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

CRS
Docket No: 1487-02
18 September 2002

[redacted]

[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 18 September 2002. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by Headquarters Marine Corps dated 8 June 2002, a copy of which is attached.

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

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

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

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure
Copy to: Disabled American Veterans

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

IN REPLY REFER TO
1070
JAM9

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

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

Encl: (1) Copy of Petitioner's NJP
(2) Sexual harassment class rosters

1. We are asked to provide an opinion on Petitioner's request for reinstatement to the grade of corporal (Cpl), paygrade E-4. In addition to other punishment, Petitioner was reduced to her current grade, lance corporal (LCpl), paygrade E-3, as a result of non-judicial punishment (NJP) received on 30 November 2001.

2. We recommend that Petitioner's request for relief be denied. Our analysis follows.

3. Background. On 30 November 2001, Petitioner accepted battalion level NJP for inappropriate conduct with a staff sergeant (SSgt), paygrade E-6, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ). During the NJP statements were reviewed and witnesses testified. After considering all the evidence, the battalion commander found the Petitioner committed the offense. Enclosure (1) pertains. Petitioner, then a Cpl, paygrade E-4, was awarded reduction to LCpl, paygrade E-3, forfeiture of $600.00 pay per month for 2 months, and 45 days extra duties. The NJP authority suspended the forfeiture of $600.00 pay per month for 2 months and 45 days extra duties, for a period of 6 months. Petitioner was notified of her right to appeal to the Regimental Commander and she elected not to appeal the punishment. On 10 February 2002, Petitioner was discharged from the Marine Corps.

4. Analysis. No legal error occurred in the imposition of NJP. However, Petitioner now claims that her reduction to paygrade E-3 was unfair because her conduct was the result of sexual harassment and intimidation. Petitioner does not question the legality of her NJP and our review of her case confirms that Petitioner was afforded all of her NJP rights. As discussed below, Petitioner's claims are without merit.

a. Procedural rights. Based on the documentary evidence provided by Petitioner, the NJP proceeding was conducted properly and Petitioner received all the rights to which she was entitled at NJP. Petitioner was advised of her right to counsel on 29 November 2001 and requested military counsel on 30 November 2001. Petitioner makes no claim that her request for military counsel was denied. Similarly, Petitioner was informed of her right to demand trial by court-martial but instead accepted NJP. If Petitioner truly believed she was not guilty then she should not have accepted NJP and instead forced the Government to prove her guilt beyond a reasonable doubt at a court-martial. Moreover, if Petitioner believed that reduction to LCpl was disproportionate to the offense or that her NJP was unjust, then her appropriate course of action was to appeal her NJP. If appealed, Petitioner's NJP would have been reviewed by the General Court-Martial Convening Authority to determine if the punishment imposed was disproportionate or unjust. However, Petitioner did not appeal her punishment and does not claim that she was denied the right to do so. Additionally, we also note that the fact that Petitioner was taking medications as a result of jaw surgery should not impact the legality of the NJP proceeding. The offenses that Petitioner was charged with occurred prior to her surgery, and as discussed, she was able to make numerous decisions on her rights at NJP to include presenting her case before the NJP authority.

b. NJP authority's interpretation of the facts. The NJP authority was in the best position to determine the facts surrounding the case. Petitioner had an opportunity to present evidence regarding the offense, to include evidence explaining her actions. Based on the NJP summary contained in enclosure (1), Petitioner did in fact present evidence on her behalf. Moreover, prior to finding Petitioner guilty, the NJP authority asked if Petitioner had anything further to present and Petitioner then spoke to the NJP authority. After considering all the evidence, the NJP authority believed that the preponderance of the evidence weighed against Petitioner. However, Petitioner now purports to offer additional information including names of individuals to support her case. We note that based on Petitioner's comments many of these witnesses, if not all, were available at the time of her NJP. If she did not believe such information was significant enough to present at

her NJP, then such information should not be considered after the fact.

c. Allegations of misconduct by NJP authority. Petitioner makes numerous assertions and allegations of misconduct by the NJP authority, the battalion sergeant major, and various staff non-commissioned officers. However, Petitioner provides absolutely no evidence to support her statements.

d. Setting aside NJP. A commander, who imposed NJP, or successor in command, may set aside executed or unexecuted punishment only when the authority considering the case believes, that, under all circumstances of the case, the punishment has resulted in clear injustice.[1] Petitioner has effectively requested to have her entire NJP set aside. In order to have a valid NJP, punishment must be imposed. Initially, Petitioner was awarded reduction to LCpl, forfeiture of pay, and extra duties with the latter two being suspended for 6 months. At the expiration of the suspension period, the only punishment that was actually imposed was the reduction to LCpl. Therefore, if Petitioner is reinstated to the rank of Cpl, the effect would be that she never received a punishment, therefore the NJP proceeding would be nullified.

e. Observation. Petitioner allegedly endured over 6 months of sexual harassment, making it known to the command only after being charged with violating Article 134, UCMJ. We note that that Petitioner attended at least two sexual harassment classes during her 3-plus years at Inspector Instructor Staff (I&I Staff), Alameda, California. See enclosure (2). There is no doubt, that based on the initial sexual harassment training provided at boot camp and the refresher training provided by her I&I unit, Petitioner knew the proper channels to follow in order to make and substantiate a claim of sexual harassment. Had she made a timely report that she believed she was a victim of sexual harassment when it first occurred, as taught in her training, her command would have been charged with investigating her allegations. Moreover, Petitioner does not state that she feared for her safety as a reason for not reporting allegations of sexual harassment. Based on Petitioner's own statement she had numerous opportunities to report allegations of sexual

[1] Part V, para. 6d, Manual for Courts-Martial, (2000 ed.).

harassment to Marines senior to herself, but choose not to report her allegations.

5. Conclusion. Accordingly, we recommend that the requested relief be denied.

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Assistant Head, Military Law
Branch, Judge Advocate Division