



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

TRG
Docket No: 2277-00
20 February 2001

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) Case Summary
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy filed enclosure (1) with this Board requesting, in effect, that she be reinstated in the Navy to qualify for retirement.

2. The Board, consisting of Mr. Zsalman, Mr. Rothlein and Ms. Hardbower, reviewed Petitioner's allegations of error and injustice on 30 January 2001 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner first enlisted in the Navy on 3 January 1979. During the period 15 February 1980 to 12 June 1985 she received nonjudicial punishment (NJP) on five occasions. Her offenses were the theft of three eye shadows valued at about \$4.00, sleeping on watch, dereliction of duty, use of provoking words and several instances of disobedience.

d. Following the 12 June 1985 NJP, Petitioner served over seven years without any disciplinary infractions. During this period, on 7 June 1991 she reenlisted in the Navy for four years and on 16 November 1991 she was advanced to RM1 (E-6). On 1 December 1992 she received her sixth NJP for dereliction of duty. The punishment imposed included forfeitures of pay and a

suspended reduction in rate.

e. On 10 May 1993 Petitioner was issued a letter of substandard performance in which she was informed that she could not reenlist or extend her enlistment without the "specific prior approval of the Chief of Naval Personnel". In the performance evaluation for the period 1 December 1993 to 30 April 1994, she was assigned an adverse mark of 2.8 in reliability and was not recommended for advancement or retention in the Navy.

f. On 30 November 1994 after considering the foregoing record and a favorable recommendation from Petitioner's command, the Chief of Naval Personnel granted authority to extend her enlistment for 21 months. She was warned that prior approval was required to extend her enlistment beyond March 1997 and that she would remain on probation. On 20 January 1995 she extended her enlistment for 21 months.

g. On 28 August 1996 Petitioner received her seventh NJP for an unauthorized absence of about three days and making a false official statement, and was awarded a suspended reduction in rate. On 28 October 1996, Petitioner was denied reenlistment because of her "long history of substandard performance and behavior". It was also directed that she be assigned an RE-4 reenlistment code. She completed 18 years of active service on 2 January 1997.

h. On 4 February 1997, Petitioner requested a further extension, or reenlistment or retirement under the provisions of the Temporary Early Retirement Authority (TERA). Subsequently, the Bureau of Naval Personnel recommended as follows that the request be disapproved:

"...she lacks the leadership qualities required of a serious petty officer and demonstrates no potential for further service. ... She was extended for 30 days until final action could be taken.

It is hard not recommending reenlistment for a petty officer with over 18 years of service. However, (she) has an obligation to meet the Navy half-way. All she had to do was show up for work and do her job and everybody in the chain of command would be on her side. Since she is unable or unwilling to meet that minimal responsibility, the Navy should not be obligated to retain her to retirement eligibility.

On 28 March 1997, the Deputy Chief of Naval Operations denied her request for further service or retirement under TERA.

i. Following a period of medical hold, surgery and convalescent leave, Petitioner was honorably discharged on 9 May 1997. At that time, she was paid separation pay of \$22,440 and was assigned an RE-4 reenlistment code. The DD Form 214 shows that as of that date she had completed 18 years, 4 months and 7 days of active service.

j. Petitioner alleges in her application that the Navy failed to follow the law in that she was discharged in violation of Title 10 U.S.C. 1176(a). This law requires retention of servicemembers who have completed 18 years of service.

k. The Board received an advisory opinion in a similar case from the Deputy Assistant Judge Advocate General. The advisory opinion states, in part, as follows:

... the decision to reenlist a service member is discretionary, unless such discretion has been constrained by statute or regulation. Additionally, even where an applicable statute or regulation does not compel reenlistment there may be a bar to separation. Such is the case with respect to enlisted members who are within 2 years of qualifying for transfer to the Fleet Reserve. Title 10 U.S.C. § 1176(a) provides that if the term of enlistment expires for an enlisted member who is within 2 years of qualifying for transfer to the Fleet Reserve and if such a member is denied reenlistment, the member shall not be discharged, but "shall be retained on active duty until the member is qualified for retirement or transfer to the Fleet Reserve."

The advisory opinion concludes as follows:

Where a member is within 2 years of qualifying for transfer to the Fleet Reserve and the member is denied the opportunity to reenlist or extend his or her enlistment, retention on active duty is mandated by 10 U.S.C. § 1176 and OPNAV Instruction 1160.5C. Petitioner was within 2 months of qualifying for transfer to the Fleet Reserve when, after his request for extension of enlistment was denied, he was discharged. Such discharge was contrary to applicable law. Thus, because Petitioner's retention on active duty was compelled by statute and regulations, relief

is warranted; however, such relief should not provide an excessive benefit to Petitioner through compensation for service that was neither performed nor obligated. Accordingly, Petitioner should be allowed to return to active duty in order to complete that active service required for transfer to the Fleet Reserve.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. Given the circumstances of this case, the Board concludes that the provisions of 10 U.S.C. § 1176 were applicable to this case, and Petitioner should have been retained on active duty until eligible to transfer to the Fleet Reserve on completion of 20 years of service. The Board notes the recommendation made in the advisory opinion that the Petitioner in that case be required to return to active duty to complete service to retirement. However, the Board notes that if Petitioner had been retained on active duty as required by law, she would have completed her service and been retired. Since an error occurred, the Board believes the record should be corrected as if she was never discharged. This is consistent with the action taken in the case for which the advisory opinion was obtained.

Therefore, the record should be corrected to show that Petitioner was not discharged on 9 May 1997 but continued to serve on active duty until she transferred to the Fleet Reserve at the earliest possible date after completion of 20 years of active service. This date is believed to be 1 February 1999 but the actual date will be as determined by the Navy Personnel Command.

The Board further concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future reviewers will understand her status in the Fleet Reserve.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that she was not discharged on 9 May 1997 but continued to serve on active duty until she transferred to the Fleet Reserve at the earliest possible date after completion of 20 years of active service.

b. That this Report of Proceedings be filed in 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. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director