



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

AEG
Docket No: 1155-02
6 December 2002

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 3 December 2002. 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, your medical 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 were commissioned an ensign (O-1) in the Navy on 24 May 1996 upon graduating from the Naval Academy. After brief periods of duty at the Academy and the Joint Staff, Washington, D.C, you reported for duty to the Naval Aviation Schools Command (NAVAVSCOLSCOM), Pensacola, FL for training as a naval aviator.

On 22 July 1997 you were injured in a traffic accident. A blood alcohol content (BAC) test performed at that time showed a BAC of .11. Consequently, you were charged with driving under the influence (DUI) of alcohol. You were found guilty of this offense on 19 February 1998 and sentenced to probation, community service, a \$776 fine, and suspension of your driver's license. Attendance at DUI school and a victim impact panel was also directed.

You were screened and evaluated at the local addiction treatment facility (ATF) on 24 September 1997, but did not meet the applicable criteria for a diagnosis of either alcohol dependence

or abuse.¹ You completed an "Alcohol Impact" class on 23 November 1997. A certificate dated 12 March 1998 reflects that you completed Navy DUI remedial training, consisting of 24 hours of alcohol/drug awareness instruction, in conjunction with the Navy Alcohol and Drug Safety Action Program (NADSAP).

Also in March 1998, you were shown a draft of a Civil Action Report that the Commanding Officer (CO), NAVAVSCOLSCOM proposed to send to the Chief of Naval Personnel (CNP). In response to the draft action, on 11 March 1998 you submitted the following statement:

I am aware of the consequences of this conviction in both the Naval Service and the Civil System and I accept full responsibility for my actions. Through my poor example I have embarrassed the Naval Service and myself. I have learned a great deal from the entire experience and I will use these lessons to improve myself as an officer and a person. I am grateful for the opportunity to continue my Naval Career. My desire to succeed in the Naval Service has not been diminished by the handicap I have placed upon myself through this conviction.

On 1 April 1998 the CO, NAVAVSCOLSCOM submitted the Civil Action Report to CNP and stated that part of your sentence was "probation for 12 months."

By letter of 19 May 1998 CNP sent you a copy of the final Civil Action Report and stated that you should have been given an opportunity to comment on the final report and not the draft. You were given 15 days to do so and advised that if no comment was received by that time, the statement of 11 March 1998 would be entered into the record as your response to the final report. The record does not indicate that you submitted any further comment.

Meanwhile, you had been reassigned to Training Squadron SIX. On 15 June 1998 you were promoted to lieutenant junior grade (LTJG; O-2). A fitness report which closed out on 1 September 1998 states that you had been dropped from flight training.

On 1 November 1998 you were refused entry into a local tavern due to your intoxicated appearance. When an employee tried to get you a taxi, you hit him in the side of his face with a closed fist. You were then arrested by civil authorities and charged with assault and battery. On 23 November 1998 you pled *nolo contendere*, were found guilty and sentenced to a \$300 fine.

On 3 December 1998 you returned to the ATF and were once again screened and evaluated. Subsequently you were diagnosed with "alcohol abuse (provisional)" and recommended for return to duty,

¹ *Diagnostic and Statistical Manual of Mental Disorders* 181-83 (American Psychiatric Association 4th ed. 1994). [DSM-IV]

attendance at a one-week program of formal outpatient treatment, and 12 weeks of structured continuing care. Entries in the medical record reflect that you completed an "intensive outpatient" program in January and February 1999.

Once again, you were presented with a draft of a civil action report and, on 10 December 1998, you submitted a statement which referenced such a report and "concurred that all information set forth in (the report) is said to be true." On 14 December 1998 the Commander, Training Wing FIVE submitted a final Civil Action Report to Navy Personnel Command that stated, in part, as follows:

This is not (LTJG M's; your) first conviction for an alcohol related incident . . . (LTJG M) was convicted on 19 February 1998 for a DUI offense on 22 July 1997 and was sentenced to probation for 12 months . . .

The Commander also recommended that you be processed for administrative separation.

It appears that the command presented you with a copy of the final Civil Action Report because on 16 December 1998, you submitted a letter with the subject line "Civil Action Report," in which you acknowledged that the convictions had placed your career in jeopardy, accepted responsibility for your actions, and requested "the opportunity to complete my commitment to the Navy honorably."

On 1 March 1999 CNP notified you that administrative separation action had been initiated, and of the debt you would owe the government for the educational expenses incurred while at the Naval Academy. Although the separation processing documentation is not a part of the record, your Certificate of Release or Discharge from Active Duty (DD Form 214) indicates that separation action was initiated by reason of misconduct due to commission of a serious military or civilian offense.

In response to the proposed separation action, you requested retention in the Navy. In the alternative, you submitted an unqualified resignation which, if accepted, would have resulted in an honorable discharge instead of the general discharge that could result upon approval of the administrative separation action. In support of the request for retention, you submitted a letter from the former CO at NAVAVSCOLSCOM, who summarized your excellent performance while attached to that command, questioned the legal advice which led you to plead no contest to the assault charge, and opined that "there's still fine officer material in (LTJG M)." You also elected to contest the validity of the indebtedness to the government; however, in so doing, only reiterated your desire for retention and did not contend that the debt itself was invalid.

On 20 April 1999 CNP submitted a letter to the Secretary of the Navy (SECNAV) recommending separation with a general discharge by reason of misconduct and, in accordance with applicable Federal law,² pro-rata recoupment of the cost of your education at the Academy. In the letter, CNP quoted from the Civil Action Report of 1 April 1998 to the effect that the first civil conviction resulted in "probation for 12 months." After reciting the remainder of the substantive and procedural history of your case, CNP stated as follows:

. . . (LTJG M's) behavior outside of the work environment has been reprehensible and well below that expected of a naval officer. In a statement made by (LTJG M) following his DUI conviction he stated "I have learned a great deal from the entire experience and I will use these lessons to improve myself as an officer and a person." Yet less than nine months after this statement *and while still on probation* he was arrested for assaulting a person while heavily intoxicated. (LTJG M) has demonstrated a pattern of poor judgment and an inability to understand the consequences of his actions. These traits are clearly inconsistent with the needs of the Naval Service and the officer corps. (LTJG M's) misconduct warrants disapproval of his resignation request and is deserving of a General (Under Honorable Conditions) discharge . . . (emphasis supplied).

On 4 May 1999 the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA), acting for SECNAV, approved a general discharge and recoupment in the amount of \$34,397.60.

On 3 June 1999 a retired Navy captain (CAPT; O-6) wrote a letter to CNP in which he stated as follows:

As we have seen in our careers the Navy rehabilitation program has been very successful when the individual was correctly diagnosed. I believe that in (LTJG M's) situation, as expressed by a former (CO), he did not receive the correct level of rehabilitation. This does not excuse his actions, but should be taken into consideration for a totally informed decision.

Also on 3 June 1999, you underwent a separation physical examination and were deemed physically qualified for separation. The examination report noted that you had undergone Alcohol Impact training in 1997 and the intensive outpatient regimen in January and February of 1999. On 11 June 1999 you received a general discharge by reason of misconduct after about three years of active service.

² 10 U.S.C.A. § 2005 (1998).

On 13 September 1999 CNP responded, in part, as follows to an earlier letter from your father, a retired CAPT in the Naval Reserve:

The decision to discharge (him) was a very difficult one. This was especially so in view of his desire to be retained; however, two alcohol-related civil actions provided the basis for (ASN/M&RA's) decision to approve his separation. As you know, the first incident involved a one-car accident and resulted in a (DUI) conviction. The second incident involved battery *and occurred while (he) was still on probation for the first incident.* Following the first incident, he was given the opportunity to prove he was earnest when he stated "I have learned a great deal from the entire experience and I will use these lessons to improve myself as an officer and a person." Unfortunately, (his) subsequent misconduct showed he did not have the potential to continue his career as a Naval officer. (emphasis supplied)

You submitted a letter of 25 April 2000 from the Circuit Court in Pensacola, FL, which congratulated you on completing a period of probation which ended on 16 August 1998.

The Board rejected your contention that corrective action is warranted because CNP improperly stated that you were on probation at the time of your assault offense on 1 November 1998 when, in fact, you completed the probationary period on 16 August 1998. The Board noted that although the letter of 25 April 2000 does not set forth the civil offense which resulted in the probation or when you were placed on probation, it seems clear that the letter referred to the probation imposed on 19 February 1998 as part of the sentence for your DUI conviction. The letter appears to indicate that either you were placed on probation for a period of less than a year, or were placed on probation for a year, but the probation was terminated early. If the former is true, you had numerous opportunities to correct the error when you were presented with the draft and final copies of the two civil action reports, all of which apparently referred to the yearlong probationary period. If probation was terminated early, you could have mentioned this fact when presented with the draft and final copies of the second civil action report. Accordingly, you had an opportunity to correct any error concerning your probation, but failed to do so.

The Board also concluded that any error concerning the duration of your probation was not material. It is clear that your discharge was recommended and approved because you failed to learn from the DUI and ensuing conviction. Slightly more than a year after these events you were involved in yet another instance of misconduct that resulted in a second civil conviction. The Board believed that the outcome of the separation processing clearly would have been the same even if senior Naval authorities

had been aware that you were no longer on probation at the time of the second incident.

The Board also found no merit in your assertion that since your misconduct resulted from alcoholism, there was no basis for recoupment. Federal law³ states that such action is appropriate if an individual "voluntarily or because of misconduct" fails to complete an agreed upon period of active duty. It is clear that upon graduating from the Naval Academy, you were obligated to serve on active duty for a specified period. You failed to do so because of the discharge for misconduct. Accordingly, recoupment was proper in your case.

Such action is not rendered improper even if you were an alcoholic. In this regard, the Navy's directive on alcohol and drug prevention and control, in effect at the time of your misconduct, specifically stated "all personnel are responsible and fully accountable for their personal activities relating to alcohol . . . and for any . . . illegal acts resulting from such activities."⁴ This policy was reinforced by another provision of the directive which stated "(t)he primary responsibility for alcohol . . . abuse prevention rests with the individual."⁵

Additionally, nothing in the *Military Judges Benchbook*⁶ provides any support for your argument. Although one of the instructions states, in part, that "(a)lcoholism is recognized by the medical profession as a disease involving a compulsion toward intoxication," the instruction goes on to state that "(a)s a matter of law, however, intoxication from drinking as a result of the compulsion of alcoholism is regarded as voluntary intoxication," and "(a)lcoholism is not in itself a defense . . ." ⁷ Additionally, "voluntary intoxication not amounting to legal insanity is not a defense to 'general intent' crimes . . ." ⁸

The Board also rejected your contention that recoupment should be barred since the Navy failed to provide you with appropriate alcohol treatment and rehabilitation after the DUI incident in 1997. The governing directive stated that Level I treatment, designed for a non-dependent alcohol user or abuser, consisted of local command programs including intervention efforts such as civilian or military discipline, administrative screening and NADSAP.⁹ Part of NADSAP was DUI school.¹⁰ Level II, the counseling and assistance center, was also designed for a non-dependent individual, but one whose degree of abuse requires more

³ 10 U.S.C.A. § 2005(a)(3).

⁴ Chief of Naval Operations Instruction (OPNAVINST) 5350.4B , ¶ 7p.

⁵ OPNAVINST 5350.4B, Encl (3), ¶ 1.

⁶ Department of the Army Pamphlet (DA PAM) 27-9.

⁷ *Id.*, at ¶ 5-12.

⁸ *Id.*

⁹ OPNAVINST 5350.4B, Encl (6), ¶ 2a.

¹⁰ *Id.*, at ¶ 2b.

than Level I treatment.¹¹ Level III, in-patient treatment, was for those individuals diagnosed as alcohol-dependent.¹²

The Board cannot tell whether the Alcohol Impact Class and the DUI remedial training were the same class, or constituted different training. In any case, it seems clear that you received Level I treatment after your DUI. The Board concluded this was the appropriate level of treatment. In reaching this determination, the Board noted that the applicable regulation defined "alcohol abuse," in part, as the use of alcohol to an extent that it leads to one or more alcohol related incidents or, clinically, a residual category set forth in the DSM for noting maladaptive patterns of alcohol use that do not meet the criteria for dependence.¹³ DSM IV, in effect at the time of the DUI, stated that criteria for such a pattern consisted of recurrent substance use resulting in a failure to fulfill obligations at work school or home; recurrent substance use in physically hazardous situations (such as DUI); recurrent substance -related legal problems; or continued substance use despite persistent social or interpersonal problems.¹⁴ Your record at the time reflected only the one instance of DUI, and none of these warning signs of more serious abuse. Further, the evaluator at the ATF indicated that you did not meet the DSM criteria for abuse. Unless you related a history to the ATF evaluator that would have led to the conclusion that your alcohol problem was actually more severe, it was reasonable for Navy officials to conclude that your level of abuse was low and you needed only the minimal treatment provided by Level I.

The Board also found no merit in your contention that recoupment constituted disparate treatment and was unfair when compared with other similar cases. In support of this contention, you cite two cases in which this Board recommended a waiver of recoupment for midshipmen involved in alcohol-related misconduct. However, as you point out, those recommendations were disapproved and the individuals have not been relieved of their responsibility to reimburse the government. In another midshipman's case, the Board's recommendation for relief initially was disapproved, but this action was later vacated and corrective action was approved. However, this case was somewhat peculiar in that it involved homosexual behavior, and a Department of Defense directive pertaining to recoupment in such cases.

Although the 24 midshipmen discharged from the Naval 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 took so long, and senior Navy officials cautioned that such action "should not be looked at as something that will

¹¹ *Id.*, at ¶ 2c.

¹² *Id.*, at ¶ 2d.

¹³ OPNAVINST 5350.4B, Encl (1).

¹⁴ DSM IV, pp. 182-83.

happen again in the future."¹⁵ Concerning the case of the midshipman who was relieved of the reimbursement requirement even though he was discharged from the Academy for using LSD, the Board determined that this waiver action resulted from political considerations, and concluded that this case should not be viewed as setting a precedent that should be followed.

The Board also found it significant that all of the cases you cite involved former midshipmen. However, you were serving as a commissioned officer at the time recoupment was directed. Accordingly, even if it could be said that you were not treated as leniently as they were, such action would be appropriate since you, as a commissioned officer, were held to a higher standard of conduct.

Therefore, the Board could find no justification to upgrade your discharge, change the reason for separation or relieve you of the responsibility to reimburse the government for the cost of your education. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

The Board noted your desire for a personal appearance but concluded that a decision could be made based on the documentary evidence of record. Accordingly, a personal appearance by you would serve no useful purpose.

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

¹⁵ ~~_____~~ Final Decision Made: 24 Mids to be Expelled, BALT. SUN, Apr. 29, 1994, at 1B, 9B.