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

AEG
Docket No.7317-01
5 August 2002

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 Navy, applied to this Board requesting that his naval record be corrected by removing the nonjudicial punishment (NJP) of 15 September 2000 and all underlying documentation alleging sexual harassment, setting aside the general discharge and RE-4 reenlistment code issued on 6 July 2001, and reinstating him on active duty.

2. The Board, consisting of Messrs. Brezna and Chapman and Ms. Nofziger, reviewed Petitioner's allegations of error and injustice on 24 July 2002 and, pursuant to its regulations, determined that the partial corrective action indicated below should be taken on the 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 Navy for four years on 24 July 1986. During this first period of service, he received NJP on two occasions and an adverse administrative remarks (page 13) entry. However, he also received satisfactory performance evaluations, was advanced in rate to fire controlman third class (E-4) and was recommended for further advancement and preferred reenlistment. Petitioner then reenlisted for six years and then performed in a superb manner. He received no mark lower than a perfect 4.0 on any of his evaluations, was advanced in rate to

fire controlman first class (E-6), and received the Navy and Marine Corps Achievement Medal (NAM) for outstanding performance of duty.

d. Petitioner again reenlisted for six years on 24 July 1996, thus obligating himself to serve until 23.July 2002. During the next two years, he received his second NAM and three more superb evaluations, all of which awarded the highest advancement recommendation of "early promote." In September 1998 he was selected for chief fire controlman (FCC; E-7), and he was advanced to that rate in early 1999.

e. Unrebutted documentation in the record reflects that in the Fall of 1998, Petitioner's 43 year-old, insulin dependent wife discovered that she was pregnant. Subsequently, medical tests revealed that this child, a girl, would be born with Down's Syndrome. Petitioner and his wife elected not to terminate the pregnancy; however, in January 1999, they received more bad news when they were told that the fetus' aorta had not formed, and survival to term was not likely and the mother's life would be placed at risk. Accordingly, it was decided to induce labor at that time, knowing that the child would surely die. Petitioner's daughter was born on 21 January 1999 and died two days later. It appears that this process cost Petitioner about $7500 in medical expenses. Additionally, at about this time, Petitioner's 15 year-old stepson began having behavioral problems.

f. On 5 February 1999 Petitioner was apprehended by civil authorities and charged with soliciting the services of a prostitute. On 24 March 1999 he was convicted of this offense in civil court and sentenced to a fine of $200, of which $100 was suspended, and probation for one year. No jail time, either suspended or unsuspended, was adjudged. This information was relayed to representatives of the Naval Criminal Investigative Service, who briefed Petitioner's new command, USS KEARSARGE (LSD-3). However, the conviction was not mentioned in Petitioner's excellent fitness report for the period March to September 1999, and he received a third NAM for outstanding performance of duty from April to October 1999.

g. In September 2000 an investigation was conducted into allegations that Petitioner had sexually harassed three female Sailors assigned to KEARSARGE, at least two of whom were in his chain of command. All three women executed written statements in which they accused Petitioner of making inappropriate comments. Two of the women stated that he solicited sex from them. Statements were also obtained from several individuals who said that one of the women, a Fire Controlman Third Class (FC3; E-4) Miranda B, had complained to them, and seemed upset about, Petitioner's comments.[1] In two separate statements, Petitioner

[1] One of these individuals was FC3 B's mother, who told the investigating officer that when her daughter reported Petitioner's actions, she was "crying hysterically."

either denied making the statements at issue, or said that his comments had been misconstrued. However, the investigating officer found that Petitioner had "sexually harassed and solicited sex" from the three female servicemembers, and recommended NJP and administrative separation action.

h. On 15 September 2000 the commanding officer (CO) of KEARSARGE imposed NJP of a letter of reprimand, forfeitures of pay totaling over $1700 and a suspended period of restriction for the following violations of Article 92 of the Uniform Code of Military Justice:[2]

> In that (Petitioner) . . . did, at Haifa, Israel, between on or about 1 July 1999 to on or about 31 July 1999, violate a lawful general order, to wit: SECNAVINST (Secretary of the Navy Instruction) 5300.26C[3] . . . by wrongfully sexually harassing AO3 (Aviation Ordnanceman Third Class) Claire (A), . . . by stating to her, "That's some sexy underwear you have on."
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> In that (Petitioner) . . . did, at Portsmouth, Virginia, between on or about 1 November 1999 to on or about 30 November 1999, violate . . . SECNAVINST 5300.26C . . . by wrongfully sexually harassing AO3 Kelly (M) . . . by stating to her, "This division needs some divisional whores and you would make a prime candidate."
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> In that (Petitioner) . . . did, at Portsmouth, Virginia, between on or about 6 January 2000 to on or about 13 February 2000, violate . . . SECNAVINST 5300.26C, . . . by wrongfully sexually harassing AO3 . . . (A) by stating to her, "When are we going to have sex?"
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> In that (Petitioner) . . . did, at Portsmouth, Virginia, between on or about 1 April 2000 to on or about 17 July 2000, violate . . . SECNAVINST 5300.26C . . . by wrongfully sexually harassing FC3 (B) . . . by stating to her, "Sex is a good way to relieve stress", "Are you on the pill because I hate condoms", and "If I wasn't married and were 20 years old again, I would have no problem having sex with you."

There is no indication in the record that Petitioner appealed the NJP.

i. On 2 October 2000 Petitioner received an adverse fitness report for the period of 16 September 1999 to 15 September 2000. On that same date, the CO of KEARSARGE recommended to the Commander, Amphibious Group (COMPHIBGRU) TWO that Petitioner be detached for cause. This recommendation apparently was approved and he was reassigned to the latter command.

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[2] 10 U.S.C.A. § 892 (West 1998).

[3] *Department of the Navy (DON) Policy on Sexual Harassment.*

j. On 13 March 2001 COMPHIBGRU TWO initiated administrative separation action by reason of misconduct due to commission of a serious offense and civil conviction. In accordance with Article 1910-142 of the Naval Military Personnel Manual (MILPERSMAN), an individual may be separated due to commission of a serious offense if the specific circumstances of the offense warrant separation, and the offense could result in a punitive discharge from a court-martial. MILPERSMAN 1910-144 states that an individual may be separated upon conviction by civil court if the offense could result in a punitive discharge at court-martial, the specific circumstances warrant separation, or if the "civil sentence includes confinement for 6 or more months without regard to suspension, probation or early release." MILPERSMAN 1910-144 also states that a conviction is binding on the issue of whether misconduct has occurred and an administrative discharge board (ADB) is required to find that misconduct did occur.

k. After being notified of the separation action, Petitioner then elected to present his case to an ADB, which met on 24 April 2001. At the ADB, the recorder presented evidence pertaining to the civil conviction and the NJP, including the documentation from the civil court, the report of investigation into the allegations of sexual harassment, UCMJ Article 92 and pertinent parts of SECNAVINST 5300.26C. The recorder also presented a number of provisions from the MILPERSMAN, including the foregoing articles. Petitioner's civilian defense counsel also presented numerous exhibits, to include a statement from a clinical psychologist and Petitioner's wife concerning the stressors they were under during and immediately after her pregnancy. In this regard, the clinical psychologist, Dr. (Ph.D) L stated as follows:

> As a clinical psychologist with many years of experience in both the public and private sector, it is my opinion that any one of the . . . sources of stress would, by themselves, be considered extremely severe. Added together, considering the severity and the fact that they were all occurring simultaneously, could only be considered catastrophic.

In her statement, Petitioner's wife referred to the civil conviction and said that she and her husband "worked on this issue with Dr. (L) and he explained that during times of stress with funerals, it is not unusual to make mistakes."

l. The recorder then elicited sworn testimony from the three women allegedly victimized by Petitioner's sexual harassment, and one other individual who testified concerning what FC3 B told him about those comments. All three victims stated that at least some of Petitioner's comments were inappropriate and made them uncomfortable. However, they all minimized Petitioner's misconduct to some extent, and two of the women specifically said that they did not feel they had been sexually harassed. Additionally, two of the victims said that

Petitioner should not be separated. Petitioner's counsel called three other chief petty officers and a senior chief (E-8), all of whom essentially testified that although Petitioner's actions were inappropriate, he was worth saving and should be retained. In his sworn testimony, Petitioner gave his version of events and requested retention.

m. After the recorder and Petitioner's counsel made their final arguments, the ADB retired for deliberation. Slightly more than an hour later, the ADB reconvened and the senior member reported as follows:

> By a vote of 3 to 0 the (ADB) finds that the preponderance of evidence does not support a finding of misconduct-commission of a serious offense. By a vote of 3 to 0 the (ADB) finds that the preponderance of evidence does support a finding of misconduct-civil conviction . . . The (ADB) finds that misconduct did occur in the form of sexual harassment and that harassment was of a nature to produce an intimidating work environment. However the (ADB) does not find that the behavior meets the criteria of a serious offense. With regard to misconduct-civil conviction, the (ADB) relied on MILPERSMAN (Article) 1910-144 and recognized that it was bound to accept the findings of the civilian court. Specifically, the 12 month probationary sentence satisfies the clause "civil sentence includes confinement for 6 or more months without regard for suspension, probation or early release." By a vote of 3 to 0 the (ADB) supports (retention for) reason number one (serious offense), . . . and by a vote of 3 to 0 the (ADB) supports (retention for) reason number 2 (civil conviction) . . . The (ADB) does not find that the civilian conviction for prostitution was of a nature to support separation.

n. On 20 April 2001 Petitioner's civilian counsel submitted a letter of deficiency to COMPHIBGRU TWO, the ADB convening authority, and requested as follows that the finding of misconduct due to civil conviction be set aside:

> It is apparent that the basis of the separation action against my client was not for the civil conviction, but instead for the allegation of the commission of a serious offense, to wit: sexual harassment. The civil conviction occurred on 5 February 1999, immediately prior to my client reporting onboard the USSS KEARSARGE. Shortly after my client reported aboard . . . , he was advised that no action would be taken by the command on that charge and that the matter was not an issue with his command. Had the allegations of sexual harassment not come up, clearly the civilian conviction for soliciting a prostitute would never been the subject of administrative separation action. Since the (ADB) found no misconduct as to the allegation of . . . commission of a serious offense, I request that the

finding of misconduct by reason of civilian conviction be vacated.

(T)he comments of the (ADB) . . (note) that the *"12 months of probation sentence satisfies the clause 'civil sentence includes confinement for six or more months without regard for suspension, probation or early release.'"* That statement is incorrect. Under no circumstances does the fact that the court imposed a suspended fine under a 12 month period of "probation" support a contention that the civilian conviction was for an offense that can be characterized as a "serious offense" in the military, which is necessary for a civilian conviction to be binding upon the (ADB). The offense of soliciting a prostitute . . . (carries) a maximum punishment of six months of confinement. As such, that offense does not qualify as a "serious offense" under military standards. The military does not have a similar offense under the UCMJ. (emphasis in text)

o. On 4 May 2001 COMPHIBGRU TWO forwarded Petitioner's case, along with counsel's letter of deficiency, to the Navy Personnel Command (NAVPERSCOM) recommending, in part, as follows that Petitioner be separated despite the ADB's recommendation:

I concur with the (ADB's) finding that misconduct (sexual harassment) occurred, but disagree with their conclusion that it was not a serious offense. Arguments by the Counsel for the respondent regarding the (ADB's) finding are not in keeping with the statement by the (ADB) and the guidance provided in the MILPERSMAN. Once the (ADB) found that (Petitioner) had committed the alleged misconduct in violation of Article 92, UCMJ . . . (the ADB was) bound to determine that the offense qualified as a "serious offense" because a punitive discharge is authorized as a potential sentence for that article. Additionally, counsel for the respondent argues that the finding of misconduct based on the civilian conviction for solicitation of a prostitute should be vacated because, standing alone, it would not have been used as a basis for separation. I disagree. Once the additional misconduct by (Petitioner) occurred the Navy had every right to process him for all known reasons.

(Petitioner's) misconduct reveals a lack of respect for the Navy's rules, and an even deeper lack of respect for the rights and roles of women. The fact that this behavior spans an extended period of time is indicative of the depth of his disrespect and his inability to perform on a professional level with women in the Navy. His conviction in civilian court for the solicitation of a prostitute and his harassing statements made to a number of junior female Sailors, for whom he served as a role model, expose his lack of moral character, are service discrediting, and prejudicial to good order and discipline. Because of his

misconduct and lack of fitness to serve as a Chief Petty Officer, I recommend his separation . . . with a General Discharge (Under Honorable Conditions).

The foregoing letter was submitted in the format set forth in the MILPERSMAN. The record does not specifically state that the convening authority referred the letter to Petitioner or his counsel for comment, but the MILPERSMAN does not contain any such requirement.

p. In a memorandum of 11 June 2001 to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA), the Chief of Naval Personnel (CNP) endorsed the recommendation for discharge, stating:

> Discussion: The sexual harassment that precipitated processing (Petitioner) for administrative separation was manifested in the form of inappropriate remarks of a sexual nature to junior enlisted females under his direct supervision. The (ADB) found that (Petitioner) did not commit misconduct due to commission of a serious offense; but committed misconduct due to civilian conviction. The (ADB's) finding of no misconduct due to a serious offense is contradictory and may indicate misunderstanding of what constitutes misconduct.
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> Recommendation: Separate (Petitioner) . . . with a General . . . discharge. This case is forwarded . . . recommending overturn of the (ADB's) recommendation for retention. This recommendation . . . is based on (Petitioner's) lack of potential for further productive service and his disregard for Navy Core Values and the rights and roles of women in the Navy. Your approval of this letter will effect the recommended action. The separation code will be GKB (misconduct).

Separation code "GKB" is assigned when an individual is discharged by reason of misconduct due to civil conviction.[4]

q. On 20 June 2001 Petitioner's counsel faxed a supplemental letter of deficiency to NAVPERSCOM responding, in part, as follows to the 4 May 2001 letter from COMPHIBGRU TWO:

> Pursuant to MILPERSMAN 1910-710 if the (ADB) finds that the preponderance of the evidence does not support one or more of the reasons for separation alleged and recommends retention then the Separation Authority must approve the (ADB's) findings and recommendations unless the overwhelming weight of the evidence of record was not recognized by the (ADB), in which case, the Convening Authority may reprocess the case under Best Interest of the Service for submission to SECNAV for final action.

[4] Bureau of Naval Personnel Instruction (BUPERSINST) 1900.8, encl. (2), p. 4.

> Due to the fact that the (ADB) found by a vote of 3 to 0 that the preponderance of the evidence did not support the allegations of misconduct due to commission of a serious offense, and thereafter recommended that (Petitioner) be retained . . . , I submit that pursuant to (the) MILPERSMAN . . . , my client must be retained on active duty as recommended by the (ADB). (emphasis in text)

r. Although it is unclear whether the Senior Civilian Official acting as ASN/M&RA considered the 20 June 2001 letter prior to taking action in Petitioner's case on that same day, she approved the 11 June 2001 recommendation of CNP that Petitioner be discharged. Accordingly, on 6 July 2001 Petitioner received a general discharge by reason of misconduct and an RE-4 reenlistment code,[5] after nearly 15 years of active service. The Certificate of Release or Discharge from Active Duty (DD Form 214) reflects a separation code of GKB and separation authority of "MILPERSMAN 1910-144," the article authorizing separation by reason of civil court conviction. Since Petitioner was discharged by reason of misconduct, he was not eligible to receive involuntary separation pay.[6]

s. In his application, Petitioner alleges that he was denied due process of law because he was not given the opportunity to respond to the letter from COMPHIBGRU TWO to NAVPERSCOM or the memorandum from CNP to ASN/M&RA. Counsel also reiterates his earlier assertion that given the provisions of MILPERSMAN 1910-710, Petitioner should have been retained. Finally, counsel alleges that Petitioner never should have been separated by reason of misconduct due to civil conviction since the real reason for the separation action was the NJP he received for sexual harassment, and the ADB found this reason for separation unsupported by the evidence.

t. Federal courts have consistently held that if an individual has a right to due process of law, the right is violated and an administrative action will be invalidated if a party to the action, acting in adversarial capacity, engages in an *ex parte* communication with the decision maker.[7] However, this prohibition does not apply to "internal documents of an advisory nature."[8] In this regard, courts have long held that a decision maker may rely on subordinates to analyze the record and

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[5] This code means that Petitioner was not eligible to reenlist (Chief of Naval Operations Instruction [OPNAVINST] 1160.5C, ¶ 6e). Such a code must be assigned to an individual separated by reason of misconduct (BUPERSINST 1900.8, *supra* note 4).

[6] Secretary of the Navy Instruction (SECNAVINST) 1900.7G, ¶ 9m.

[7] *Camero v. United States*, 375 F.2d 777 (Ct.Cl. 1967); *Ryder v. United States*, 585 F.2d 482 (Ct.Cl. 1978); *Fitzgerald v. United States*, 623 F.2d 696 (Ct.Cl. 1980).

[8] *Sullivan v. United States*, 720 F.2d 1266, 1272 (Fed. Cir. 1983).

prepare recommendations.[9] In the recent case of *Stone v. F.D.I.C.*,[10] the United States Court of Appeals for the Federal Circuit elaborated as follows:

> The introduction of new and material information by means of *ex parte* communications to the deciding official undermines the . . . constitutional due process guarantee of notice . . . and the opportunity to respond. When deciding officials receive such *ex parte* communications, employees are no longer on notice of the reasons for their dismissal and/or the evidence relied upon by the agency. procedural due process guarantees are not met if the employee has notice only of a certain charges or portions of the evidence and the deciding official considers new and material information. It is constitutionally impermissible to allow a deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process . . .
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> . . . (N)ot every *ex parte* communication is a procedureal defect so substantial and so likely to cause prejudice that it undermines the due process guarantee and entitles the claimant to an entirely new administrative proceeding. Only *ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee . . . Ultimately, the inquiry is . . . whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation . . . under such circumstances.[11]

u. MILPERSMAN 1910-710 sets forth the actions a separation authority (SA) may take upon receiving case in which an ADB was held. If the ADB "finds a preponderance of the evidence supports one or more of the reasons for separation and recommends retention," the SA may approve the ADB findings and recommendations. Alternatively, the SA may approve only the findings and submit the case "to . . . (SECNAV) . . . recommending separation for one of the specific reasons supported by a preponderance of the evidence."[12] However, if the ADB "finds a preponderance of the evidence does not support one or more of the reasons for separation alleged and recommends retention," and "the overwhelming weight of (the) evidence of record was not recognized by the (ADB)," the only way to separate the individual is to "reprocess the case under Best Interest of the Service for submission to SECNAV for final action."[13]

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[9] *Morgan v. United States*, 298 U.S. 468, 481-82 (1936); *Braniff Airways, Incorporated v. C.A.B.*, 379 F.2d 298 (D.C. Cir. 1967); *K.F.C. National Management Corp. v. N.L.R.B.*, 497 F.2d 298 (2nd Cir. 1974).

[10] 179 F.3d 1368 (Fed.Cir. 1999).

[11] *Id.*, 1375-76.

[12] MILPERSMAN 1910-710, p. 3.

[13] *Id.*, at p. 5.

v. MILPERSMAN 1910-164 states that an individual may be issued an honorable or general discharge by reason of best interest of the service if separation is appropriate, but the individual does not meet the minimum criteria for any other reason for separation. Only SECNAV may direct separation for this reason.[14] An individual facing such a separation may not elect an ADB under any circumstances, but is entitled to notice of such action, to consult with counsel, and to submit a statement in rebuttal to the proposed separation action.[15] When best interest of the service, or secretarial authority, is the reason for separation, an RE-4 reenlistment code may be assigned.[16] A servicemember separated for this reason is presumptively entitled to separation pay,[17] but such pay may be denied "(i)n extraordinary cases, when (SECNAV) . . . determines that the conditions under which the member is separated do not warrant separation pay."[18] However, such authority is to "be used sparingly."[19]

w. Federal courts have consistently held that regulations of the individual services must comport with those issued by DOD. If there is a conflict between a DOD regulation and a service directive, the former is controlling.[20] Additionally, an instruction from SECNAV binds all of his subordinates in their authority to issue directives.[21]

x. DOD Directive (DODDIR) 1332.14, which sets forth binding guidance on enlisted administrative separations, states that an individual may be separated by reason of misconduct due to civilian conviction if the individual has been so convicted or action is taken which is tantamount to conviction; the specific circumstances of the offense warrant separation; and a punitive discharge would be authorized for the same or a closely related offense, or the individual is sentenced by civil authorities to confinement for six months or more, without regard for suspension or probation.[22] The pertinent provision of the Department of the Navy's implementing instruction, SECNAVINST 1910.4B, is in

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[14] In fact, if an individual is separated due to BIOTS, the narrative reason for separation on the Certificate of Release or Discharge from Active Duty (DD Form 214) is "Secretarial Authority." *See* BUPERSINST 1900.8, encl. (2), p. 12.
[15] *See* MILPERSMAN 1910-402.
[16] BUPERSINST 1900.8, encl. (2), p. 12.
[17] 10 U.S.C.A. § 1174(b) (West, 1998); Department of Defense Instruction (DODINST) 1332.29, ¶ 3.4; SECNAVINST 1900.7G, ¶ 9; DAJAG (Admin. Law) Memo Ser13/4RB11400.02 of 4Apr02.
[18] SECNAVINST 1900.7G, ¶ 9p.
[19] *Id.*
[20] *Gilchrist v. United States*, 33 Fed.Cl. 791, 801 (1995) (and cases cited therein).
[21] *United States v. Daskam*, 31 M.J. 77, 81 (CMA 1990); *United States v. Lopez*, 35 M.J. 35, 39 (CMA 1992); *United States v. Romano*, 46 M.J. 269, 274 (1997); *United States v. Davis*, 47 M.J. 484, 485-86 (1998).
[22] Encl. 3, Atch. 1, ¶ 1.11.1.1.4.

accord.[23] However, as previously noted,[24] MILPERSMAN 1910-144 states that an individual may be separated upon civil conviction if the circumstances warrant separation; a punitive discharge would be authorized for the offense; or there is a sentence to confinement, with or without probation or suspension, for six months or more.

y. As has already been mentioned,[25] MILPERSMAN 1910-142 authorizes separation by reason of misconduct due to commission of a serious offense if the offense could result in a punitive discharge, and the circumstances of the offense warrant separation. If convicted by court-martial of violating a lawful general instruction such as SECNAVINST 5300.26C, a servicemember may be sentenced to a punitive discharge.[26] This directive defines sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when submission to such conduct is made a term or condition of an individual's career; submission or rejection of the conduct by the victim is used as a basis for career decisions affecting this individual; or the conduct unreasonably interferes with the victim's duty performance or creates an intimidating, hostile or offensive working environment. Deliberate unwelcome verbal comments of a sexual nature in the workplace are sufficient to constitute sexual harassment[27] MILPERSMAN 1910-142 states that separation processing is mandatory in sexual harassment cases if an individual threatens or attempts to adversely influence another's career in exchange for sexual favors; rewards another individual in exchange for such favors; or creates unwanted physical contact which could result in a punitive discharge.[28]

z. If a discharge is found to be improper or unjust, the record should normally be corrected to show that the individual completed the last period of obligated service.[29] Corrective action to show service beyond this point is almost never required, since an individual has no right to reenlist.[30] However, courts have authorized the correction boards to backdate a discharge and deny constructive service if backdating "places the claimant where he would have been without the improper

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[23] Encl. (2), Pt. 1, ¶ K1a(4)(a).
[24] *Infra*, ¶ 3j.
[25] *Id.*
[26] *Manual for Courts-Martial, United States* (2000 ed.),[MCM] Pt. IV, ¶ 16e(1).
[27] SECNAVINST 5300.26C, Encl. (1), ¶ 4.
[28] This provision of the MILPERSMAN does not preclude separation processing for an individual who commits other forms of sexual harassment; it merely requires such processing for these aggravated forms of harassment.
[29] *Maier v. Orr*, 745 F.2d 973 (Fed. Cir. 1985); *Thomas v. United States*, 42 Fed.Cl. 449, 453 (1998).
[30] *Id.* Additionally, even if Petitioner had served until the expiration of his enlistment, he would not have been permitted to reenlist because of the detachment for cause (OPNAVINST 1160.5, Encl. (2); MILPERSMAN 1160-030, ¶ 5).

discharge,"[31] or if a grant of constructive service would rest on "absurd premises."[32] Such a denial must not be based on "mere speculation."[33]

aa. In an advisory opinion of 18 March 2002, a representative of the Judge Advocate General (JAG) responded to Petitioner's contention that he was denied due process of law because he was not permitted to respond to the 4 May 2001 letter of COMPHIBGRU TWO and CNP's 11 June 2001 memorandum. JAG points out that it appears that Petitioner's counsel may well have been provided a copy of the former missive because he referenced it in his own letter to NAVPERSCOM of 20 June 2001. JAG then notes that internal, non-adversarial documents do not constitute prohibited *ex parte* communications.[34] JAG then states:

> Here . . . the communication at issue fails to meet the impermissible *ex parte* criteria . . . First, although an (ADB) is adversarial, the convening authority (COMPHIBGRUTWO) is not an adversary in that proceeding; rather, it is the recorder who is the adversary. Arguably, if the convening authority's recommendation was not based on the record of proceedings, it would have assumed an adversarial role; however, the evidence is clear that his recommendation was premised on the fact that the (ADB) ignored the overwhelming weight of the evidence.

JAG goes on to point out that the MILPERSMAN specifically instructs the convening authority to submit a recommendation to the separation authority, and does not entitle the respondent to a copy of that recommendation. Accordingly, JAG concludes that "the convening authority's communication at issue is not an *ex parte* communication; rather, merely internal advice to a superior decision-making authority."

bb. JAG was also asked to comment on the apparent inconsistency between the provisions of DODDIR 1332.14 and SECNAVINST 1910.4B, and the MILPERSMAN, pertaining to separation by reason of misconduct due to civil conviction. In response, JAG commented, in part, as follows:

> DODDIR 1332.14 permits the separation of an enlisted member who has been convicted of a civilian criminal offense if a two-prong test is satisfied. First, the specific circumstances of the offense must warrant separation. Second, either a punitive discharge would be authorized for the same or closely related military offense, or the

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[31] *Denton v. United States*, 204 Ct.Cl. 188, 200 (1974).
[32] *Carter v. United States*, 509 F.2d 1150, 1156 (Ct.Cl. 1975).
[33] *Carter v. United States*, 213 Ct.Cl. 727, 731 (1977) (order).
[34] Citing *Morgan v. United States, infra*, at note 7; *Della Valle v. United States*, 231 Ct.Cl. 818, 821 (1982) (no impermissible communication when psychiatrist provided an opinion concerning an employee's mental fitness to the decision maker but not to the employee).

sentence includes six months confinement without regard to suspension or probation. MILPERSMAN 1910-144 does not. Rather, MILPERSMAN 1910-144 offers a reformulation of this two-prong test, permitting separation in either of two situations: (1) the specific circumstances of the offense warrants separation, and the offense would warrant a punitive discharge for the same or closely related military offense . . . , or (2) the civil sentence includes confinement of six months or more without regard to suspension, probation or early release. Clearly, the first situation is consistent with applicable superior directives. Conversely, the second situation is not because a mandated element of the basis for separation is omitted; namely, that the specific circumstances of the offense warrants separation.

In applying this test to Petitioner's case, JAG states:

> The record of proceedings indicates that the Petitioner was prejudiced by this inconsistency. MILPERSMAN 1910-144, a Government exhibit, was the only governing provision before the (ADB). The government submitted evidence of the Petitioner's conviction and sentence of a 12-month probation. The (ADB) had no evidence that (the military offense of) solicitation of prostitution was punishable . . . with a punitive discharge. The (ADB) found that the Petitioner's sentence of 12 months of probation satisfied MILPERSMAN 1910-144's requirement; however, it "did not find that the civil conviction . . . was of a nature to support separation." Obviously, the only reasonable conclusion is that the (ADB) adhered to the errant construct of MILPERSMAN 1910-144, to the prejudice of the Petitioner.
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> Even though Petitioner received only probation, the convening authority processed for administrative separation pursuant to MILPERSMAN 1910-144, apparently under the theory that the civilian sentence included confinement of six months. The (ADB) agreed with the Government and found that the conviction qualified as a "civil sentence [that] includes confinement for 6 or more months without regard for suspension, probation or early release." This is clearly erroneous. The error was prejudicial, when considered in the context of the inconsistency between MILPERSMAN 1910-144 and DODDIR 1332.14, because . . . the conviction alone directed the (ADB) to find that the Petitioner committed misconduct, and the conviction was the sole basis for the Petitioner's separation.

JAG goes on to point out that the military offense of solicitation of prostitution is punishable with a punitive

discharge,[35] and could have provided a supportable basis for separation. However, JAG then notes that this would likely not have produced a different result since "an element of the basis for separation . . . is that the circumstances surrounding the offense warrant separation, and the (ADB),. . . specifically determined that this offense did not warrant separation." JAG then concludes that the ADB's finding of misconduct due to conviction by civil authorities "should have been rejected as clearly erroneous," but further notes that Petitioner could have been reprocessed for separation by reason of best interest of the service.

cc. JAG also commented on the assertions in the COMPHIBGRUTWO letter and CNP memorandum to the effect that the ADB was required to determine that Petitioner's sexual harassment constituted misconduct due to a serious offense simply because a punitive discharge was authorized:

> MILPERSMAN 1910-142 permits the separation of enlisted service members for (sic) reason of misconduct (commission of a serious offense). The government must prove both that the specific circumstances of the offense warrant separation and the offense would warrant a punitive discharge per the (MCM) for the same or a closely related offense. If the (ADB) finds both of those requirements in the affirmative, then the (ADB) must find that the respondent committed misconduct, recommend if the respondent should be retained, and determine a characterization of service . . .
>
> . .. .
>
> . . . (T)here is no legal authority for the proposition that a violation of any MCM provision is a *per se* serious offense. Not only does the MILPERSMAN fail to provide such a formulaic definition, but additionally, such an interpretation renders the two elements of MILPERSMAN 1910-142 a mere tautology . . .

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that partial corrective action is warranted by changing the reason for separation from misconduct to best interest of the service, or secretarial authority.

The Board can find no reason to change Petitioner's record by removing either the NJP or the underlying documentation pertaining to sexual harassment. Although Petitioner protested his innocence of the allegations during the NJP process, the CO of KEARSARGE chose to believe the allegations of the victims and

[35] *See* MCM, Pt. IV, ¶¶ 105e, 97a, 97e(1).

the conclusion of the investigating officer that Petitioner had engaged in such misconduct. Petitioner chose not to appeal this adverse finding after being advised that he had a right to do so. Even though he continued to maintain his innocence at the ADB, the members rejected his assertion and concluded that he had committed sexual harassment as alleged. This conclusion is supported by the NJP and supporting documentation introduced as evidence before the ADB, and by the testimony of the victims. After examining the relevant provisions of SECNAVINST 5300.26C, the Board essentially agreed with the ADB that Petitioner's comments constituted sexual harassment since they created an intimidating or hostile work environment. Indeed, the directive indicates that such comments in the workplace constituted sexual harassment because they were deliberate, unwelcome, and of a sexual nature. Finally, the Board notes that although Petitioner requests removal of the NJP and underlying documents in his application, he presents no argument whatsoever in support of that request.

Turning to Petitioner's administrative discharge, the Board first considered his contention that he was denied due process of law since he was not provided with copies of COMPHIBGRUTWO's letter of 4 May 2001 or CNP's memorandum of 1 June 2001. It is clear that this contention is without merit. In his memorandum CNP did not engage in an impermissible *ex parte* communication in an adversary capacity, but merely analyzed the ADB record of proceedings and made a recommendation to his superior, ASN/M&RA. This is the sort of internal, advisory missive that the law clearly allows.

The Board also concludes that given its content, COMPHIBGRUTWO's letter also is legally unobjectionable, although it is not as sure as JAG seems to be that the convening authority is in a totally non-adversarial position since COMPHIBGRUTWO initiated the separation action against Petitioner. Nevertheless, it is clear that the letter did not raise any new reasons for separation or introduce any new evidence against Petitioner. COMPHIBGRUTWO simply recommended a course of action based on the ADB record of proceedings. Since the letter did not raise any new and material evidence, it does not constitute an impermissible *ex parte* communication.

The Board also rejects Petitioner's contention that MILPERSMAN 1910-710 required his retention because the ADB made a finding that "a preponderance of the evidence does not support one or more of the reasons for separation." First of all, even if that provision governs Petitioner's case, he could have been reprocessed by reason of best interest of the service. Second, the Board believes the applicable provision of MILPERSMAN 1910-710 is the one that provides that if the ADB "finds a preponderance of the evidence supports one or more of the reasons for separation and recommends retention," the case may be submitted to SECNAV with a recommendation for separation. This provision describes what happened in Petitioner's case—the ADB

found that misconduct due to civil conviction was supported by the evidence, but misconduct due to commission of a serious offense was not. Accordingly, CNP forwarded the case to SECNAV, recommending separation for the former reason. The Board believes that the provision pertaining to retention or reprocessing was only intended to apply to a situation in which the ADB found *none* of the reasons supported by a preponderance of the evidence. However, this conclusion is of only marginal consequence, given the Board's basic agreement with that part of the JAG opinion which states that Petitioner never should have been separated by reason of misconduct due to civil conviction. The Board notes JAG's belief that MILPERSMAN 1910-144 allows separation if the specific circumstances of the offense warrant separation and the offense would warrant a punitive discharge, or if the civil sentence includes confinement for six months or more. However, the Board's reading of 1910-144 is that if there is a conviction, separation may be directed if the specific circumstances of the offense warrants separation, *or* the offense would warrant a punitive discharge, *or* the civil sentence includes more than six months of confinement. In any case, the Board agrees that 1910-144 does not comply with the binding guidance set forth in DODDIR 1332.14, and that Petitioner was prejudiced by this noncompliance.

Since Petitioner was discharged by reason of misconduct due to the civil court conviction, relief would normally consist of a correction to the record to show that he served until the expiration of his last enlistment on 23 July 2002, and was separated at that time. However, the Board does not believe such action is warranted here. It is very clear that had appropriate authorities been aware that separation was by reason of misconduct due to civil conviction was improper, Petitioner could have been reprocessed for separation by reason of best interest of the service if "the overwhelming weight of the evidence was not recognized by the (ADB)."[36] Given the very strong comments in the COMPHIBGRUTWO letter and the CNP memorandum recommending separation, the Board believes Petitioner inevitably would have been reprocessed and discharged. Furthermore, such action would have been totally appropriate, based on Petitioner's willful and persistent sexual harassment of junior personnel.

The Board rejects the theory of COMPHIBGRUTWO and CNP that Petitioner's sexual harassment, coupled with the possibility of a punitive discharge, mandated a finding of misconduct by reason of commission of a serious offense. The Board agrees with JAG that in addition to these findings, the ADB had to find that the circumstances of his offenses warranted separation. Since the ADB specifically declined to so find, its overall finding that he had not committed a serious offense is technically correct. Further, the Board believes that the ADB may have been correct in its conclusion that the conviction did not warrant separation since it occurred about 18 months before separation action was

[36] *Infra*, ¶ 3u; note 13.

initiated and there may have been some mitigating factors involved, given Petitioner's personal life at the time. Additionally, as JAG points out, the ADB failed to recognize the overwhelming weight of the evidence of record when it erroneously found that Petitioner's sentence from the civil included confinement for six months or more. Accordingly, reprocessing on the basis of the civil conviction would not have been appropriate.

The Board believes that the ADB ignored the overwhelming weight of the evidence in finding that Petitioner's sexual harassment was not sufficiently serious to warrant separation. Petitioner was serving as a chief petty officer, a position of senior enlisted leadership at his command. As such, he was supposed to set a good example. Instead, he used that position to make totally inappropriate comments and even solicit sex from female servicemembers. Further, the women he victimized were considerably junior to him, and he had a supervisory relationship with at least two of them. Additionally, his misconduct was not limited to an isolated incident; he harassed three women, some of them on more than one occasion. The Board notes, but ascribes no particular significance to, the comments of the victims that tend to minimize Petitioner's actions. It is up to Petitioner's superiors, not his juniors, to appropriately judge his conduct. In sum, the Board believes that COMPHIBGRUTWO and CNP were correct when they opined, in their letter and memorandum respectively, that Petitioner had serious problems dealing with women. The Board believes that in today's Navy, a Navy in which women play such a large and vital part, there is no room for an individual such as Petitioner who behaves in such an inappropriate manner, especially while serving in a position of leadership. The Board believes that the ADB, in finding to the contrary, simply turned a blind eye to the evidence.

Accordingly, the Board believes that even absent the finding of misconduct due to civil conviction, Petitioner would have been reprocessed for separation due to best interest of the service, and SECNAV clearly would have directed discharge for that reason. It is therefore appropriate, in lieu of constructive service, to simply substitute a discharge by reason of best interest of the service for the discharge due to misconduct now of record. The Board also sees no reason to change Petitioner's general discharge or RE-4 reenlistment code, since both are authorized when an individual is separated due to best interest of the service, and both are appropriate in Petitioner's case, given the misconduct of record.

Additionally, the Board concludes that this is one of those extraordinary cases in which an individual should not receive separation pay, despite his presumptive eligibility for such pay. In this regard, the Board notes that Petitioner is essentially being discharged due to documented misconduct, and individuals discharged for that reason are not eligible for separation pay.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that on 6 July 2001, he was discharged by reason of best interest of the service (secretarial authority), vice the discharge by reason of misconduct now of record.

b. That the record be further corrected to show that the Secretary of the Navy determined that the conditions under which Petitioner was separated do not warrant separation pay.

c. That no further relief be granted

d. 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.

e. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of 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.

W. DEAN PFEIFFER

Reviewed and approved: OCT 4 2002

Joseph G. Lynch
Assistant General Counsel
(Manpower and Reserve Affairs)