



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

ELP
Docket No. 5272-98
2 July 1999

[REDACTED]

[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 16 June 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 15 October 1996 for five years as an FT1 (E-6). At the time of your reenlistment you had completed more than 11 years of prior active service. The record reflects that in October 1995, during a prior enlistment, you had an alcohol related incident for which you received nonjudicial punishment. You completed a level III alcohol rehabilitation treatment program in November 1995.

On 24 May 1997, you were involved in a minor automobile accident and were cited by local police for driving under the influence (DUI) with a blood alcohol content (BAC) of .251. You were placed on report on 30 May 1997. On 16 June 1997 a Report and Disposition of Offenses was referred for preliminary investigation and a recommendation. A preliminary inquiry officer (PIO) reported to the commanding officer (CO) that in addition to being cited for DUI, you also disobeyed a lawful general regulation by failing to immediately advise the CO of your arrest by civil authorities. It was noted that statements by your supervisors agreed that you were an excellent watch stander and an asset to the command. The PIO recommended that

the offenses be disposed of at nonjudicial punishment (NJP). On the same day, you received NJP for drunk and reckless driving of a vehicle and disobedience of a lawful regulation by failing to immediately notify the CO of your arrest by civil authorities. Punishment imposed consisted of a reduction in rate to FT2 (E-5) and forfeitures of one-half pay per month for two months. Thereafter, you were disqualified for duty in submarines.

On 3 July 1997 you appealed the NJP as being unjust. You contended that you were not guilty of violating a lawful order since the accident occurred on a weekend and you notified the command on your first day back at work. You claimed that the CO imposed NJP on you for DUI without suspending any of the punishment, but a week later he suspended the punishment of another crewmember accused of the same offense. Further, you were processed for administrative separation and the other sailor was not. You asserted that the command's action was unjust since most commands did not act in such a case until it was resolved by civil authorities. You noted that the command knew of your arrest only because of your notification upon returning to work.

On 11 July 1997 you were notified that you were being considered for discharge by reason of misconduct due to commission of a serious offense as evidenced by the foregoing NJP and alcohol rehabilitation failure. You were advised of your procedural rights and elected representation by counsel and presentation of your case to an administrative discharge board (ADB).

On 30 July 1997 you appeared before an ADB with counsel. The ADB found, by a vote of 3-0, that a preponderance of the evidence showed that you had committed misconduct due to commission of a serious offense and alcohol abuse rehabilitation failure. The ADB recommended an honorable discharge. Your defense counsel filed a letter of deficiency, citing the Manual of the Judge Advocate General Manual (JAGMAN) which stated that a service member should not be subject to court-martial or mast when he is being tried in a civil court for an offense. Counsel asserted that you were being tried by civil authorities and stated "the question is not can the command punish and process you but should it." Counsel argued that such actions ran counter to principles which prohibit double jeopardy. Counsel requested retention or, as an alternative, separation on the basis of alcohol rehabilitation failure.

On 21 August 1997 your NJP appeal was denied. The appeal authority initially noted that since the regulation at issue is a lawful general order, it need not be shown that an individual had actual knowledge of its provisions. More importantly, the evidence supported a finding that you were aware of the requirement to report your arrest since you admitted to other

individuals that you knew of the requirement, but did not want to report the arrest until you talked to an attorney. Further, other individuals stated that you did not notify the command until the third duty day after the arrest. With regard to your contention of unequal punishment by the command, the appeal authority stated that although you and the other individual committed the same offense, the CO took into consideration that you were a first class petty officer and had previously received treatment for an alcohol abuse problem.

Your medical record reflects that on 22 August 1997 a fine needle aspiration of the right thyroid showed no obvious evidence of malignancy.

On 27 August 1997, the CO concurred with the ADB recommendation for an honorable discharge and forwarded the proceedings to the Chief of Naval Personnel, advising that you were being separated by reason of misconduct. He noted that you had not yet been tried by civil authorities for the single offense of DUI, but had retained a lawyer and were pursuing deferred prosecution in an attempt to avoid trial. The CO stated that there was no double jeopardy issue in this case, and there was no fleet or group policy on the issue of awarding NJP versus deferring to civil authorities. He asserted that the Navy wisely allows a CO to exercise NJP authority at his discretion. The CO further asserted that counsel's letter cited no deficiencies in the separation processing but only complained about the NJP which served as the basis for separation. The CO stated that you demonstrated a blatant disregard for the Navy's policy of zero tolerance for alcohol abuse since you endangered yourself and others by operating a motor vehicle while under the influence. Your high blood alcohol content was seen as an additional aggravating factor. The CO determined that you had no potential for productive naval service and your actions undermined good order and discipline.

The medical record reflects that thyroid surgery scheduled for 8 September 1997 was cancelled due to separation. On the date of separation, the surgeon spoke to your executive officer and was told that you were ineligible for care and could seek treatment through the Department of Veterans Affairs. However, the surgeon suggested that you be sent on temporary additional duty for surgery since such action was required for a meaningful diagnosis. However, on 4 September 1997, you were honorably discharged by reason of misconduct.

Paragraph 510.6 of the Standard Organization and Regulations of the Navy states "any person arrested or detained by civil authorities will immediately advise the commanding officer . . . and state the facts concerning such arrest or detention."

Chapter 36 of the Naval Military Personnel Manual authorizes separation of enlisted personnel by reason of misconduct due to commission of a serious military or civilian offense when the specific circumstances of the offense warrant separation; and the member has committed an offense for which a punitive discharge is authorized by the Manual for Court-Martial. A bad conduct discharge is authorized for the offenses of drunk driving and failure to obey a general order or regulation. Chapter 36 provides that the special court-martial convening authority is the discharge authority when administrative board procedures are used and the ADB recommends separation with an Honorable or General discharge.

Paragraph 0124 of the JAGMAN establishes policy regarding the exercise of military jurisdiction in cases tried in domestic or foreign criminal courts. That paragraph states that when a person in the naval service has been tried in a state or foreign court, whether convicted or acquitted, or when a member's case has been "diverted" out of the regular criminal process for a probationary period or adjudicated by juvenile court authorities, military charges shall not be referred to a court-martial or be the subject of NJP proceedings for the same act or acts. An exception is made for those unusual cases in which trial by court-martial or the imposition of NJP is considered essential in the interest of justice, discipline, and proper administration with the naval service.

In its review of your application the Board carefully weighed all potentially mitigating factors such as your more than 11 years of honorable service prior to the DUI, which included the award of three Good Conduct Medals and the Navy Achievement Medal. The Board noted the lengthy explanation of your version of the events and circumstances which led to your NJP and subsequent discharge, and the documentation submitted in support of your application.

You essentially request removal of the NJP from the record and reinstatement in the Navy. The Board noted your numerous contentions to the effect that the NJP was unjust in that punishment was imposed prior to the case being resolved in the civil court; other commands in the area did not take any action in similar cases until the civil court had acted; and the command ignored you when you alleged a violation of the jurisdictional policy outlined in the JAGMAN. You also claim that you were given an insufficient amount of time to prepare for the NJP, especially since the charge of failure to obey a lawful regulation was added very shortly before the CO imposed NJP. You assert that your fundamental right to due process was violated by this and other injustices. You also allege that you were discharged only four days before you had been scheduled for surgery.

You further contend that the offenses did not warrant discharge given your otherwise excellent record; the circumstances did not meet regulatory requirements for separation; no response was received to the letter of deficiency; and the command overreacted and rushed to judgment in an attempt to make an example out of you. You also allege that the ADB was held before your appeal was final and took no action regarding the unjust circumstances surrounding the NJP; and the command abused its authority by making it impossible for you to defend yourself. You claim that the charge of failure to obey a lawful general regulation was fabricated in order to justify the CO's punitive action and the use of "misconduct" as a basis for discharge. You contend that the arrest was reported on the first day back to work; you were directed not to have any contact with anyone on board the submarine, and therefore could not obtain any witnesses; the executive officer threatened further adverse action if you appealed the NJP; and you were told that you would receive additional alcohol rehabilitation prior to discharge.

The Board concluded that the foregoing factors, contentions, assertions, and claims are insufficient to warrant removal of the NJP from the record, or reinstating you in the Navy. In this regard, the Board was persuaded that the CO had the authority to impose NJP for the offenses. The Board noted that the important word in the JAGMAN article on which you rely is the word "tried." At the time the NJP was imposed, you had not been tried on the DUI charge. Therefore, the Board concluded there was no abuse of discretion by the CO when he imposed NJP. In the letter of deficiency, your own defense counsel stated the question was "not can the command punish you, but should it", indicating that even he realized the CO was within his authority since the civil court had not acted. You provide no evidence as to what action civil authorities took on the civil offense. The Board also noted that the regulation which required that an arrest be reported clearly states that such action must be taken immediately. This means that you should have reported the arrest to the command duty officer or officer-of-the-day sooner than you did.

The Navy views drunken driving as a serious matter. The Board noted your otherwise excellent record. However, the Board believed your excellent record could not mitigate your gross lack of judgment when you made a choice to operate an automobile with a BAC of 251. You were a first class petty officer with above average intelligence, a highly skilled technician, and had received the necessary tools for maintaining sobriety during alcohol rehabilitation. The Board believed your actions were inexcusable, and that the CO properly determined that you had no potential for further service. Despite your contention to the contrary, a drunk driving offense met the regulatory requirements for discharge by reason of misconduct due to commission of a serious offense since a punitive discharge could be awarded if

tried by court-martial. Determining whether or not an offense warrants separation is a subjective issue to be determined by the ADB and the CO. In your case, the ADB apparently agreed with the CO when it concluded that the facts and circumstances of the case warranted discharge. Your contention that the ADB failed to consider the legitimacy of the NJP proceedings is without merit. The purpose of an ADB is to determine if an individual committed misconduct and, if so, whether he should be retained or discharged and the characterization of the discharge. Action by an ADB neither affects the legitimacy of NJP proceedings nor is it an avenue for reversing the results. The fact that the ADB was convened prior the NJP appeal authority's action is of no consequence, especially since your appeal was denied. Your numerous other claims are neither supported by the evidence of record, nor by any corroborating evidence submitted in support of your application.

Lastly, the Board noted that scheduled surgery was cancelled due your discharge. Administrative separation terminates any medical treatment or disability processing then in effect. Since available records contained no evidence of malignancy at the time of discharge, the command's recommendation that you pursue treatment through the Department of the Veterans Affairs appears appropriate and proper.

In view of the foregoing, the Board found no basis for removing the NJP and concluded that the discharge was 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