



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

TRG
Docket No: 1651-00
21 February 2002

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10 of the 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 13 February 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 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 reenlisted in the Navy for six years on 8 December 1994. At that time you had completed about six years of active service on prior enlistments. The record shows that you served without any disciplinary infractions until 19 August 1998. On that date you received nonjudicial punishment (NJP) for four instances of using indecent language, two instances of indecent assault and solicitation to commit sodomy. The punishment imposed included forfeitures of pay and a reduction in rate from YN2 (E-5) to YN3 (E-4). Subsequently, your appeal of the NJP was denied.

Based on the misconduct, you were processed for an administrative discharge for commission of a serious offense and homosexual conduct. At that time, you elected to waive your right to have your case heard by an administrative discharge board. On 15 September 1998, the discharge authority approved the recommendation of your commanding officer that you be discharged for misconduct with a discharge under other than honorable conditions. However, on 18 September 1998 the discharge directive was rescinded because of your claim that you had blindly waived your rights because of emotional stress. The discharge authority directed that you be given an opportunity to

request an administrative discharge board (ADB).

On 28 January 1999, the ADB unanimously found that a preponderance of the evidence supported a finding of guilt on four charges, found that you were guilty of another charge by a two to one vote, and found you not guilty on two charges. The ADB unanimously recommended discharge under other than honorable conditions.

On 5 March 1999, your defense counsel submitted a letter of deficiency and contended that your initial waiver of rights was improperly allowed in evidence and you were stigmatized as a malcontent by testimony concerning your intent to file an equal opportunity complaint and contact your congressman. Counsel further contended that the ADB erred in allowing a witness to testify on the ultimate issue of misconduct, and its findings were not supported by a preponderance of the evidence. Counsel requested that the ADB's finding of misconduct and recommendation for discharge be set aside, or that you receive a new ADB.

On 11 August 1999, the commanding officer recommended discharge stating, in part, as follows:

.... After a 15 hour (ADB), and after hearing from 6 government witnesses and 6 defense witnesses, the (ADB) determined that the respondent committed five separate serious offenses, each involving improper homosexual conduct on board either a military installation or a Naval vessel. The (ADB) unanimously recommended that he be separated with an Other Than Honorable Discharge.

.... After review of the arguments made in the letter (of deficiency), I determined that the issues raised did not adversely impact (his) rights, nor did that adversely impact the outcome of the (ADB).

The commanding officer noted your exemplary performance for almost eight months after the ADB, and recommended a general discharge instead of the discharge under other than honorable conditions recommended by the ADB. After review in the Bureau of Naval Personnel, a general discharge by reason of misconduct was directed. You were so discharged on 1 November 1999.

In your application you are requesting, in effect, a change in the reason for your discharge so that you can receive separation pay. You essentially contend that you were improperly discharged for misconduct based on the issues raised in the letter of deficiency.

The Board considered the letter of deficiency but concluded that even if was improper to admit the disputed testimony opining that

you were guilty, this error was harmless. In this regard, the Board noted that the ADB members heard all the testimony and found you guilty by a preponderance of the evidence of some charges, but not guilty of others. Therefore, it appears that the ADB members performed their duty to evaluate the evidence in a conscientious manner and that they were not influenced by the disputed testimony. The Board further noted that the senior member essentially stated that your election of an ADB after, initially waiving this right, would not be held against you. Concerning your grievances, the senior member characterized them as "background and side issues", and that the central determination would be whether you committed misconduct. The Board further decided that the determination of the ADB that you did commit misconduct was reasonable and should not be overturned. The Board concluded that the general discharge by reason of misconduct was proper as issued 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