



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

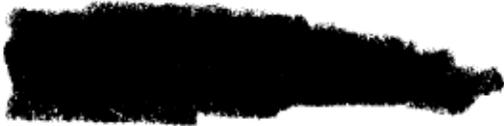
2 NAVY ANNEX

WASHINGTON DC 20370-5100

ELP

Docket No. 2676-99

8 November 1999



Dear [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 7 November 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that you reenlisted in the Navy on 20 April 1989 for four years as an MM1 (E-6). At the time of your reenlistment you had completed more than 12 years of active service. You were promoted to MMC (E-7) on 30 September 1990.

The record reflects sketchy details of a driving under the influence (DUI) incident in April 1991. However, on 20 May 1991, you were admitted to in-patient treatment at the alcohol rehabilitation department (ARD), Naval Hospital, Great Lakes, IL. You were discharged from treatment on 26 June 1991 and diagnosed as alcohol dependent. You were placed on a one year aftercare program of daily antabuse, urinalysis testing, counseling, and support group meetings. Your prognosis was considered poor and you were warned that further misconduct could result in administrative discharge.

During the early hours of 26 November 1991, you were apprehended by civil authorities for DUI. Later that day, you were referred

for psychiatric evaluation due to the DUI. The consultation report noted that you had previous DUI's in April 1981 and April 1991. Your explanation of the previous night was "I had recently graduated my first class...I was feeling so good...went down to the club...just had one beer but they - well - it led to another and...well, you know the rest." The report further noted that your primary support system was "drinking buddies at the club," and you currently worked there part-time but stated you would quit. You were diagnosed with alcohol dependence in partial remission.

On 29 November 1991, you were interviewed by a clinical psychologist. The interview report noted that on 25 November 1991 you drank 8-10 beers over a five hour period. You stated that after your discharge from ARD, you had two to three weeks of sobriety before returning to five to eight beers every one or two weeks. You stated you could not limit yourself. You stopped antabuse, then started, then stopped again. After ARD, you went to three alcoholics anonymous (AA) meetings per week, then stopped for one or two weeks, then started again. The foregoing diagnosis of alcohol dependence remained unchanged.

On 2 December 1991, upon further interview and psychological testing, you were diagnosed with a moderate personality disorder, not otherwise specified, with avoidant, dependent and obsessive-compulsive features, a condition existing prior to enlistment.

The aftercare program manager informed the command on 4 December 1991 that the DUI on 26 November 1991 constituted an alcohol-related incident and requested that you be considered for administrative discharge.

On 3 January 1992, you were convicted in civil court of the 26 November 1991 DUI and sentenced to probation for one year; a \$750 fine; and directed to complete a "third level DUI project," which was waived after continued counseling by the command psychologist.

On 5 February 1992 you were notified that administrative separation was being considered by reason of alcohol rehabilitation failure and misconduct due to civil conviction. You were advised of your procedural rights. You consulted with counsel and elected representation by counsel and presentation of your case to an administrative discharge board (ADB). You stated that you did not intend to file an appeal of the civil conviction, but did not desire to be separated before the time for appeal had passed.

You appeared before an ADB on 22 April 1992. You were represented by civilian counsel and an appointed military defense counsel. The defense counsel introduced evidence of prior

three chief warrant officers, an MMCM (E-9), two MMCS (E-8), a BTCS, and several chief petty officers from various ratings. All described you in glowing terms and stated that you had potential for further service. Certain civilians submitted statements to document your overall character and civic involvement. After considering the testimonial and documentary evidence, the ADB by a vote of 3 to 0 found you were an alcohol abuse rehabilitation failure and had committed misconduct due to civilian conviction and recommended that you be separated from the Naval service under honorable conditions for those reasons.

On 27 April 1992, the Navy clinical psychologist who had been seeing you submitted a letter stating that you been in outpatient therapy with her since 29 November 1991 and that you maintained sobriety since that time and had started an AA program on base. She stated that you had made "substantial progress" and noted your personality disorder was only moderate since your alcohol dependence was in full remission. She opined that you were psychologically fit and suitable for duty and transfer. However, you should continue attend AA meetings and maintain a 12-step program.

On 11 May 1992, military defense counsel submitted a letter of deficiency concerning the ADB to the Chief of Naval Personnel (CNP) which attached a letter from you. The letter contended that your outstanding record and "remarkable turn around since the DUI" warranted retention in the Navy. It was also contended that it was unethical for both the senior member and recorder to serve on the board since the senior member was the recorder's officer-in-charge. You alleged that the recorder told your fiance during the ADB that a decision had already been made to discharge you. Further contention was made that the recorder and senior member misled the civilian attorney into believing that the ADB would be concerned primarily with misconduct and not alcohol rehabilitation failure. You also alleged that the psychologist was wrongly prevented from testifying at the the ADB by the recorder. In this regard, you alleged that your medical record had been lost and your alcohol dependence had been diagnosed as being in remission. Finally, you contended that you were not properly represented by your military defense counsel because he "left one hour after the ADB convened and never showed up again." You asserted that had military counsel been there, he would have "caught some of the misleading information" presented. Concerning this allegation, the military counsel stated as follows:

(I) had a court appearance the afternoon of the (ADB). After discussion with civilian counsel and (Petitioner), the decision was made that it would be better to release (me) from further representation than to postpone the (ADB). This did, however, leave civilian counsel at a disadvantage.

But, such a disadvantage was determined at the time to be preferable to postponing the (ADB). In retrospect, this was not necessarily the correct decision.

The military defense counsel also contended that the transcript of the ADB was inadequate due to malfunctions in the recording equipment and, therefore, it did not portray an accurate picture of what happened at the ADB.

On 9 June 1992, the commanding officer (CO) responded to the foregoing contentions stating that nothing in the regulations prohibits a senior/subordinate relationship between the senior member and the recorder of an ADB. He expressed confidence that the senior member and the recorder acted properly in their respective roles. Further, he said that neither the record nor the civilian who put the recorder's exhibits together had possession of the medical record. He also stated that although you had sought treatment after the November 1991 DUI and formed a successful AA group, you still had an alcohol related incident after ARD treatment. Further, he documented certain incidents of non-compliance with the aftercare program. He also stated that the military defense counsel was released from further representation at the ADB only after the situation was discussed with you and civilian counsel. Further, the CO stated that both the senior member and the recorder made it clear that you were being processed for both alcohol rehabilitation failure and misconduct due to civil conviction, and that the foregoing was clearly stated on the letter of notification. He noted that the recorder denied making any statement to your fiance that a decision on your discharge had already been made. The CO finally noted that although there was a malfunction with the recording equipment at the ADB, the proceedings were halted and it was repaired.

The CO forwarded the case to CNP on 11 June 1992 recommending approval of the findings, and your separation with an honorable discharge. On 22 June 1992, your civilian counsel submitted a memorandum stating that he had not received a copy of the ADB proceedings and noted that military counsel had not attended the entire ADB due to other obligations. He asserted that you had wanted the appointed defense counsel to be present during the hearing.

On 8 July 1992, CNP directed an honorable discharge by reason of misconduct due to civil conviction. A memorandum on file in the record directs that you be given a copy of the ADB proceedings.

The record reflects that the enlisted performance evaluation report for the period of 1 October 1991 to 14 October 1992 was adverse. You were assigned an adverse mark of 2.8 in personal behavior and were not recommended for reenlistment. The

reporting senior stated that you had "displayed a lack of good judgment by your continuous abuse of alcohol."

The record further reflects that on 25 October 1992 you appealed the DUI conviction of 3 January 1992. You contended that you were denied effective assistance of counsel since your civilian lawyer did not advise you that the conviction would result in discharge from the Navy. On 29 October 1992, the U.S. District Court for the Northern District of Illinois entered a temporary restraining order (TRO) directing the Navy not to discharge you. CNP was notified that a rehearing was scheduled for 4 November 1992 at which time the TRO would expire. However, on 5 November 1992 the TRO was extended until 13 November 1992. The CO advised CNP on 18 November 1992 that it was the opinion of the court that you did not receive a fair and impartial hearing because of your claim that you did not have military counsel present during the entire proceedings, and because the recorder entered the deliberation room while the members were deliberating. A final hearing was scheduled for 21 January 1993. The results of that hearing are not file in your record.

On 19 April 1993, you were honorably discharged by reason of expiration of enlistment and assigned an RE-4 reenlistment code. The enlisted performance evaluation submitted for the period 15 October 1992 to 19 April 1993 incident to your discharge continued not to recommend you for reenlistment due to your past alcohol abuse incidents and the alcohol rehabilitation failure.

In its review of your application the Board conducted a careful search your of service records for any mitigating factors which might warrant changing the assigned reenlistment code and removing those records which prevent you from reenlisting. However, no justification for removing the discharge processing documentation or changing your reenlistment code could be found. The Board noted your contention that the commanding officer's non-recommendation for reenlistment was based on information outside the reporting period. You point out that you had straight 4.0 performance evaluations from 1984 through 1991 and received an overall rating of 3.8 in 1992, were group leader for the local AA, and a leader in your church and community for charity and youth activities.

The Board specifically noted the 26 January 1993 letter of reprimand you submitted with your application. The letter of reprimand was issued at nonjudicial punishment (NJP) for DUI. However, the letter of reprimand was not addressed to you, but to another chief petty officer who received NJP on 26 January 1993 for a 17 December 1992 DUI. But in the attachment to your application, you state that you were issued the letter of reprimand for such an offense.

Regulations require the assignment of an RE-4 reenlistment code to individuals who are not recommended for reenlistment by their commanding officer. The Board noted the TRO which prevented the Navy from administratively discharging you by reason of misconduct due to civil conviction. It appeared to the Board that the court's decision was upheld since you were separated at the expiration of your enlistment and not for misconduct. Your contention that the commanding officer's non-recommendation for reenlistment was based on information outside the reporting period is without merit. A commanding officer's non-recommendation for reenlistment and decision to assign an RE-4 reenlistment code is based on the individual's overall record in the current enlistment. The Board concluded that an alcohol abuse rehabilitation failure; a DUI conviction; and an adverse performance evaluation within a year of discharge; and, if you are to be believed, a letter of reprimand for another DUI, all provided sufficient justification to warrant the commanding officer's non-recommendation for retention. The Board concluded there was no basis for reinstating you to active duty, the reenlistment code is proper and no change is warranted. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request. It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director