



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

ELP  
Docket No. 6221-00  
16 July 2001

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 Navy Records, sitting in executive session, considered your application on 27 June 2001. 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.

You enlisted in the Marine Corps on 28 November 1994 for four years at age 23. The record reflects that you were advanced to LCPL (E-3) and served without incident until 26 March 1996, when you received nonjudicial punishment (NJP) for two incidents of disrespect. Punishment imposed consisted of a reduction in rank to PFC (E-3), forfeitures of \$300 per month for two months, and 45 days of restriction and extra duty. In April 1996, you were formally counseled for violating a general order and for taking more than one newspaper from a newspaper machine, and warned that failure to take corrective action could result in administrative separation.

At a medical examination on 17 April 1996, you were diagnosed with a "traumatic left median neuropathy with electromyographic evidence of denervation and secondary focal dystonia." A

physical evaluation board (PEB) was indicated since your inability to "flex or oppose your left thumb" appeared to be permanent, and you were considered unable to perform the duties of your rank. A medical board concurred with the diagnosis and recommended that your case be referred to a PEB for further adjudication.

On 3 May 1996 you received a second NJP for failure to go to your appointed place of duty and four instances of failure to obey a lawful order. Punishment consisted of a forfeiture, restriction and extra duty.

The record reflects that on 13 May 1996, a PEB requested that your former command provide a copy of the line of duty investigation that was conducted regarding the stab wound you sustained to your left wrist while horsing around in the barracks on or about 4 March 1995. On 17 June 1996, after no response, the command was advised that if it could not provide a copy of the preliminary inquiry and the pertinent health record entries, or the line of duty investigation, your PEB case would be terminated.

On 7 August 1996 you received your third NJP for a UA of about a day and absence from your appointed place of duty. Punishment imposed was a forfeiture of \$228 and 14 days of restriction and extra duty, all of which were suspended for six months. On 29 August 1996 the suspended punishment was vacated and ordered executed. During the four month period from August to November 1996 you were formally counseled and warned on four occasions regarding the deficiencies in your personal appearance, apathetic attitude, and misconduct involving UAs, disrespect, and disobedience of orders.

On 25 November 1996 you were notified that you were being recommended for discharge under other than honorable conditions by reason of misconduct due to minor disciplinary infractions. You were advised of your procedural rights, declined to consult with legal counsel or submit a statement in your own behalf, and waived the right to present your case to an administrative discharge board (ADB). Thereafter, the commanding officer recommended your discharge under other than honorable conditions by reason of misconduct due to minor disciplinary infractions. A staff judge advocate found the discharge processing documentation to be sufficient in law and fact. The discharge authority approved the recommendation and on 4 December 1996 you were administratively reduced to PVT (E-1) due to incompetence. On 18 January 1997, a DD Form 214 was issued showing that you were honorably discharged by reason of personality disorder. On 6 March 1997, a DD form 215 (Correction to DD Form 214) was

issued and corrected the reason for discharge to "minor disciplinary infractions" and the characterization to "other than honorable conditions." On 25 July 1997 the Naval Discharge Review Board denied your request for an upgrade of your discharge.

This Board was unsuccessful in obtaining the medical records which were available at the time of the NDRB's review. A staff member of the Board was advised by the PEB that it had no records and that your case was terminated prior to any final action.

Paragraph 8508 of the Marine Corps Separation Manual states as follows:

Administrative separation does not supersede a disability separation; only disciplinary separation is not precluded by the disability statutes and such separations supersede disability separation or retirement.

Additionally, the regulation states that if a disciplinary or administrative discharge proceedings results in either a punitive or administrative discharge for misconduct, the medical board is filed in the Marine's terminated health record and the physical defects are noted in the medical record.

SECNAVINST 1850.4c provides binding guidance on the disability evaluation system within the Department of the Navy. Paragraph 2072a of that directive states as follows:

a. Disciplinary separation is not precluded by the disability statutes and such separation . . . supersede disability separation or retirement. Whenever a member is being processed for disability evaluation and, at the same time, administrative involuntary separation for misconduct, (or) disciplinary proceedings which could result in a punitive discharge, disability evaluation shall be suspended and the non-disability action monitored by . . . CMC. If the action taken does not include punitive or administrative discharge for misconduct, the case will be forwarded or returned to the PEB for processing. If the action includes (such a) discharge, the medical board report will be filed in the member's terminated health record.

In its review of your application the Board weighed all potentially mitigating factors such as your letters of reference attesting to your post-service achievements and employment in a home therapy program, and your university academic records. You also contend that you were unfairly disciplined on several occasions after physical disability proceedings were initiated,

were singled out for discipline and counseling because of these proceedings, and that command delays effectively terminated the PEB proceedings and denied you a medical discharge in favor of an administrative discharge. Counsel asserts that your PEB was mishandled and that regulations provide that an administrative separation does not supersede disability separations which have been initiated.

The Board concluded that the foregoing factors were insufficient to warrant recharacterization of your discharge given your record of three NJPs for nine separate offenses and a vacation action, and formal counseling on five occasions all of which occurred during an eight period from March to November 1996. Despite counsel's contentions to the contrary, in most cases, administrative separation for misconduct does supersede disability separation processing. Administrative separation action in your case did not commence until after your third NJP and seven months after a medical board referred your case to a PEB. Since the PEB had not been approved by that time, administrative separation action took precedence over any disability processing. Your contention that you were singled out for discipline because of these proceedings is neither supported by the evidence of record nor by any evidence submitted in support of your application. The Board also noted that you had more than one instance of misconduct prior to the initiation of any medical board proceedings, and you could have been processed for separation by reason of misconduct as early as May 1996 when you received your second NJP. Clearly you failed to learn from your initial disciplinary experience and your continued infractions demonstrated a willful disregard for military discipline and authority. Furthermore, you waived the opportunity to present your case to an ADB, the one opportunity you had to show why you should be retained or discharged under honorable conditions. Your discharge was accomplished in compliance with applicable regulations and there is no indication of any procedural errors that would have substantially jeopardized your rights. The Board 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

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Attorney at Law