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

AEG
Docket No. 3943-99
1 September 2000

[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 29 August 2000. 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, your naval record and applicable statutes, regulations and policies. The Board also considered the advisory opinion and legal analysis, dated 14 July 2000, furnished by the Deputy Assistant Judge Advocate General (Administrative Law), copies of which is attached.

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 first enlisted in the Navy on 13 August 1979. For the next 13 years you served well and were advanced to the rate of chief sonar technician (E-7).

On or about 15 September 1992 you submitted a urine sample that tested positive for methamphetamine. Accordingly, at a special court-martial held on 4 December 1992, you were tried on a single specification of violating Article 112a of the Uniform Code of Military Justice (UCMJ). After you denied using drugs under oath and introduced evidence that showed your good military character, you were acquitted of the charge and specification. On 6 May 1994 you reenlisted for five years.

On 30 November 1994 you once again submitted a urine sample that tested positive for methamphetamine. On 21 December 1994 you received nonjudicial punishment (NJP) for this violation of UCMJ Article 112a. Punishment extended to forfeitures of over $1,000 per month for two months and restriction for 30 days. On 25

December 1994 you submitted a lengthy statement to the commanding officer (CO) in which you admitted to a history of drug use since age 13 consisting of the intermittent use of marijuana, cocaine and methamphetamine. However, you also said that you were no longer were in denial, and had received help from Narcotics Anonymous. Concerning the drug use that led to the earlier court-martial, you stated as follows:

> Two years ago I had my first positive urinalysis for methamphetamine. I chose court-martial, denied it, and was found not guilty. Even at this point, I did not realize I had a problem. The same day I was found not guilty, I celebrated with a line of meth . . .

Administrative separation action was then initiated by reason of misconduct due to drug abuse based on the use of methamphetamine. At an administrative discharge board (ADB), held on 8 March 1995, evidence was introduced concerning your recent NJP. You also testified concerning your career in the Navy, your drug use, and the reasons for it. In this testimony, you also admitted to perjuring yourself at the 1992 SPCM, stating that the allegation of methamphetamine use "was true, and I denied it."

Other individuals also testified on your behalf, including your wife, another member of Narcotics Anonymous, and several other servicemembers. These individuals testified about your drug problem and your efforts to overcome it, and your achievements in the Navy. After considering the evidence, the ADB found that you had committed misconduct due to drug abuse as alleged and recommended discharge under other than honorable conditions (UOTHC). However, the ADB also recommended suspension of the discharge for a probationary period of one year.

In an undated letter forwarding the case to the Chief of Naval Personnel (CNP), the CO concurred with the findings and recommendations of the ADB. However, on 6 June 1995 CNP directed an unsuspended discharge UOTHC and, on 21 June 1995, you were so separated.

Meanwhile, on 16 March 1995 the United States District Court for the Northern District of California decided the case of *Rogers v. Dalton*, No. C-94-3388 EFL (N.D. Ca. 1995). In that case, the court set aside the discharge of a Sailor who had been separated for drug abuse and rationalized that decision as follows:

> The binding policy of the Department of Defense (DOD) concerning drug and alcohol abuse . . . is set forth at 32 C.F.R. § 62.4. DOD policy is to " . . .(5) Treat or counsel alcohol and drug abusers and rehabilitate the maximum feasible number of them; (6) Discipline and/or discharge traffickers and those alcohol or drug abusers who cannot or will not be rehabilitated . . ." Subparagraphs (5) and (6), taken together provide that it is the intent of the DOD to rehabilitate and retain the maximum feasible

number of alcohol and drug abusers, and to discharge only those traffickers and abusers who "cannot or will not be rehabilitated."

Subsequent to the enactment of 32 C.F.R. § 62.4, the Navy promulgated regulations, directives and instructions which conflict with 32 C.F.R. § 62.4. Navy regulations MILPERSMAN (Naval Military Personnel Manual) 3630620 and OPNAVINST (Chief of Naval Operations Instruction) 5350.4B, as modified by NAVADMIN (Naval Administrative Message) 18/92 create a "zero tolerance" drug policy by requiring mandatory processing for separation of all first time drug offenders, and provide no opportunity for rehabilitation and retention to be considered.

The DOD Directive establishes a policy whereby individual services are to implement regulations and procedures which provide for an evaluation of drug abusers' potential for rehabilitation prior to discharging them. The Navy MILPERSMAN regulations governing the (ADB) proceedings do not require the (ADB) to make such a finding, and no such fining was made by the (ADB) in (the plaintiff's case. The Navy's failure to follow DOD policy by discharging (the plaintiff) without considering his potential for rehabilitation denied (him) due process of law.

The cited provisions of 32 C.F.R. § 62.4 were codified in paragraph D1 of DOD Directive (DODDIR) 1010.4 of 25 August 1980. On 18 January 1996 the Director of Correspondence and Directives, Department of Defense, ordered that the directive be modified by deleting the requirement to rehabilitate drug abusers. The change was effective immediately. However, 32 C.F.R. 62.4, as it is set forth in the *Federal Register*, has not been modified. The January 1996 change was embodied in the new DODDIR 1010.4 of 3 September 1997.

Meanwhile, on 31 March 1997 you filed suit in the United States District Court for the Southern District of California, essentially alleging that your discharge failed to pass constitutional muster for the reasons set forth in *Rogers, supra*. On 2 December 1997 you and the Navy settled the case and agreed that the discharge would be set aside and you would be restored to duty, "with the understanding that (you are) subject to administrative reprocessing for drug abuse . . . " Both parties to the litigation also agreed that the settlement "shall not constitute an admission of liability on the part of the United States, . . . and is entered into by both parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation."

Consequently, on or about 18 May 1998, you were reinstated in the Navy. On 13 July 1998 administrative separation action was initiated by reason of misconduct due to drug abuse as evidenced by your 1994 violation of UCMJ Article 112a, as provided for in

MILPERSMAN Article 1910-146; and by reason of misconduct due to commission of a serious offense as evidenced by your perjury at the December 1992 court-martial, in violation of UCMJ Article 131, as provided for in MILPERSMAN Article 1910-142.

You once again elected to present your case to an ADB, which met on 5 August 1998. Among the exhibits introduced by the recorder to the ADB was a copy of MILPERSMAN Article 1910-212. That article states that in making the decision to whether to separate or retain an individual, the ADB and separation authority should consider the seriousness of the offense and likelihood of a recurrence, and the individual's potential for further service and military record. No other information, such as the original or modified versions of DODDIR 1010.4 or 32 C.F.R. § 62.4, was presented to the ADB concerning the policy on rehabilitation and retention of drug abusers. During the ADB, you presented evidence of past achievements during your Navy career. Testimony and statements were also received from a number of individuals who opined that you had potential for further service. Several of these individuals had experience or training in advising and counseling drug abusers.

After considering the documentary evidence and testimony, the ADB found that you had committed misconduct due to drug abuse and commission of a serious offense as alleged. The ADB recommended separation because "member has no potential for further service," and further recommended a characterization of UOTHC. In his letter of 19 August 1998 concurring with the ADB's findings and recommendations, the CO noted that " . . . of utmost importance, the (ADB) found that (you lack) rehabilitative potential . . ."

On 9 November 1998 CNP, acting in his capacity as Deputy Chief of Naval Operations for Personnel, directed your discharge UOTHC by reason of misconduct. CNP also stated that MILPERSMAN Article 1910-146, which provides for separation by reason of misconduct due to drug abuse, constituted the separation authority. Additionally, CNP directed a separation code of "GKK," which means that the individual was discharged due to drug abuse. Accordingly, on 18 December 1998, you were discharged UOTHC after about 19 years and 4 months of active service.

The Board rejected your contentions that separation processing based on your perjury violated the settlement agreement of 2 December 1997, and that such processing was a nullity because the perjury occurred during a prior enlistment. In this regard, the Board substantially concurred with paragraph 3b of the advisory opinion and paragraphs 4e and 5b of the legal analysis.

The Board also concluded your discharge would be proper and appropriate even if even if the perjury should not have been used as a basis for separation. MILPERSMAN Article 1910-170 essentially states that when an individual is processed for discharge for more than one reason, the separation authority must choose the most appropriate reason for separation when he directs

discharge. CNP did so 9 November 1998 when he directed separation by reason of misconduct due to drug abuse. Accordingly, it is immaterial whether processing by reason of commission of a serious offense was proper since you were not actually separated for that reason. Additionally, in accordance with MILPERSMAN Article 1910-214, even if the perjury had not been used as a basis for separation, that misconduct could have been considered by the ADB on the issue of whether you should be separated or retained. That article allows adverse matter from a prior enlistment to be considered if it would have a direct value in determining whether separation is appropriate. Although the use of such material is normally be limited to situations involving patterns of misconduct, your drug abuse constituted such a pattern, and you perjured yourself to cover up part of that pattern of abuse.

The Board also found no merit in your contentions that regulations in effect in 1998 failed to contain any procedures by which the ADB could consider your potential for rehabilitation, and directing separation UOTHC was improper given the evidence of rehabilitation in the record. Along these lines, the Board concurred with paragraph 3a of the advisory opinion and paragraphs 4a-d and 5a of the legal analysis. The Board also noted that MILPERSMAN Article 1910-212 was considered by the second ADB and states that in deciding whether an individual is to be separated, the ADB should consider the likelihood that the offense will recur, the individual's potential for further service, and his entire military record. In short, an ADB is required to consider an individual's rehabilitative potential, and that is what the ADB did in your case. Additionally, DODDIR 1010.4 called for rehabilitation of "the maximum feasible number" of drug abusers. Discharge was authorized for those abusers "who could not or would not" be rehabilitated." The mandate for rehabilitation clearly refers to rehabilitation for the purpose of retention in the service, and not simply to weaning an abuser from his drug use. The Board believed it is not feasible to rehabilitate and retain an individual such as yourself who used drugs while in a position of leadership as a chief petty officer. It is a fundamental tenet of leadership that someone in such a position must set a good example for subordinates, and such an individual is rightly held to a higher standard of conduct. Accordingly, the ADB and CNP could reasonably conclude that it was not feasible to rehabilitate you for the purpose of retention in the Navy.

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 a probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure

Copy to: Mr. [redacted]