



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

AEG

Docket No. 148-97

21 October 1999

Mr. [REDACTED]

Dear Mr. [REDACTED]:

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 19 October 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary evidence considered by the Board consisted of your application, together with all material submitted in support thereof; documentation submitted by the United States Naval Academy; and applicable statutes, regulations and policies.

The available evidence of record reveals that you began serving as a midshipman at the Naval Academy in the summer of 1990. You apparently served in a satisfactory manner during your fourth class and third class years at the Academy.

About midway through your second class year, you were accused of falsifying a restriction muster card and denying that you had done so, both violations of the Academy's Honor Code. On 19 January 1993 you were brought before the Brigade Honor Board, found guilty of the foregoing offenses and recommended for separation from the Academy. After a personal hearing on 28 January 1993, the Commandant of Midshipmen approved the findings and recommendation of the Honor Board.

You then elected to submit a qualified resignation from the Academy in lieu of further processing. In connection with your resignation, you requested a waiver of the requirement that you either serve on active duty in an enlisted status or reimburse the government for the cost of your education. On 12 February 1993 the Superintendent of the Academy favorably endorsed your resignation request and recommended discharge and that you reimburse the government in the amount of \$50,000.

In his endorsement, the Superintendent set forth the facts of your case as follows:

On Friday, 20 November 1992, Lieutenant (LT; O-3) (W), Conduct Officer, was inspecting the pending restriction muster cards in an effort to determine which restrictees would be able to take Thanksgiving leave. When he reviewed Midshipman (MIDN) (R's) card, (LT W) discovered that 40 days had been recorded as days served since 29 October 1992. (LT W) took (MIDN R's) card and compared it to other restriction cards and the main office . . . log. He determined that (MIDN R's) restriction card reflected that 17 days had been falsely logged.

(LT W) contacted (MIDN R) and told (MIDN R) to report to his office. When (MIDN R) arrived, (LT W) asked him if he had forged the extra days on his restriction card. (MIDN R) stated that he had not nor did he know about anybody else signing them off. (LT W) then asked (MIDN R) if he noticed that his card was incorrect. (MIDN R) stated that he had noticed the extra days but had not intended to bring it to anyone's attention. (LT W) then asked (MIDN R) if he had planned to let everyone believe that he had served his full restriction when he did not. Although (LT W) cannot recall (MIDN R's) exact reply, (LT W) believes (MIDN R) answered affirmatively. (LT W) then informed (MIDN R) that he would be turning the case in as an Honor offense.

After questioning (MIDN R), (LT W) proceeded to investigate further in an effort to determine who had signed the extra days off on (MIDN R's) muster card. The two sets of initials in question, annotated before the false musters and immediately following, belonged to (MIDN T) . . . (LT W) contacted (MIDN T), who stated that, although the first set of initials was his, the second set was not. Upon closer inspection, (LT W) concluded that the second set of initials had been forged.

(LT W) then inspected the initials immediately following the second set of initials and determined that they belonged to (you) . . . (LT W) then walked to (your) room, where he discovered that (you were) (MIDN R's) roommate. (LT W) entered the room and asked all persons present, except (you) and (MIDN R), to leave the room. (LT W) then asked (you) if he had forged the extra days on (MIDN R's) card and (you) replied that he had not. (You were) then directed by (LT W) to finish getting dressed and report to his office.

(LT W) questioned (you) in the presence of (LT C), the Ethics Advisor. (You) denied any knowledge of the extra days appearing on (MIDN R's) card. After discussing the issue with (LT C), (LT W) informed (you) that he would be referring (you) to the Brigade Honor Board.

On 23 February 1993 the Chief of Naval Personnel concurred with the Superintendent's recommendations for discharge and

reimbursement and, on 10 March 1993, the Chief of Naval Operations, as Acting Secretary of the Navy (SECNAV), approved those recommendations. Accordingly, on 19 March 1993 you were discharged from the Academy and the Naval Service.

On 10 September 1994 your counsel submitted a letter to SECNAV requesting reconsideration of your case. In his letter, counsel cited a report of the Navy Inspector General that found fault with the Academy's Honor Concept, and noted that SECNAV had waived the reimbursement requirement for those midshipmen found guilty in the recent cheating scandal. Counsel additionally alleged that your misconduct was "equally pervasive and widespread" as cheating and, therefore, waiver was warranted in your case. In support of this contention, counsel submitted a statement from a former midshipman who wrote that he had "heard of numerous occasions when a certain midshipman would sign off restriction days for another midshipman."

On 17 February 1995 the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA) replied to counsel's letter and stated, in part, as follows:

. . . ([Y]ou) were disenrolled from the . . . Academy for unsatisfactory conduct. The decision . . . was made on an individual basis with due consideration of the circumstances. In evaluating individual cases under applicable statutes and regulations, as you know, decisions in other cases of misconduct do not indicate how a given case under consideration should be decided.

Accordingly, ASN/M&RA affirmed the decision to require reimbursement.

In reviewing your request to waive or cancel the requirement to reimburse the government for the cost of your education at the Academy, the Board took note of 10 U.S.C. § 2005, which essentially states, in part, that reimbursement may be directed if an individual is discharged after failing to complete the course of instruction at the Academy. The Board also noted that upon entering the Academy, an individual is routinely advised of this provision of law, and you have never alleged that you were not so advised.

The Board first considered your contention that due to poor legal advice you received from a military lawyer at the Academy, you elected to resign instead of pleading your case to the Superintendent. However, you have not shown or even alleged that if such a meeting had taken place, you could have said or submitted anything that would have caused the Superintendent to overrule the findings and recommendations of the Honor Board and the Commandant. Accordingly, even if you received poor legal advice, you have not shown that this advice was prejudicial to you. See generally, *Strickland v. Washington*, 466 U.S. 668 (1984).

The Board found no merit in your assertion that requiring reimbursement in your case was unfair since falsifying restriction musters was relatively common. In this regard, although several former midshipmen have now submitted statements to the effect that such misconduct occurred frequently, it does not appear that Academy officials were aware of other instances of muster falsification. Accordingly, the Board believed that had other individuals been caught altering restriction muster cards, they also would have been discharged and required to perform enlisted service or reimburse the government for their education.

The Board also rejected your attempt to analogize your case to more recent cases in which the reimbursement requirement was waived. For instance, although the 24 midshipmen discharged from the Academy in 1994 for cheating were not required to serve in an enlisted status or reimburse the government for educational expenses, waivers were granted only because the investigation concerning the cheating scandal took so long. Further, senior Navy officials cautioned that such action "should not be looked at as something that will happen again in the future." John Fairhall, *Final Decision Made: 24 Mids to be Expelled*, Baltimore Sun, Apr. 29, 1994, at 1B, 9B. Accordingly, the Board concluded there was only a tenuous connection between these cheaters and you.

In another case, the Board recommended that a former midshipman be relieved of the reimbursement requirement, but that recommendation was later disapproved by ASN/M&RA. Another individual initiated action in Federal court after the Board denied relief, and the case was settled favorably to the individual. However, the Board was aware that cases are settled for a variety of reasons, and did not believe that such action should serve as a precedent. Finally, although there was a relatively recent case in which an individual was relieved of a requirement to reimburse the government even though he was discharged from the Academy for using LSD, the Board determined that the waiver action resulted from political considerations, and concluded that this case should not be viewed as setting a precedent that should be followed.

Accordingly, no corrective action is warranted, and your application has been denied. The names and votes of the members of the panel will be furnished upon request.

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

record, the burden is on the applicant to demonstrate the existence of a probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director