THE ASSISTANT SECRETARY OF THE NAVY
(MANPOWER AND RESERVE AFFAIRS)
WASHINGTON, D.C. 20350-1000

20 December 2002

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

Subj: [redacted]

I have considered the recommendation of the Board for Correction of Naval Records (BCNR) under the provisions of 10 U.S.C. 1552. For the reasons that follow, the BCNR's recommendation is disapproved.

The BCNR concluded that petitioner's discharge was unfair because he had been mistakenly assured by his command that he would not be processed for discharge if he pled guilty to a misdemeanor. I disagree that this constitutes an error or injustice warranting relief. The command had no authority to extend such assurances. In addition, given the circumstances surrounding the incident, I am not persuaded that the command's erroneous assurances were the motivating factor in petitioner's decision not to contest the charges.

In light of these circumstances, I find no error or injustice warranting relief. The petition is denied.

William A. Navas, Jr.
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

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

AEG
Docket No. 8202-01
10 October 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 setting aside his discharge and reinstating him on active duty.

2. The Board, consisting of Messrs. Tew, Frankfurt and Carlsen, reviewed Petitioner's allegations of error and injustice on 22 May and 24 September 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 has served continuously on active duty since 4 May 1982, when he first enlisted in the Navy. Over the next ten years, he served in a mostly satisfactory manner. His more recent enlisted performance evaluations reflect excellent service. In January 1996 Petitioner was advanced to the rate of gunners mate (guns) first class (GMG1; E-6). Subsequent evaluations indicate that he continued to serve in an excellent manner. However, he received promotion recommendations of "promotable," instead of one of the more favorable recommendations of "must promote" or "early promote." Petitioner has received a number of awards and decorations, including three Good Conduct Medals and the Southwest Asia Service Medal.

d. On 13 March 1998, while assigned to USS SPRUANCE (DD 963), Petitioner reenlisted for four years. Less than three weeks later, at approximately 2330 hours on Tuesday, 30 March 1998, Petitioner was arrested by civil authorities in Jacksonville, FL and charged with the felony offense of lewd and lascivious acts with a minor. In a sworn declaration submitted in connection with subsequent federal court action, the legal officer of SPRUANCE, Lieutenant Junior Grade (LTJG; O-2) S, described as follows certain events that followed Petitioner's civil arrest:

> In early 1998, I received a telephone call from the Jacksonville Sheriff's Department notifying me that a member of my division, (Petitioner), had been arrested and charged with the felony of "Lewd and Lascivious Acts in the Presence of a Minor."
>
> . . .
>
> . . . (A)fter returning to the ship, (Petitioner) told me his version of the story. Mainly, I remember him telling me that he had removed his shorts to shake the sand out. He said it happened in the evening after sunset and he had thought he was alone.
>
> Shortly after (Petitioner) was arrested, I discussed the felony charges against (him) with the Commanding Officer (CO) of . . . SPRUANCE, Commander (CDR; O-5) (W). CDR (W's) position was that if (Petitioner) was found guilty of the felony, he would process (him) for separation from the Navy.
>
> Soon after the initial report, (Petitioner) started to talk of a plea bargain. (He) stated he was in bad financial shape due to the attorney's fees, and further stated that he was thinking of pleading no contest to a misdemeanor.
>
> I asked (CDR W) what he intended to do if (Petitioner) pled guilty to a misdemeanor. (CDR W) said he would not seek separation for a misdemeanor.
>
> I am not sure who came up with the idea, (CDR W), (Petitioner), or myself, but I visited the local Trial Service Office to find out what the Navy Legal's reaction would be. Lieutenant (LT; O-3) (B) was who I talked to. After discussing the facts of the case, (LT B) said that he did not see Navy Legal taking (Petitioner) to a court-martial or administratively separating him over a misdemeanor. I returned and told this to (CDR W). I was then told to talk to (Petitioner).

I relayed the following information to (Petitioner): (CDR W) would not seek separation or court-martial for a no contest plea to a misdemeanor . . .

e. On 10 July 1998 Petitioner pled no contest to a misdemeanor violation of a Florida statute prohibiting the exposure of one's sexual organs in public, or public nudity.[1] The court then withheld any adjudication of guilt but sentenced Petitioner to 12 months probation, a $1,000 fine and 50 hours of community service. It was further directed that he have no unsupervised contact with children and undergo a sexual evaluation. The computerized "Civil Court Case Report" which was generated as a result of this action, reflected that Petitioner was apprehended on 30 March 1998, tried on 10 July 1998, charged with lewd and lascivious acts, pled no contest, had adjudication of guilt withheld, and was sentenced as noted above.

f. The sexual evaluation directed by the court took place on 29 July 1998. The ensuing 14 August 1998 report of that psychological evaluation states as follows concerning the conflicting versions of events on 30 March 1998:

> (Petitioner's) account of the events on the night in question started with him claiming that he went to Jacksonville Beach to relax around 8:30 or 9:00 p.m. He left the beach briefly but returned to Jacksonville Beach at around 10:00 p.m. After parking his truck and beginning to walk to the beach, (Petitioner) claimed that he was approached by a woman who accused him of not wearing any pants or bathing trunks under his long T-shirt. (Petitioner) claimed that he showed this woman that he was indeed wearing blue shorts and then he proceeded to the beach. He briefly sat in the sand for approximately five minutes after which he walked into the sand dunes, took his shorts off, shook the sand off his shorts, and replaced the shorts. He denied seeing anyone on the beach who might have seen him take his shorts off in the sand dunes. He then walked back to his truck and from a distance, saw the car of the alleged victims but denied approaching the car.
>
> The victims in this case claimed that (Petitioner) walked up to their car with his penis exposed and masturbated in their view. (Petitioner) denied this and claimed that he walked directly to his truck but noticed the same woman sitting in her car with her two children. (Petitioner) supposedly left the parking lot but was soon pulled over by the police and arrested. (Petitioner) claimed that the police never told him why he was being arrested but they did ask him if he recalled doing anything at the beach that was unusual. To this (Petitioner) told the police about his removing his shorts in the and dunes to brush the sand off the shorts but did not tell the police about the

[1] FLA. STAT. ANN. § §800.3 (West 1999).

woman's supposedly false accusation of his not wearing pants when he claimed that he was doing so.

(Petitioner) was asked why he thought it important to tell the police about his removing his shorts but not tell them about the woman "falsely" accusing him of not wearing shorts. His response was, "I don't know. I guess I didn't see the importance in telling them about her." He added, "I regret I even told them about taking my shorts off." He finally stated that what the woman said to him seemed to him to be "casual conversation" and did not consider it important at the time.

(Petitioner) could give no explanation for why a woman and her children, admitted perfect strangers, would purposely lie about his behavior. He also could not explain how an 8 and 10 year old could learn to repeat that lie consistently to the police after only about ten minutes had expired. However, when the facts of his story and the police report were reviewed with him, (Petitioner) maintained his innocence even though he acknowledged that the circumstances would be "amazing" for the woman and her children to have fabricated the events.

g. On 6 October 1998, the local Family Advocacy Program (FAP) held a hearing in Petitioner's case. He submitted a letter, dated 1 October 1998, to the FAP that reads, in part, as follows:

I was wrongfully accused of the charge that was brought against me. I pled "No Contest: with the adjudication of guilt withheld" to a misdemeanor charge. Navy officials told me that if I did so, the Navy would not seek action against me. This, coupled with the extremely high cost of legal fees, is the only reason I did not continue to fight these charges in court . . .

On 14 October 1998 the CO of Naval Station (NAVSTA), Mayport, FL sent a letter to the CO of SPRUANCE, stating that the FAP had substantiated Petitioner's case for child sexual abuse, noting that "according to the allegations, (Petitioner) exposed his private body parts and masturbated in the presence of two minor children." Administrative separation action was recommended. A copy of this letter was sent to the Child Sex Abuse Case Supervisor in the Advocacy and Prevention Branch of the Navy Personnel Commmand (Pers-661D).

h. In an affidavit filed in connection with the federal court action, CDR W, the CO of SPRUANCE, explained his subsequent action as follows:

At the time I discussed (Petitioner's) case with (LTJG S), I did not realize that Navy regulations required me to process (Petitioner) for separation. I thought that the

decision to take action against him was at my own discretion.

Sometime later I received a letter from the local Navy Family Advocacy Program Office recommending I take administrative action against (Petitioner). I then sought an opinion . . . from a Command Services attorney at the local Trial Service office, who informed me that administrative processing was mandatory in cases of deviant sexual behavior, to include "indecent exposure," such as that to which (Petitioner) pled no contest. Therefore, I sent (him) to an administrative board.

Accordingly, on 30 October 1998 Petitioner was notified that administrative separation action had been initiated by reason of misconduct due to commission of a serious offense and civil conviction. At that time, Petitioner elected to present his case to an administrative discharge board (ADB) and to obtain copies of documentation forwarded to the discharge authority supporting the foregoing bases for separation.

i. On 5 November 1998 Petitioner's civilian counsel submitted a letter to his military counsel that stated as follows concerning the civil court action and his client's response to it:

Initially, (Petitioner) was arrested for a second degree felony and his case was investigated by the State Attorney's office. Eventually, the State Attorney's Office offered (Petitioner) the opportunity to enter a plea to a misdemeanor charge with the understanding that he would not be convicted of any crime and that he would obtain an evaluation and any follow-up counseling that would be deemed appropriate. This, along with paying a fine and completing some community service hours, was what (Petitioner) agreed to do. His alternative was to proceed with the case and be charged with a felony.

If he were formally charged with a felony and he was found guilty by a jury, he would undoubtedly be sent to state prison and become a convicted felon. While it was not certain that he would be convicted, there would certainly be a chance if he were to have risked going to trial on the felony charge. A further consideration was that if he had decided to proceed to trial, he would have expended anywhere from $7500 to $10,000 in legal fees and costs to handle the case through a jury trial. Given that he could avoid any possibility of incarceration as well as being convicted of a crime, he decided that it was in his best interest to enter a plea of no contest and resolve the case . . .

On 8 December 1998 the executive officer (XO) of SPRUANCE, Lieutenant Commander (LCDR; O-4) N, submitted a letter to the military counsel which states as follows concerning the processing of Petitioner's case before the FAP:

> I attended the (FAP) hearing for (Petitioner). The (hearing) convened because (Petitioner) had been accused of lewd & lascivious acts in the presence of a minor . . .
>
> It was pointed out that (Petitioner) was not convicted of the felony charge, but rather pled "no contest with the adjudication of guilt withheld" to a misdemeanor charge of indecent exposure. The (FAP) board stated that it was not concerned by what the legal system had found. No contest with adjudication of guilt withheld was "guilty" . . . (T)hey believed their guidance to be clear, if a child was a victim of indecent exposure (although inadvertent) then there was a reason for separation. The vote was unanimous that (Petitioner) should be processed for separation.
>
> I pointed out that a convicted child molester has been allowed to remain on active duty. So, why would inadvertent exposure be reason for separation? The answer was that incest was treatable, but this form (of) sexual deviancy (exposure to minors, inadvertent or not) is untreatable.

j. Petitioner's ADB met on 10 December 1998. In his opening statement, the recorder to the ADB summarized the case by stating that Petitioner was arrested on 30 March 1998 by the Jacksonville Sheriff's Office, charged with lewd and lascivious behavior, and subsequently pled no contest to the lesser offense of indecent exposure in public. The only substantive evidence introduced by the recorder concerning the civil action against Petitioner, or the underlying allegations, was the Civil Court Case Report. Neither the 14 August 1998 psychological evaluation nor any police report was introduced. The recorder also introduced certain provisions from the Naval Military Personnel Manual (MILPERSMAN), and explained their relevance as follows:

> What I did was to copy the relevant parts of the MILPERSMAN . . . but I'd like to go over it a little bit. Separation by reason of misconduct, that's where we are here. If you note under the policy it says nolo contender (sic). No contest pleas, member is being separated based on that. On the next page of that, mandatory processing, the command doesn't have a choice, they must process this person, and if you look at lewd and lascivious acts, it falls under that for processing. Next exhibit is . . . (t)he findings and recommendations, basically, what we do in the (ADB). First, make the decision whether the event occurred or not. We're not going to go into the facts of the case because (Petitioner) plead no contest, by the standards of the MILPERSMAN we find misconduct so that's the decision that

has to be made. Next decision that you have to make is whether or not to separate or retain. To determine that . . . the factors that you consider for retention or separation (are), seriousness of the offense, the likeliness of recurring, potential for further service, and the member's military record . . .

For some reason, these MILPERSMAN provisions introduced by the recorder were deleted from the record of the ADB.

k. In his opening statement, the defense counsel alleged that processing for separation in this case was unfair given Petitioner's lengthy service and good duty performance, the nature of his offense, and the promise made to him by the command that he would not be so processed. Counsel introduced in evidence a history of his assignments, his awards and qualifications, and his most recent enlisted performance evaluations. Counsel also introduced the letters from Petitioner, his civilian attorney and the XO. Even though it was apparently already in evidence, counsel introduced the applicable MILPERSMAN article to emphasize the fact that although separation processing was mandatory in Petitioner's case, separation was not. Counsel apparently also introduced the provision of the MILPERSMAN setting forth the factors to be considered on retention and separation, and stated that "I agree with (the recorder) that . . . the main question here . . . is whether to retain . . . or separate (Petitioner), those four factors are what you should concentrate on . . ."

l. The recorder apparently called no witnesses to testify before the ADB. Defense counsel called LTJG S, the ordnance officer; LTJG U, the gunnery officer; and Senior Chief Gunners Mate (GMCS; E-8) B, Petitioner's leading chief petty officer. All of these individuals testified to his excellent performance of duty while assigned to SPRUANCE. The ADB's record of proceedings does not reflect that Petitioner testified in his own behalf. However, the senior member of the ADB, LCDR E, in her testimony in connection with the federal court action, stated that "he got on the stand and swore that he hadn't done anything wrong . . ."

m. After the defense counsel made a final argument, the ADB retired for deliberations. Upon reopening, the ADB announced a finding that Petitioner had not committed misconduct due to commission of a serious offense or civil conviction. LCDR E's federal court testimony describes subsequent events as follows:

The original findings that we announced were . . . no misconduct for the civil conviction or for commission of a serious offense . . . When we announced the original findings the . . . government lawyer immediately asked for a recess and had everyone leave the room. And he and the defense lawyer, basically, approached the (ADB) and drew our attention to the fact that the material that had been

presented to us was a Navy instruction that required us to find guilt for civil conviction based on the act that (Petitioner) had entered a no contest plea to the charges against him in Jacksonville.

Accordingly, the ADB then found that Petitioner had been convicted by civil authorities, but recommended that he be retained in the Navy. Concerning this recommendation, LCDR E testified in court that it was based on his good service record and uncontradicted testimony to the effect that he had done nothing wrong.

n. On 22 December 1998 CDR W favorably endorsed the ADB report and recommendation and strongly recommended Petitioner's retention, characterizing him as a "valuable asset" to SPRUANCE, and noting that he was one of the finest Range Masters in the Navy. On 1 April 1999 the CO advised the Navy Personnel Command (NAVPERSCOM) that Petitioner had been reassigned on 25 January 1999. The CO forwarded the ADB proceedings to the Navy Personnel Command on 5 April 1999, erroneously reporting that the ADB had found that the allegations against Petitioner were not supported by a preponderance of the evidence. The CO also echoed his earlier recommendation, stating that Petitioner was a good Sailor with the ability to provide results. By this time, Petitioner had reported to his new duty station, Special Boat Unit (SBU) 22, Stennis Space Center, MS.

o. On 12 May 1999 the Chief of Naval Personnel (CNP) forwarded Petitioner's case to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA) with a cover letter that reads as follows:

> An (ADB) found (Petitioner) committed misconduct due to civilian conviction and recommended retention. His (CO) concurs. (CNP) does not concur. This case is forwarded . . . recommending separation.
>
> The (ADB) had evidence . . . which demonstrates an incompatibility with military service. Specifically:
>
> --(Petitioner) was arrested for exposing himself and masturbating in the presence of two minor children. He was charge (sic) with lewd and lascivious acts in the presence of a minor. He pled no contest to the lesser charge of indecent exposure in public. He was sentenced to 12 months probation, (a) $1,000 fine, 50 hours of community service, and directed to have no unsupervised contact with children.
>
> Recommend you approve the administrative separation of (Petitioner) for misconduct due to civilian conviction with characterization of service as General (Under Honorable Conditions).

It appears that the drafter of this memorandum, an individual in the Enlisted Performance Branch (Pers 832) of NAVPERSCOM, utilized the copy of the letter dated 14 October 1998 from the CO of COMNAVSTA Mayport to the CO of SPRUANCE that was sent to Pers-661.

p. On 20 May 1999 ASN/M&RA approved CNP's recommendation. Accordingly, by message of 27 May 1999, SBU 22 was directed to separate Petitioner with a general discharge by reason of misconduct within 30 days.

q. Prior to being discharged, Petitioner initiated action in the United States District Court for the Southern District of Mississippi in which he requested that the Navy be enjoined from discharging him. The court then granted Petitioner's request for a temporary restraining order (TRO) to keep him on active duty during the court action. During the court action, Petitioner testified as follows concerning his motivation for pleading no contest to the misdemeanor charge:

> I was going to plead . . .not guilty to the (felony) charge if I had went (sic) to court on it and when they told me that they would not pursue it any further, I figured it was in my best interest, what I thought at the time was going to save me about $10,000 in court costs and attorney's fees, that I would just go ahead and take the no contest because I was not being convicted of a crime.

Additionally, in an affidavit and in his testimony, Petitioner essentially adhered to his version of events concerning his actions on the night of 30 March 1998.

r. On January 2000 the court found that Petitioner's allegations were without merit, denied his request for an injunction, and vacated the TRO. Accordingly, Petitioner received a general discharge by reason of misconduct on 3 February 2000, after 17 years and 9 months of active service. Petitioner then appealed the ruling of the District Court to the United States Court of Appeals for the Fifth Circuit. On 9 October 2000 the appellate court dismissed Petitioner's appeal and complaint due to a lack of jurisdiction based on his failure to exhaust his administrative remedy before this Board.[2]

s. Petitioner then submitted an application to this Board, accompanied by an affidavit which reads, in part, as follows:

> On or about March 30, 1998, affiant was arrested . . . for Lewd, Lascivious or indecent assault or act upon or in the presence of a child . . . Affiant did not masturbate or do any other lewd or lascivious act in the presence of a child or anyone else.

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[2] *Strickland v. Danzig*, 235 F.3d 1339 (5th Cir. 2000), *cert. denied*, ___U.S.___, 121 S.Ct. 2191, 149 L.Ed.2d 1023 (2001).

Affiant did take his shorts off to shake sand from them in an isolated section of the beach. It was dark and affiant believes that he could not be seen by anyone. This area was blocked from view of the parking lot or the roadway.

. . .

Affiant plead nolo contendere[3] (to misdemeanor indecent exposure), in part, in reliance upon naval officials assurances that he would not be administratively separated. Financial concerns and the possibility of being tried for a felony if he did not plead guilty to the misdemeanor were other factors he considered in making his decision.

. . .

Affiant had no knowledge that the result of the (ADB) was forwarded to (ASN/M&RA) for adjudication. He was not provided with the supporting documents sent to (ASN/M&RA) or allowed to submit information on his behalf to (ASN/M&RA). He has never been presented with a brief statement of reasons for (ASN/M&RA's) actions.

t. In a brief attached to Petitioner's application, counsel makes the following contentions:

The provisions of the MILPERSMAN which state that a no-contest plea is tantamount to a conviction, and that any conviction is binding on an ADB, are without force and effect since those provisions are not set forth in Secretary of the Navy Instruction (SECNAVINST) 1910.4B; and since that directive empowers the ADB to determine whether allegations are supported by a preponderance of the evidence, and states that a member may not be separated based on action having the effect of an acquittal.

The ADB was improperly lectured, off the record, to change its finding.

Since Petitioner plead no contest to a statute which does not require that exposure of one's genitalia be indecent, and there is such a requirement in military law, his infraction was not "closely related" to a military offense and, therefore, did not meet the requirements for separation by reason of misconduct due to civil conviction.

ASN/M&RA's action to discharge Petitioner was arbitrary and capricious since she disregarded the well-reasoned recommendation of the ADB, gave no reasons for her decision, and relied on invalid regulations.

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[3] Latin for "I will not contest it." (*Black's Law Dictionary* 1198 [4th ed. 1957]).

The separation action was based on insufficient evidence since the only evidence against Petitioner was the Civil Court Case Report; the memorandum from CNP to ASN/M&RA contained misleading information, specifically, that Petitioner's exposure was in the presence of children; and the ADB concluded the evidence did not show that the specific circumstances of the offense warranted separation.

ASN/M&RA failed to properly consider Petitioner's potential for rehabilitation and the established criteria for retention.

Petitioner's right to due process of law was violated because neither CNP nor ASN/M&RA provided him with notice and an opportunity to respond after CNP recommended discharge despite the favorable recommendation of the ADB.

It was fundamentally unfair to discharge Petitioner based on his no contest plea since it resulted, in large part, from assurances of Navy representatives that such a plea would not result in administrative separation.

u. Federal law authorizes the discharge of a regular enlisted servicemember prior to the expiration of his enlistment, "as prescribed by the Secretary concerned."[4] Implementing guidance on enlisted administrative separations is set forth in Department of Defense Directive (DODDIR) 1332.14, SECNAVINST 1910.4B and MILPERSMAN Articles 1900 and 1910. Federal courts have consistently held that regulations of the individual services, such as SECNAVINST 1910.4B and the MILPERSMAN, must comport with DOD regulations like DODDIR 1332.14. If there is a conflict between a DOD regulation and a service directive, the former is controlling.[5] Additionally, an instruction from SECNAV binds all of his subordinates in their authority to issue directives.[6]

v. The applicable provision of DODDIR 1332.14[7] states that an individual may be discharged by reason of misconduct due to civil conviction if (1) he is convicted by civil authorities or action is taken that is "tantamount to a finding of guilty;" (2) the specific circumstances of the offense warrant separation; and (3) either a punitive discharge would be authorized for the same or a "closely related" offense[8], or the sentence imposed by the

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[4] 10 U.S.C.A. § 1169 (West 1998).

[5] *Gilchrist v. United States*, 33 Fed.Cl. 791, 801 (1995) (and cases cited therein).

[6] *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. Davis*, 47 M.J. 484, 485-86 (1998).

[7] Encl. 3, Atch. 1, ¶ 1.11.1.1.4.1.1.

[8] Pt. IV and App. 12 of the Manual for Courts-Martial (MCM) set forth all offenses under the Uniform Code of Military Justice (UCMJ), and whether a punitive discharge is authorized for each offense.

civil authorities includes six months of confinement. When this directive was first issued in 1982,[9] the drafters stated that "actions 'tantamount to a finding of guilty' includes pleas of nolo contendere."[10] The provision of SECNAVINST 1910.4B pertaining to separation due to civil conviction[11] is virtually identical to DODDIR 1332.14. The corresponding MILPERSMAN provision[12] is similar to those in the superior directives but specifically states that a plea of nolo contendere is an action tantamount to a finding of guilty.

w. The MILPERSMAN[13] states that when separation "processing includes a court-martial conviction . . . or a civilian conviction (or civil action tantamount to a civil conviction), the (ADB) may not render its own findings, because these matters have already been judicially determined to have occurred." No similar provision is contained in SECNAVINST 1910.4B. Both directives state that the ADB must determine whether the allegations against a respondent are supported by a preponderance of the evidence.[14] Those regulations further state that an individual may not be separated based on conduct resulting in an acquittal or action having the same effect, unless the action is based on a determination not going to the issue of guilt or innocence, or the judicial proceeding at issue was conducted in a state court and separation is approved by SECNAV.[15]

x. Florida law[16] states that in a case such as Petitioner's, a court "may . . . with or without an adjudication of . . . guilt . . . , hear and determine the question of the probation of a defendant . . . who . . . has entered a plea of nolo contendere." An individual who is sentenced or placed on probation after adjudication of guilt is withheld has the right of appeal.[17]

y. The Florida statute which Petitioner allegedly violated reads, in pertinent part, as follows:

> Exposure of Sexual Organs
>
> It is unlawful to expose or exhibit one's sexual organs in public or on the private premises of another, or so near thereto as to be seen from such private premises, in a

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[9] DODDIR 1332.14 was reissued in 1993 and changed on one occasion in 1994. However, neither the reissued regulation nor the change altered the provision at issue.
[10] Sectional Analysis, 47 Fed.Reg. 10168 (Mar. 9, 1982).
[11] Encl. (2), Pt. 1, ¶ K1(4).
[12] Article 1910-144.
[13] Article 1910-518.
[14] SECNAVINST 1910.4B, Encl. (2), Pt. 5, ¶ A7b; MILPERSMAN 1910-518.
[15] *Id.*, at Encl. (2), Pt. 2, ¶ A3a; and 1910-220.
[16] FLA. STAT. ANN. § 948.01 (West 1999).
[17] FLA. R. CRIM. P. 3.670.

vulgar or indecent manner, or to be naked in public except in any place provided or set apart for such purpose.[18]

In interpreting the virtually identical predecessor version of this statute, the Florida courts consistently held that in order to prove a violation of the prohibition against public nakedness, mere nudity is insufficient and some sort of lewd or lascivious behavior must also be present.[19]

z. Indecent exposure is an offense under UCMJ Article 134.[20] An element of this offense is that the accused exposed his body "to public view in an indecent manner."[21] The term "indecent" is defined as immorality relating to sexual impurity which is grossly vulgar, obscene and repugnant to common propriety; and tends to excite lust and deprave sexual morals.[22] The Criminal Law Division of the Office of the Judge Advocate General has submitted an advisory opinion which states that if Petitioner was truthful in his assertion to the effect that he only took off his shorts to shake sand from them, such action would not constitute indecent exposure under UCMJ Article 134. However, masturbation in the presence of children "would certainly violate Article 134 . . ."

aa. The applicable provision of SECNAVINST 1910.4B[23] states that both the ADB and the separation authority must consider a respondent's potential for rehabilitation and further military service. The directive also states that certain factors may be considered on the issue of separation or retention, including the seriousness of the offense and likelihood of a recurrence, and the individual's potential for further service and military record.[24] The corresponding provision of the MILPERSMAN[25] goes even further, stating that such factors "should" be considered.

bb. When a military official such as ASN/M&RA performs her duties, there is a strong presumption that she does so "correctly, lawfully and in good faith."[26]

cc. Procedural due process restricts governmental decision-making if an individual may be deprived of a liberty or property

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[18] FLA.STAT. ANN. § 800.3 (West 1999).
[19] *Hoffman v. Carson*, 250 So.2d 891 (Fla. 1971); *Duvallon v. State*, 404 So.2d 196 (Fla. App. 1981; *Goodmakers v. State*, 450 So.2d 888 (Fla.App.2 Dist. 1984); *Payne v. State*, 463 So.2d 271 (Fla.App.2 Dist. 1984). *See also United States v. A Naked Person Issued Notice of Violation*, 841 F.Supp. 1153 (M.D. Fla. 1993); 16 FLA. JUR. 2D *Criminal Law* § 3707 (2001).
[20] 10 U.S.C.A. § 934 (West 1998).
[21] MCM, Pt. IV, ¶ 88b(1).
[22] *Id.*, at ¶ 90c.
[23] Encl. (2), Pt. 2, ¶A2b.
[24] *Id.*, at Encl. (2), Pt. 2, ¶ A2d.
[25] Article 1910-220.
[26] *Doe v. United States*, 132 F.3d 1430, 1434 (Fed. Cir. 1997); *Sanders v. United States*, 594 F.2d 804, 813 (Ct.Cl. 1979).

interest within the meaning of the due process clause of the Fifth or Fourteenth Amendments to the Constitution.[27] Given the provision of Federal law which authorizes a service secretary to separate an individual prior to the expiration of his enlistment,[28] courts have held that an enlisted servicemember has no property interest in continued service.[29] He does, however, have a liberty interest which prevents the military from discharging him without due process if, as in Petitioner's case, the discharge would impose a stigma.[30] In such a case, the due process clause requires that the individual have an opportunity to refute the charge against him.[31] Since the essence of due process rights is notice and an opportunity to respond,[32] due process requirements are satisfied by providing notice of the proposed government action and an opportunity to respond, either before or after that action is taken.[33]

dd. Applicable provisions of SECNAVINST 1910.4B[34] and the MILPERSMAN[35] state that if an ADB finds that no reason for separation is supported by a preponderance of the evidence, the individual may be discharged only if the separation authority directs reprocessing for separation under the plenary authority of SECNAV.[36] In such a case, the notification procedure must be followed,[37] in which the individual is entitled to certain procedural rights, such as notice of the proposed action and the opportunity to submit a statement,[38] before the case is submitted to SECNAV for final action. However, if, as in Petitioner's case, the ADB concludes that a reason for separation is supported by a preponderance of the evidence but nevertheless recommends retention, the separation authority may simply recommend to SECNAV that the individual be separated for that reason, notwithstanding the recommendation of the ADB.[39]

ee. If a discharge is found to be improper or unjust, the record should normally be corrected only to show that the

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27 *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976).
28 *Supra*, note 2.
29 *Vierrether v. United States*, 27 Fed.Cl. 357, 364-65 (1992), *aff'd*, 6 F. 3d 786 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994). *See also Guerra v. Scruggs*, 942 F.2d 270, 278 (4th Cir. 1991); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1226 (10th Cir. 1984).
30 *Holley v. United States*, 124 F.3d 1462, 1469-70 (Fed. Cir. 1997).
31 *Codd v. Velger*, 429 U.S. 624, 627 (1977) (*quoting Board of Regents v. Roth*, 408 U.S. 564, 573 [1972]).
32 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).
33 *Canonica v. United States*, 41 Fed.Cl. 516, 524 (1998).
34 Encl. (2), Pt. 6, ¶ C2c(2).
35 MILPERSMAN 1910-710.
36 Separation by reason of secretarial plenary authority is authorized by SECNAVINST 1910.4B, Encl. (2), Pt. 1, ¶ P; and MILPERSMAN 1910-164 (Best Interest of the Service).
37 *Id.*
38 *Id.*, at Encl. (2), Pt. 4, ¶ B; and 1910-402.
39 *Id.*, at Encl. (2) Pt. 6, ¶ C2b(2); and 1910-710.

individual completed the last period of obligated service, since an individual has no right to reenlist.[40] However, an individual who is within two years of attaining eligibility for transfer to the Fleet Reserve will be retained on active duty until he accrues enough active service to so transfer, unless he is discharged under another provision of law.[41]

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board) concludes that partial corrective action is warranted. Specifically, the Board believes that although counsel's contentions of legal error have no merit, Petitioner's discharge was unfair and should be set aside.

The Board first rejects counsel's assertion that the MILPERSMAN is impermissibly inconsistent with DOD and SECNAV guidance concerning pleas of no contest or nolo contendere. It is very clear that when DODDIR 1332.14 was first promulgated in 1982, the drafters intended that such a plea be viewed as an action tantamount to a finding of guilty. The fact that SECNAVINST 1910.4B does not specifically reference a no contest plea is essentially irrelevant, especially since it is mentioned in the applicable provision of the MILPERSMAN. The circumstances of Petitioner's plea are a perfect illustration of why such a plea is viewed as being tantamount to a guilty finding. After his plea was accepted, he was sentenced to a fine and community service, thus depriving him of both liberty and property. The action of the court also triggered a right of appeal; a right normally associated with a conviction. Accordingly, the Board thus also rejects the contention that separation processing was precluded since the civil court action had the effect of an acquittal. Contrary to the implication of counsel, this prohibition is contained not only in SECNAVINST 1910.4B, but also in the MILPERSMAN, so there is no inconsistency in the two directives. Finally, even if the action of the Florida court could somehow be viewed as an acquittal, the directives provide an exception to the general rule if an individual is convicted in state court and separation is approved by SECNAV—exactly what happened in Petitioner's case.

The Board also concludes that a civil conviction is binding on an ADB, and no contrary finding on this issue may be made. Further, although a MILPERSMAN article contains this specific guidance, the guidance is superfluous, given the provisions of DODDIR 1332.14, SECNAVINST 1910.4B and the MILPERSMAN which specifically state that separation of a servicemember is authorized by reason of misconduct due to civil court conviction. These provisions make it crystal clear that the fact of the individual's

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[40] *Maier v. Orr*, 745 F.2d 973 (Fed.Cir. 1985); *Thomas v. United States*, 42 Fed.Cl. 449, 453 (1998).

[41] 10 U.S.C.A. § 1176(a) (West 1998).

conviction, or equivalent action, results in presumptively eligibility for separation, and whether or not the individual actually committed the underlying act is not relevant.[42] The regulatory provisions that require the ADB to determine whether allegations are supported by the evidence only authorize the ADB to determine whether an individual has been convicted, not whether the respondent committed the underlying act of misconduct. Accordingly, as it pertains to separations due to civil conviction, the MILPERSMAN may be redundant but it is neither inconsistent with higher-level directives nor improper.

The Board also finds no merit in counsel's contention that the ADB was improperly prevailed upon to change its finding. It is perfectly clear that the members did so only after both the recorder and defense counsel told the ADB that a finding of no misconduct was improper, given Petitioner's plea of no contest and the governing MILPERSMAN provision. Further, his counsel made this concession earlier in the ADB proceedings. In this regard, the Board specifically notes LCDR E's later testimony to the effect that the ADB's original finding was based on Petitioner's allegation that he had done nothing wrong. However, as previously noted, such a contention was essentially irrelevant since he was processed for separation based on the conviction and not the underlying act.

The Board also rejected counsel's contention that since the Florida statute to which Petitioner pled no contest does not require indecency, it is not closely related to the military prohibition against indecent exposure, and separation based on a violation of the state statute was improper because Petitioner did no more than take off his shorts and shake sand from them. However, given the decisions of the Florida courts interpreting that statute, it is clear that an indecency requirement exists not only with regard to the prohibition against publicly displaying one's sexual organs, which is what the female complainant alleged that Petitioner did, but also to the statute's ban on public nudity. Additionally, given the court's direction that Petitioner have no unsupervised contact with children, it seems clear that the court assumed that he was guilty of displaying his sexual organs in front of children.

The Board finds no merit in the contention that the action of ASN/M&RA in directing Petitioner's discharge, notwithstanding the recommendation of the ADB, was arbitrary and capricious. Since Petitioner pled no contest to a civil offense for which separation was authorized, her decision to direct such action even though the ADB made a contrary recommendation can hardly be considered irrational. Although she gave no reasons for her decision, she concurred with the memorandum submitted to her by CNP, which set forth an adequate rationale for the proposed

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[42] Of course, the conviction is only one of the elements of separation due to civil conviction (*Infra*, at ¶ 3v).

action. Further, as previously noted, none of the regulations she would have relied on were improper.

Additionally, contrary to counsel's contention, ASN/M&RA had sufficient evidence before her to justify discharge. The Civil Court Case Report sufficiently documented Petitioner's no contest plea, and other documentation in the record provided some background on the circumstances surrounding his offense and overall record of service. In this regard, the Board is aware that CNP's memorandum of 12 May 1999 specifically stated that Petitioner was initially accused of masturbating in front of children, but nothing in the ADB record of proceedings so stated. However, the ADB record does contain, as a defense exhibit, the XO's letter to the effect that he was charged with lewd and lascivious acts with a minor. Accordingly, any error committed by CNP or his agents in departing from the record was harmless. Further, given the nolo contendere plea, ASN/M&RA could well determine that Petitioner committed misconduct that was sufficiently serious to outweigh his otherwise excellent record of service in recent years.

Further, contrary to counsel's assertion, the record does not reflect that the ADB reached a specific conclusion that the circumstances of Petitioner's civil offense did not warrant separation. In fact, according to LCDR E, the ADB based its recommendation partially on its belief that Petitioner had done nothing wrong,[43] in other words, that he had not committed any offense at all. This, the Board believes, is different from a conclusion that he committed an offense, but extenuation and mitigating factors lessened its seriousness.

The Board also rejects counsel's contention that ASN/M&RA failed to consider the appropriate criteria for retention or his potential for rehabilitation in her decision to discharge him. There is nothing in any of the governing directives which required her to list these criteria in making the decisional document. The Board therefore presumes that she acted properly and in accordance with applicable regulations in performing her duty.

Additionally, the Board finds no merit in the assertion that CNP and ASN/M&RA deprived Petitioner of due process of law by failing to provide him with notice and an opportunity to respond to the proposal to discharge him despite the favorable recommendation of the ADB. Both SECNAVINST 1910.4B and the MILPERSMAN distinguish between two different scenarios. In the first situation, an ADB finds that the proposed reason for separation is not substantiated by a preponderance of the evidence and the individual must be reprocessed for separation under secretarial plenary authority, in which notice and an opportunity to respond

[43] LCDR E said that the recommendation was also based on Petitioner's good record, an appropriate factor for the ADB to consider on the issue of retention (*Infra*, at ¶3aa).

are required. In the second scenario, the ADB finds a reason for separation is supported by the evidence but recommends retention, in which case no procedural rights are provided and the case is simply sent to SECNAV.

The Board concludes that this distinction does not violate the due process rights of an individual such as Petitioner who falls into the latter category. It must be kept in mind that he has already received the full panoply of due process rights during the ADB proceedings—notice of the allegations against him; representation by counsel; a hearing before an impartial panel at which he is confronted with the evidence against him and given an opportunity to cross-examine witnesses and testify on his own behalf; and findings and recommendations by the ADB based on the evidence presented to it. When CNP forwards a case to ASN/M&RA, he does so based on the ADB's finding that the reason for discharge is supported by the evidence. No new allegation is raised, nor is another reason for separation for proposed; CNP only recommends separation in lieu of retention. The individual has already, at the ADB, had an opportunity to rebut the charge against him and failed to do so. This scenario must be contrasted with the situation in which the ADB finds that the reason for separation unsupported by the evidence and, in order to overrule the ADB, separation processing must return to "square one" with allegations of a new reason for separation—secretarial plenary authority. Since this essentially constitutes a new charge against the individual, due process calls for notice and an opportunity to respond, which is provided by the applicable directives.

Despite the lack of merit in any of the contentions of legal error, the Board nevertheless concludes that Petitioner's discharge was fundamentally unfair because of the assurances he received that if he pled guilty to a misdemeanor, he would not be processed for discharge. The Board initially notes that from the very beginning, Petitioner has contended that he did not masturbate in the presence of the woman and her young children but only took his shorts off to shake sand from them. This assertion is especially significant because if true, he did not violate the Florida statute at issue. In addition, given the contents of the advisory opinion, such an action would not constitute violate military law. Therefore, even if his actions violated some other state statute, a conviction or no contest plea to such a violation would not result in separation processing since his civil offense would not be closely related to a military offense.

As indicated in the 10 August 1998 evaluation report, it appears that substantial evidence exists to show that Petitioner did masturbate in front of the woman and her children. However, no such evidence was introduced at the ADB proceedings. Further, the Board believes there are certain unresolved questions about the incident at issue, for example, why this woman was out so

late in the evening with young children on a school night.[44] Since Petitioner pled no contest, those issues were never resolved at trial. Petitioner's decision not to contest the misdemeanor charge against him was clearly motivated, in large part, by the assurances he received from his superior officers that if he did so, separation processing would not be initiated. Once he did so, not only was separation processing required, but since he was processed by reason of civil conviction, he was foreclosed from protesting his innocence of the underlying charge at the ADB.

The Board is especially sensitive to the unfairness of the situation given the circumstances surrounding Petitioner's case. At the time of his separation, he had provided nearly 18 years of faithful service. Given the testimony at the ADB of his superiors aboard SPRUANCE and the recommendation of the CO for retention, he clearly was a very valuable member of the ship's company.

Having found that discharge was unfair, the Board would normally recommend a correction to the record to show that Petitioner completed the four-year enlistment that began on 13 March 1998. However, such a correction would leave Petitioner with about 19 years and 10 months of service, just short of the 20 years required for transfer to the Fleet Reserve. Since Federal law now precludes the involuntary separation of individuals with more than 18 years of active service prior to attaining eligibility for transfer to the Fleet Reserve, the Board concludes that correcting the record to show active service until 12 March 2002 would not provide adequate relief. Accordingly, the record should be corrected not only to show that Petitioner completed his last enlistment, but that he extended the enlistment for a sufficient period to attain 20 years of active service, and then transferred to the Fleet Reserve.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that Petitioner was not discharged on 3 February 2000 but continued to serve without interruption on active duty.

b. That the record be further corrected to show that on 11 March 1998, Petitioner extended his enlistment for a period of three months.

c. That the record be further corrected to show that Petitioner transferred to the Fleet Reserve in the rate of GMG1 on the date he first became eligible for such action.

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[44] In 1998 Easter Sunday fell on April 12 (DATES OF ASH WEDNESDAY AND EASTER SUNDAY, U.S. Naval Observatory, Astronomical Applications Dept, *available at* http://aa.usno.navy.mil/data/docs/easter.html). Accordingly, it does not appear that the children would have been on Spring vacation on 30 March 1998, the date of the incident at issue.

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: