFC (P) and . . . (the) EO (equal opportunity) advisor that an apology from (Petitioner) and an informal counsel (sic) on his behavior would be acceptable."

Also submitted with Petitioner's appeal were numerous character reference letters attesting to his prior excellent performance and exemplary behavior.

h. The CO, HQHQRON endorsed Petitioner's appeal on 14 April 1998 and recommended it be denied since the misconduct was "unbecoming of a . . . leader of Marines." The appeal was then reviewed by the station judge advocate, who also recommended that

it be denied and commented as follows in his memorandum of 23 April 1998:

> . . . Based on my review, I do not consider the punishment to be unjust or disproportionate to the offenses. Specifically, I am convinced that the preliminary inquiry . . . establishes . . . that (Petitioner) committed the acts against the victims which constitute sexual harassment as defined by (SECNAVINST 5300.26B). The SECNAVINST does not require that sexual harassment complaints be handled by informal resolution--regardless of the victims' alleged desires. Dismissing the assault and adultery charges did not lessen the gravity of the (Petitioner's) actions.

i. On 29 April 1998 the CO of the MCAS denied Petitioner's appeal, finding that the NJP was "just and proportionate to the offense." An entry was then made to reflect the imposition of NJP on the "Offenses and Punishments" page (page 12) of Petitioner's service record. However, that entry is incomplete in that it shows the NJP was appealed but does not indicate that the appeal was denied.

j. Petitioner received a fitness report for the period 1 January to 1 May 1998 in which he received an overall rating of "excellent." The reporting senior made favorable comments concerning Petitioner's performance of duty and indicated that he would "particularly desire" to have Petitioner serve with him in wartime. However, the report also mentioned the NJP in several places. The reporting senior summed up his feelings by noting that the disciplinary action was an "unfortunate incident for an otherwise excellent Marine," and further said that "(a)lthough his judgment is now suspect, he will still provide valuable service for the Corps, if allowed." The reviewer concurred, stating that the NJP was "(a)n unfortunate lapse in judgment while performing a 'practical joke,' has tarnished this Marine's career . . . recommend retention of a Marine who ably performs his duties to the Marine Corps."

k. On 11 June 1998 the CO of HQHQRON initiated administrative separation action against Petitioner by reason of misconduct due to commission of a serious offense, as evidenced by the NJP of 18 March 1998. In his letter of that date, the CO advised Petitioner that if discharged, characterization could be under other than honorable conditions, but also stated "I am recommending that you be retained on active duty." Subsequently, Petitioner elected to present his case to an administrative discharge board (ADB). Accordingly, the CO appointed an ADB consisting of a MAJ, a chief warrant officer 3 (CWO3) and a master sergeant (MSGT; E-8).

l. At the ADB, which met to consider Petitioner's case on 28 July 1998, AKAN R testified for Petitioner, in part, as follows:

I was stationed there for over eight months so I probably knew (Petitioner) for six months. I had a good working relationship with him. I did not work directly with him but I did have daily contact with him. He came to me with a bet, and after he touched me I moved to the other side of the counter. We never talked about this until it was brought up to the CO's attention. I viewed him touching me as a real bad joke. I did talk to the equal opportunity officer . . . about this. I wanted this to be addressed, but I didn't want it to get to this level. I still feel this way today. (Petitioner) did apologize for what he did. I accepted the apology and thought of it as done with. Nothing negative ever happened with (Petitioner) before or after. This did not affect my working relationship and I would like to work with (Petitioner) in the future, again.

AKAN R also testified as follows concerning the incident with Petitioner:

The incident took place in my work shop area. I was in uniform and he was in uniform. There was nobody around when this took place. I didn't respond to his bet because that wasn't a statement I would expect from a staff NCO (noncommissioned officer). He made the proposition; I didn't say anything, then he grabbed me, then I struck his arm. It is because of what he did that I struck him, because I found it offensive.

I recall a conversation I had with (Petitioner) about my fiancee, he asked me if I was feeling safe and that it can get lonely at night, so I can live with him. I interpreted it as a sexual connotation.

m. Petitioner also testified under oath as follows concerning the incidents for which he received NJP:

I believe the practical jokes that I played on PFC (P) and AKAN (R) occurred in the same week . . . AKAN (R) and I worked late one evening. We had been joking around with one another all day . . . The way the incident came about was that on the evening we were working late we had just finished betting on a football game and then I proposed another bet. Her response was that there wasn't any way that I could win that bet. I had asked her if she was willing to bet me and her response was "OK." After the joke she gave me a joking slap to my left shoulder and we continued talking. I didn't receive any negative response from her in regards to the joke. She looked surprised when I acted on the bet. I would not have acted on the bet if she had not accepted it. I would have also immediately apologized to her if she indicated that she was offended by the joke, in which case she didn't. We resumed out work relationship the next day. The situation with PFC (P) came

about on a Thursday night that I went to inspect some of the Marine's rooms that previously failed . . . That's when I ran into PFC (P). I don't remember how the joke was brought up, but when mentioned, PFC (P) asked how it was played. I told her that it was a one dollar bet. I told her that I would bet her one dollar that I could touch her breast without touching her shirt to which she replied that it was impossible. I told her that she was right and that was it. I have never touched AKAN (R) in any manner, prior to the incident. My reason for touching her on the night in question is stupidity. I had no romantic or sexual interests in AKAN (R) when this incident occurred . . . I have never propositioned AKAN (R). I joked with her in regards to her recent marriage . . . I felt that she felt uncomfortable with this and I apologized to her right away. I have a tendency to sometimes perhaps cross the line when joking around about what is or isn't appropriate, however, if it has been indicated to me as being inappropriate I make an apology in front of all persons who were present for the joke. I cannot offer any excuses for my behavior. At the time I didn't think of it as being inappropriate or sexual in nature.

In addition to the testimony of Petitioner and AKAN R, numerous other individuals attested to Petitioner's prior good behavior and excellent performance. Evidence was also submitted to the ADB that documented his excellent performance during his career in the Marine Corps.

n. After considering all of the evidence in Petitioner's case, the ADB found that Petitioner had committed misconduct as alleged, but recommended his retention in the Marine Corps.

o. Petitioner received a fitness report for the period 2 May to 30 September 1998 in which he received an overall rating of "outstanding." The reporting senior made very favorable comments, commented on Petitioner's "immense growth potential" and gave him the "highest recommendation for promotion." However, of the nine individuals rated outstanding, Petitioner was ranked eighth.

p. For some reason, the president of the ADB did not forward the ADB proceedings to the discharge authority until 5 November 1998. The CO of HQHQRON favorably endorsed the recommendation of the ADB on 9 December 1998, commenting that "the interests of justice are served with the (ADB's) recommendation . . ." The case was then reviewed on 7 January 1999 by the staff judge advocate (SJA) to the discharge authority, the commanding general (CG) of the local Marine Corps base. In his memorandum of that date, the SJA set forth Petitioner's record of service and noted that the CG could either approve the recommendation of the ADB and retain Petitioner or recommend to the Secretary of the Navy (SECNAV) that Petitioner be discharged notwithstanding that recommendation. The SJA then

recommended as follows that the CG take the latter course of action:

> The (ADB) and squadron commander recommended retention in this case. I do not concur. The (ADB) found that the preponderance of the evidence supports the allegation of misconduct due to commission of a serious offense for sexual harassment. The evidence clearly indicates that (Petitioner) offered bets to a junior female Marine and Sailor that he could touch their breast without touching their shirt. He subsequently touched the female Sailor's breast. The Marine declined his bet offer. Additionally, AKAN (R) indicates that (Petitioner) propositioned her for sex based on the fact that they were both married and could not tell. I recommend that you forward the proceedings to (SECNAV) recommending (Petitioner) be separated with a general (under honorable conditions) discharge.

q. On 11 January 1999 the CG submitted a memorandum endorsement to SECNAV, through the Commandant of the Marine Corps (CMC). Enclosures to the endorsement were the SJA's memorandum and the ADB proceedings. In the endorsement, the CG stated that he had reviewed the ADB proceedings, repeated the factual part of his SJA's memorandum, and opined as follows:

> . . . (Petitioner's) actions and defense that he was just playing a joke is contrary to every "lesson learned" about sexual harassment. His commendable service record has spared him separation with a discharge under other than honorable conditions. However, it should not spare him from being separated from the Marine Corps. Accordingly, I recommend that he be separated with a general . . . discharge. His continued presence is considered detrimental to the morale of this command.

r. When the discharge package arrived at Headquarters Marine Corps (HQMC), it was routed to CMC's SJA for comments, which were provided by memorandum of 22 February 1999. That memorandum concluded that the proceedings were "sufficient in law and fact." The SJA also noted that Petitioner had submitted a letter for consideration in which he alleged that since the ADB recommended retention and SECNAVINST 5300.26B stated that incidents of sexual harassment should be addressed at the lowest possible level, it was improper to forward his case for SECNAV action. However, the SJA dismissed this contention as "specious" and "erroneous," noted that SECNAVINST 5300.26B had been superseded, and stated that the successor directive required resolution at "the lowest appropriate level." The memorandum then concluded as follows:

> Because the (ADB) found a factual basis for the proposed separation, (CMC) may:

a. Forward the proceedings to (SECNAV) recommending separation with an honorable or a general . . . characterization of service (with or without suspension) by reason of misconduct/commission of a serious offense.

b. Direct that (Petitioner) be retained.

The record reflects that this memorandum was drafted by a chief warrant officer and signed by a judge advocate under "by direction" authority.

s. On 22 April 1999 the Director, Personnel Management Division (Code MM), HQMC, acting for CMC, submitted a memorandum to the Assistant Secretary for Manpower and Reserve Affairs (ASN/M&RA). The memorandum notes that it was prepared by "Mr. Goodwine, MMSR-3." The memorandum lists two attachments--the CG's letter of 11 January 1999 "w/end," and the 22 February 1999 comments of CMC's SJA. The memorandum reads as follows:

> (Petitioner) received (NJP) for sexual harassment. After being notified of his command's intent to recommend his administrative separation, (Petitioner) elected to present his case before an (ADB). The (ADB) found that the allegation of sexual harassment was supported by a preponderance of the evidence yet recommended his retention. The (CG) . . . disagreed with the (ADB's) recommendation and recommends (Petitioner's) discharge with a general . . . characterization of service, Attachment 1.
>
> Coordination was made with the (SJA to CMC), Attachment 2.
>
> Per SECNAVINST 1910.4B, recommend approval of (Petitioner's) discharge for misconduct due to the commission of a serious offense with a general . . . characterization of service . . .

SECNAVINST 1910.4B sets forth policy and procedures for enlisted administrative separations in the Navy and Marine Corps.

t. On 4 May 1999, acting for SECNAV, ASN/M&RA approved the recommendation of Code MM for Petitioner's separation. Accordingly, on 30 June 1999 he received a general discharge by reason of misconduct. At that time, he had about 18 years and 1 month of active service.

u. In an attachment to Petitioner's application, his counsel makes the following contentions of error:

> Although Petitioner received NJP for violating SECNAVINST 5300.26B between 1 December 1997 and 31 January 1998, he could not, as a matter of law, have violated this regulation during that time since it had been canceled on 17 October 1997 by the issuance of SECNAVINST 5300.26C; and

the latter directive had not been promulgated in his unit at the time of the alleged offenses.

The service record entry reflecting the NJP fails to reflect that Petitioner appealed the NJP and that the appeal was properly decided by the CG.

10 U.S.C. § 1176(a) prohibits the administrative separation of an enlisted servicemember with more than 18 years of active service.

Neither the CG nor CMC considered all of the factors set forth in SECNAVINST 1910.4B which are to be considered in determining whether an individual should be separated or retained; but instead focused on the circumstances of Petitioner's offense to the exclusion of all other factors.

Code MM violated SECNAVINST 1910.4B by forwarding to ASN/M&RA only the comments of the SJA to CMC of 22 February 1999 and the CG's endorsement of 11 January 1999; and did not advise her that she could direct a suspended separation.

Neither the CG nor ASN/M&RA considered Petitioner's potential for rehabilitation, as required by SECNAVINST 1910.4B.

It was unfair to direct Petitioner's separation given the more favorable treatment accorded an officer who committed more serious misconduct.

It was unfair for ASN/M&RA to direct a general discharge when Petitioner's ADB recommended retention, given the requirement in SECNAVINST 1910.4B that the characterization of discharge be no less favorable than that recommended by the ADB.

v. The Head of the Military Law Branch, Judge Advocate Division, HQMC (JAM3), has submitted an advisory opinion, dated 10 May 2000, which recommends that Petitioner's application be denied. In the opinion, JAM3 states that the service record entry documenting the NJP "is incorrect . . . to the extent that it named the predecessor order of the SECNAVINST actually violated . . ." However, JAM3 notes that the entry is "substantially correct in form and suggests no irregularity in the proceeding itself," and characterizes the discrepancies as "a scrivener's error." Turning to the administrative separation action, JAM3 states that § 1176(a) is inapplicable to Petitioner's case since that statute requires retention on active duty unless the individual is separated under anther provision of law, and Petitioner was separated under 10 U.S.C. § 1169. Concerning counsel's other contentions of procedural error, JAM3 states that Petitioner "was properly separated pursuant to the procedures in SECNAVINST 1910.4B . . ." JAM3 also opines that it

would be inappropriate to compare Petitioner's case with other cases "given the unique circumstances presented by each case."

w. Counsel responded to the JAM3 advisory opinion by letter dated 8 June 2000. In his response, counsel correctly points out that SECNAVINST 5300.26B is cited not just in the service record entry documenting the NJP, but in all of the NJP documentation created during the processing of that action, and Petitioner received NJP for violating this instruction. Accordingly, counsel takes issue with the conclusion of JAM3 that this discrepancy is no more than a scrivener's error. Counsel then essentially reiterates his contention that Petitioner cannot be punished for violating a regulation that was canceled before he committed the acts allegedly constituting a violation of that directive. Concerning the administrative separation, counsel essentially reiterates his prior contentions of error. He speculates that the violation of § 1176(a) may have occurred because none of the officials involved in processing Petitioner's case were advised that he would have 18 years of service by the time he was separated. Counsel further contends that comparisons with other cases are proper and appropriate and alleges that JAM3 concludes to the contrary because it "cannot provide a cogent, acceptable reason for the disparate treatment of a more serious offender."

x. In preparing Petitioner's case for presentation to the Board, a staff member contacted the Head of the Navy's Directives Control Office concerning the publication and distribution of SECNAVINST 5300.26C of 17 October 1997. She advised that in accordance with policy announced about a month earlier, this directive was not printed but instead, on 3 November 1997, it was submitted to the appropriate office for placement on a CD-ROM. These discs were sent to Navy commands, but not Marine commands, in late January or early February. The directive also was placed on the internet shortly before the date the CD-ROM was sent to the commands. A message of 10 December 1997 informed Marine Corps commands of this policy change, and stated that SECNAV directives would be available on the internet. A memorandum for record (MFR) reflecting the foregoing was prepared on 7 June 2000. Counsel responded to the MFR by letter of 17 June 2000 and essentially stated that his contention concerning the NJP was unchanged.

y. An MFR of 28 June 2000 documents a conversation between a member of the Board's staff and Mr. Kurt Goodwine, the Head of the Enlisted Separations Unit of HQMC (MMSR-3) and the individual who prepared the Code MM memorandum of 22 April 1999 to ASN/M&RA. Mr. Goodwine was advised of counsel's contention to the effect that the only documentation provided to ASN/M&RA concerning Petitioner's case was his memorandum, the comments of the SJA to CMC, and the CG's endorsement. Mr. Goodwine stated that according to the Code MM memorandum, Attachment 1 was the CG's letter "w/end," meaning with endorsement. He said that this notation was incorrect and should have stated "w/encls.," meaning

with enclosures. This notation would have been correct since one of the enclosures to the CG's endorsement was the ADB proceedings, and it is the policy of his office to forward the entire case to ASN/M&RA. Counsel responded to this MFR by alleging that it contradicted information in the official records, and requesting that the Board not consider the MFR without an opportunity to cross-examine Mr. Goodwine.

z. SECNAVINST 5300.26B of 6 January 1993 set forth the Navy Department's policy on sexual harassment. The directive prohibited sexual harassment, stated that no individual in the department shall commit sexual harassment as that term is defined in the regulation, and provided that a violation of that prohibition made the offender subject to UCMJ action. The term "sexual harassment" was defined, in pertinent part, as unwelcome sexual advances and other physical conduct of a sexual nature when such conduct interferes with an individual's performance or creates an offensive environment. SECNAVINST 5300.26C, dated 17 October 1997, canceled the earlier regulation but made virtually no changes to the foregoing substantive provisions.

aa. Paragraph 16 of Part IV to the *Manual for Courts-Martial* (MCM) states that in order to be found guilty of violation of or failure to obey a certain lawful general order or regulation, the regulation at issue must be "in effect." Paragraph 16 goes on to explain that although it need not be shown that the accused knew of the order or regulation and a lack of knowledge is not a defense, the directive must be "properly published." In the case of *United States v. Tolkach*, 14 M.J. 239 (CMA 1982), the Court of Military Appeals noted that an individual is presumed to be aware of general regulations, but "some form of proper publication is necessary before such knowledge is presumed or there will be a violation of constitutional due process." *Id.* at 241. The court went on to conclude that publication occurs when a regulation is made "available for reference," by the accused because such action "is sufficient to effect presumptive notice . . . " *Id.* at 244. In setting aside the accused's conviction, the court also noted that prior to publication of the directive at issue, the conduct it prohibited had not been subject to criminal penalties. *Id.*

bb. Paragraph 4a of Part IV to the MCM states that an accused facing NJP is entitled to receive a statement describing the alleged offense and the UCMJ article alleged to have been violated. Case law indicates that NJP specifications will be deemed sufficient if they protect the accused against double punishment and advise him of the allegation against which he must defend. *United States v. Eberhardt*, 13 M.J. 772, 774 (ACMR 1982). Additionally, the military courts have held that a flawed court-martial specification, challenged for the first time on appeal, is viewed with more tolerance than one challenged at trial. *United States v. Watkins*, 21 M.J. 208, 209 (CMA 1986).

cc. Paragraph 7a of Part V to the MCM states that an individual who receives NJP and believes the punishment was unjust or disproportionate may appeal to "the next superior authority." The Manual of the Judge Advocate General (JAGMAN) states that if the officer who imposed NJP is in CMC's chain of command, and there is no direction to the contrary from the general court-martial convening authority (GCMCA), any appeal should be made to "the officer who is next superior in the operational chain of command to the officer who imposed (NJP)."

dd. 10 U.S.C. § 1176(a) states, in pertinent part, as follows:

> 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 Marine Corps 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.

ee. Paragraph K of Part 1 of Enclosure (2) to SECNAVINST 1910.4B states that an individual may be processed by reason of misconduct due to commission of a serious offense if the specific circumstances of the offense warrant separation and the MCM authorizes a punitive discharge for the same or a closely related offense. If an individual is separated for misconduct after an ADB, characterization of service should be under other than honorable conditions, unless a general discharge is warranted. Absent very unusual circumstances, an honorable discharge is not authorized. Paragraph A2 of Part 2 of Enclosure (2) to the directive sets forth a number of factors that may be considered on the issue of whether an individual should be retained or separated. These factors include the seriousness of the circumstances forming the basis for separation; the effect of retention on good order, discipline and morale; the likelihood that the individual will be disruptive or undesirable in the future; the individual's ability to perform duties; the individual's rehabilitative potential; and the individual's entire military record. However, this paragraph also states that rehabilitative potential must be considered by the ADB and the separation authority, and even if separation is warranted despite such potential, consideration should be given to suspension of the separation.

ff. Paragraph F5 of Part 4 of Enclosure (2) of SECNAVINST 19190.4B requires the ADB convening authority, in this case the CO of the HQHQRON, to forward his recommendation along with the ADB proceedings, findings and recommendations, to the separation authority, the CG. Since the ADB recommended retention, paragraph C2b of Part 6 to Enclosure (2) of the directive authorized the CG to approve that recommendation, but precluded

him from directing separation. However, that paragraph also authorized him to "submit the case" to SECNAV recommending discharge, notwithstanding the action of the ADB. At that point, in accordance with Rule 1d of paragraph A of Part 6 to Enclosure (2), SECNAV became the separation authority. In directing Petitioner's separation, ASN/M&RA was limited to either an honorable or general discharge.

gg. The military appellate courts are not required to engage in sentence comparison with other cases unless sentence appropriateness can only be determined by reference to a closely related case in which there was a highly disparate sentence. A "closely related" case is one in which co-actors were involved in a common crime, individuals were involved in a common or parallel scheme, or some other direct nexus exists between the individuals whose sentences are to be compared. Additionally, even if there is a greatly disparate sentence in a closely related case, the sentence at issue may be deemed proper if there is a rational basis for the disparity. *United States v. Lacy*, 50 M.J. 286, 288 (1999).

hh. Although 10 U.S.C. § 6330 states that an individual may only be transferred to the Fleet Marine Corps Reserve (FMCR) after 20 years of active military service, section 4403(b)(2) of Public Law 102-484, as amended, provides SECNAV with Temporary Early Retirement Authority (TERA), through Fiscal Year 2001, to so transfer servicemembers with more than 15 years of active service. However, the Marine Corps has elected not to implement TERA.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief. In this regard, the Board rejects counsel's contentions of error, but believes that Petitioner's unsuspended administrative separation was overly harsh given the circumstances surrounding the offenses and his lengthy period of excellent service.

The Board begins its analysis of Petitioner's case by examining the propriety of the 18 March 1998 NJP, specifically, whether he was properly charged with a violation of SECNAVINST 5300.26B. Counsel alleges and JAM3 appears to assume that it was improper to cite this directive because Petitioner's offenses occurred during the time frame of 1 December 1997 to 31 January 1998, and since SECNAVINST 5300.26C of 17 October 1997 canceled its predecessor. The Board disagrees, and believes that Petitioner was properly charged with violating this regulation and counsel's contention to the contrary is without merit.

Paragraph 16 of Part IV to the MCM states that in order for an individual to be guilty of violating a general regulation, the directive must be "in effect." The MCM and *United States v.*

*Tolkach, supra,* also state that a regulation is not in effect until it is properly published. In Petitioner's case, it is clear that although SECNAVINST 5300.26C is dated 17 October 1997, it was not distributed to Marine commands until late January or early February of 1998, when it was placed on the internet. The Board believes that only then did the new directive go into effect because only then was it published; until that time the regulation was not available for reference by servicemembers and they did not have presumptive notice of its existence. *Tolkach,* at 244. Since SECNAVINST 5300.26B was canceled only by the issuance of SECNAVINST 5300.26C, the Board believes that the former directive remained in effect until publication of the latter. Because Petitioner's offenses occurred no later than 31 January 1998 and perhaps as early as 1 December 1997, and since publication of SECNAVINST 5300.26C did not occur until late January at the earliest, the Board concludes that in all likelihood, SECNAVINST 5300.26B was properly cited as the regulation violated by Petitioner.

Counsel appears to contend not only that SECNAVINST 5300.26B was without force and effect as of 17 October 1997, the date of SECNAVINST 5300.26C, but also that no directive was in effect prohibiting sexual harassment between that date and on or about 1 February 1997, when the latter directive was published. The Board disagrees. Clearly, SECNAV never intended that issuance of SECNAVINST 5300.26C would result in such a gap, given the fact that both directives prohibited sexual harassment in general and Petitioner's actions in particular. Along these lines, the Board notes that the conviction in *Tolkach* was reversed, in part, because prior to the issuance of the regulation at issue, the behavior engaged in by the accused was not subject to criminal sanctions. Such is not the case with Petitioner.

The Board believes it is possible, although extremely unlikely, that Petitioner might have committed the offenses after SECNAVINST 5300.26C was published. If so, this regulation should have been cited as the governing directive at NJP and not SECNAVINST 5300.26B. Even if this is the case, the Board still concludes that the NJP should not be removed from Petitioner's record. In this regard, Petitioner apparently received notice that he was accused of violating UCMJ Article 92 by touching PFC P's breast and attempting the same action with AKAN R. This notice substantially complied with the applicable provisions of the MCM, especially since the substantive provisions of the two directives are nearly the same. Additionally, the NJP documentation clearly shows that he was aware of the allegations against him, admitted that they were essentially true, and was able to provide his version of the facts and circumstances and offer extenuation and mitigation. Further, a defective NJP specification should not receive the same level of scrutiny when it is raised for the first time in an application to the Board as it might if challenged at the NJP hearing or on appeal.

The Board concurs with JAM3 that the entry documenting the NJP should be removed from the record since it does not reflect the denial of Petitioner's appeal. The Board agrees with JAM3 because the evidence of record clearly shows that Petitioner's appeal was considered and denied by proper authority. In a related matter, the Board notes counsel's assertion that the appeal authority in Petitioner's case was the CG, the GCMCA. However, relevant provisions of the JAGMAN state that such authority rests with the operational commander of the CO who imposed punishment. Accordingly, it was appropriate for the CO of the MCAS to decide Petitioner's appeal and not the CG.

Turning to the administrative separation, the Board first considered but rejected counsel's contention that § 1176(a) precluded Petitioner's discharge, essentially concurring with the comments of JAM3. The last sentence of the statute states that its 18-year safety zone is inapplicable to a servicemember discharged "under any other provision of law." § 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. SECNAVINST 1910.4B implements § 1169 by providing policy and guidance on enlisted administrative separations in the Navy Department. Accordingly, Petitioner was discharged under another provision of law, and the safety zone in § 1176(a) did not apply to him.

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, Petitioner's discharge for cause under § 1169 and the implementing directives was not affected by § 1176(a).

The Board also found no merit in counsel's contention that the CG and CMC violated SECNAVINST 1910.4B by failing to weigh all of the enumerated factors on the issue of whether to retain or separate an individual. Paragraph A2d of Part 2 to Enclosure (2) states that the listed factors *may* be considered on that issue depending on the circumstances of the particular case. Accordingly, even if counsel is correct in his contention that the CG and CMC considered the circumstances of Petitioner's misconduct to the exclusion of all other factors, no error was

committed since consideration of any one factor is not mandatory. This is especially so since Petitioner was processed for commission of a serious offense, and one of the prerequisites for such processing, as set forth in paragraph K1a(3) of Part I to enclosure (2) of the regulation, is that the circumstances of the offense itself warrant separation.

The Board considered but rejected counsel's contentions of error pertaining to the Code MM memorandum of 22 April 1999. The language of the memorandum suggests that only the CG's letter and the comments of the SJA to CMC, dated 11 January and 22 February 1999, were forwarded to ASN/M&RA with the memorandum. However, the Board believes that Mr. Goodwine, who prepared that memorandum, has correctly advised the Board that his office followed standard practice and forwarded the entire ADB proceedings to ASN/M&RA. Paragraph C2b of Part 6 of Enclosure (2) to SECNAVINST 1910.4B requires that the separation authority forward "the case" along with a recommendation that SECNAV direct separation despite the contrary recommendation of an ADB. Although the term "case" is not defined, it appears the directive intends that all the material set forth in paragraph F5 of Part 4 to Enclosure (2) of SECNAVINST 1910.4B be forwarded to SECNAV, specifically, the ADB proceedings and the CO's recommendation. The Board believes this was done in Petitioner's case.

Counsel is correct that the Code MM memorandum failed to advise ASN/M&RA of her option to direct a suspended separation. However, the text of that memorandum referenced the comments of the SJA to CMC, which specifically set forth that option. Accordingly, the Board believes that ASN/M&RA was aware that one of her options was to direct separation, but suspend its execution for a specified period.

The Board also found no merit in counsel's contention that there was noncompliance with SECNAVINST 1910.4B since neither the CG nor ASN/M&RA considered Petitioner's rehabilitative potential, as required by paragraph A2b of Part 2 of Enclosure (2) to the directive. This paragraph states that if such potential exists, it should be considered by the separation authority. In this case, the GCMCA, the CG, functioned as separation authority until he forwarded the case to SECNAV recommending discharge, whereupon ASN/M&RA assumed that role. Accordingly, it would appear that both officials were required to consider whether Petitioner possessed rehabilitative potential and, if so, whether his separation should be suspended. The Board relies on the presumption that government officials perform their duties properly and assumes that both the CG and ASN/M&RA gave this issue appropriate consideration prior to their respective decisions to recommend and direct separation. Counsel bases his contention on the fact that no documentation submitted to the CG or ASN/M&RA mentions rehabilitative potential, and his belief that ASN/M&RA was not advised of her option to suspend separation and only considered the Code MM memorandum, the comments of the SJA to CMC, and the CG's letter. However, there is no

requirement to discuss rehabilitative potential in any documentation forwarded to the CG or ASN/M&RA. It is also important to once again assert that ASN/M&RA made her decision based on the entire record, which included the favorable recommendations of the ADB and the CO, and not just the adverse comments set forth in the memoranda of the CG, the SJA to CMC and Code MM. Additionally, as previously noted, the comments of the SJA specifically noted that ASN/M&RA could direct a suspended separation.

The Board also considered but rejected counsel's contention that Petitioner's separation was unfair because more favorable treatment was accorded to an officer who committed misconduct that was arguably more aggravated. In reaching this conclusion, the Board does not fully concur with JAM3 that such comparisons are never appropriate, but does believe that the court's analysis in *Lacy v. United States, supra*, should be followed in reviewing a decision to administratively separate an individual. Accordingly, there should be no reference to other cases unless the apppropriateness of the separation decision can only be determined by examining a closely related case with a greatly disparate outcome. Since there was no closely related case to Petitioner's, no such comparisons are appropriate.

The Board also found no merit in counsel's contention that given the ADB's recommendation for retention, Petitioner's service was unfairly characterized with a general and not an honorable discharge. The Board rejects counsel's premise that the ADB inevitably would have recommended the latter characterization of service had it not recommended retention and bypassed the issue of characterization. Along these lines, the ADB found that Petitioner had committed misconduct by reason of commission of a serious offense. If the ADB had believed that separation was warranted, a recommendation for discharge under other than honorable conditions would have been appropriate, and an honorable discharge is not even authorized in most cases. Accordingly, the Board is not convinced that had Petitioner's ADB recommended separation, it would have recommended an honorable discharge. Further, ASNN/M&RA was specifically authorized to direct a general discharge in a case such as Petitioner's.

Nevertheless, the Board believes it was unfair to direct an unsuspended separation in Petitioner's case. In reaching this conclusion, the Board does not in any way condone Petitioner's behavior, and wishes to emphasize its belief that disciplinary action was not only proper but entirely appropriate. However, the Board believes that the CG, Code MM and ASN/M&RA failed to give sufficient weight to several factors in Petitioner's favor.

At the time of his separation, Petitioner had given 18 years of service to his country in a number of demanding assignments. The NJP at issue was his only disciplinary action during this entire period of service. As evidenced by his fine fitness reports and personal decorations, he performed his duties in an excellent

manner. Further, this record of performance continued after he received NJP.

It is also important to the Board that neither victim, PFC P or AKAN R, believed that Petitioner's actions were particularly serious. They both declined to report Petitioner's misconduct when it occurred and waited for a period of weeks, bringing his actions to the command's attention only after meeting at a forum and discovering that Petitioner had behaved inappropriately to both of them. Additionally, it appears that if left to their own devices, both women would have settled for an apology from Petitioner. Clearly, neither victim believed that administrative separation was warranted. AKAN R even went so far as to state that she would be willing to work for him again. Further, when Petitioner was confronted with the allegations against him, he admitted his guilt and apologized to PFC P and AKAN R. Such an admission and expression of contrition are always important steps towards rehabilitation.

The Board also gives considerable weight to the recommendations for retention of the ADB and Petitioner's superiors, especially the CO of HQHQRON. The ADB that heard Petitioner's case was composed of two experienced officers and a senior noncommissioned officer. Clearly, all of these individuals believed in upholding Marine Corps standards, but also believed that separation was not warranted. Additionally, the CO, another experienced Marine officer who is primarily responsible for the status of discipline and morale in his unit, believed that Petitioner could continue to make a contribution to the unit and the Marine Corps, and should be retained.

Taking all of these factors into consideration, the Board strongly believes that had Petitioner been retained or if the discharge had been suspended, he would have served the two years necessary to qualify for retirement without incident. Accordingly, the Board concludes that the discharge in this case constituted overkill, and relief is warranted.

Turning to the specific relief to be granted, the Board does not believe that reinstatement would be in the best interest of either Petitioner or the Marine Corps. In this regard, the Board is aware that as a SSGT, Petitioner would have to transfer to the FMCR once he attained 20 years of service. If constructive service was granted up to the current date, that would mean that Petitioner would be brought back on active duty for less than a year, thus disrupting his life and giving the Marine Corps his services for only a brief period of time. The Board believes that the fairest resolution to this case would be to substitute a TERA retirement for the discharge of 30 June 1999. In this regard, the Board recognizes that the Marine Corps has not elected to utilize TERA as a force reduction tool. However, with his 18 years of service, Petitioner is clearly eligible for transfer to the FMCR in accordance with the amended version of

Public Law 102-484. Therefore, SECNAV may legally approve such action as an exception to policy, and the Board so recommends.

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 30 June 1999 but was released from active duty on that date and was transferred to the Fleet Marine Corps Reserve on 1 July 1999, under the provisions of the Temporary Early Retirement Authority set forth in section 4403(b)(2) of Public Law 102-484, as amended.

b. That no further relief be granted.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of 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.

Carolyn Becraft

W. DEAN PFEIFFER

AUG 15 2000

Reviewed and approved:
CAROLYN BECRAFT
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)