



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

CRS
Docket No: 7195-07
1 July 2008

[REDACTED]

[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 16 April 2008. 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. In addition, the Board considered advisory opinions provided by the Acting Head, Enlisted Performance and Separations Branch (PERS-832), Navy Personnel Command (NPC), dated 15 October 2007, and an assistant legal counsel to the Commander, NPC, dated 6 December 2007. A copy of each opinion is attached.

The Board found that you reenlisted in the Navy on 11 March 2004 for a period of three years, with more than 17 years of prior active service. The date of the expiration of your enlistment was established as 10 March 2007, approximately five months after you were scheduled to complete twenty years of active duty service. On 12 September 2005 RC, the thirteen year old daughter of CW, the woman with whom you were living at that time, and with whom you had fathered a child who was RC's half sister, reported to school authorities that you had raped her on three occasions over the preceding year, and that she decided to come forward after a fourth attempt that had occurred several days earlier. She reportedly resisted the fourth attempt, which you abandoned when CW woke up unexpectedly. RC identified herself as your "stepdaughter", but her actual relationship to you is unclear.

Although you had apparently lived with CW for many years, you listed another woman as your wife and dependent in military dependency documents. In addition, you signed a Dependency Application/Record of Emergency Data form on 14 November 2003 and again on 2 April 2004, in which you claimed that RC was your daughter. That claim is apparently false, as other records indicate that her father is PC, a former paramour of CW.

On 15 September 2005, RC told a civilian police investigator that you had forcibly raped her on three occasions, and touched her breasts on fifty or sixty occasions. When questioned about those allegations, you declined to provide a statement to civilian police investigators.

On 7 February 2006 a Navy Family Advocacy Program (FAP) Case Review Committee (CRC) determined that a case of sexual child abuse had been substantiated against you. The decision was based on a Superior Court of California, County of Riverside Jurisdiction/Disposition Report, the report(s) of investigation of the Riverside County Department of Public Social Services-Temecula Child Protective Services, and the preponderance of clinical information.

A Naval Criminal Investigative Service (NCIS) criminal investigation of the rapes was initiated on 5 April 2006. On 15 June 2006, after being advised of your rights under Article 31b, Uniform Code of Military Justice by an NCIS special agent, you invoked your right to consult with an attorney and declined to be interviewed. After being asked if you would consent to providing DNA samples, you declined; however, samples were then taken from you involuntarily pursuant to a command authorization. As RC had stated that you might have ejaculated on her Mickey Mouse blanket during one of the rapes, the NCIS had the blanket tested for the presence of semen. No semen was found on the blanket which, presumably, was washable.

On an unknown date, your request for transfer to the Fleet Reserve effective 1 October 2006 was apparently approved. It is unclear whether the official who approved the proposed transfer was aware of the sexual child abuse allegations pending against you; however, the proposed transfer was subsequently held in abeyance or cancelled pending further investigation and final disposition of RC's allegations against you.

On 5 October 2006 the Headquarters Review Team (HRT) met to consider your request for review and reversal of the determination of the FAP CRC. The HRT unanimously denied your request, after it determined that you had not provided any additional information that would have resulted in a substantially more favorable result for you. On 16 October 2006, the Director, Personal Readiness and Community Support (N135),

Office of the Chief of Naval Operations, advised you that he concurred with the determination of the HRT, and that the decision of the HRT was considered final.

On 6 December 2006, a judge advocate officer of your command reviewed your case. He determined erroneously that you had been involuntarily retained on active duty beyond your enlistment, and advised you to proceed to the Personnel Support Detachment for further processing and transfer to the Fleet Reserve.

On 7 January 2007, you declined to voluntarily extend your enlistment, which was scheduled to expire on 10 March 2007, and acknowledged that your refusal to do so would result in your separation from the Navy at the expiration of your enlistment. Furthermore, you acknowledged that you would not be extended, reenlisted or recalled to active duty without the express permission of the Commander, NPC. On 16 January 2007, the Commander, NPC directed the Commander, Amphibious Group Three, to initiate mandatory administrative separation processing against you for misconduct/commission of a serious offense, based on the substantiated child sexual abuse allegation. After being advised of your rights in connection with the separation processing, you elected to appear before an administrative discharge board with civilian counsel, and waived the right to request transfer to the Fleet Reserve in lieu of separation processing. In addition, you again declined to voluntarily extend your enlistment beyond 10 March 2007 so that discharge processing could be completed. As both your assigned military counsel and retained civilian counsel indicated that they would not be able to represent you at an administrative separation board prior to 10 March 2007, you were voluntarily discharged from the Navy on 10 March 2007 at the expiration of your enlistment. You were voluntarily discharged by reason of completion of required active service, and assigned a reentry code of RE-4, which is required when a Sailor against whom a charge of sexual child abuse has been substantiated is discharged prior to the completion of administrative separation processing.

The 15 October 2007 advisory opinion from the Acting Head, Enlisted Performance and Separation Branch, NPC, which is informal and conversational in tone, is to the effect that you avoided being processed for discharge by reason of misconduct/commission of a serious offense by refusing to extend your enlistment, and voluntarily "electing to separate at EAOS". The author of the opinion speculated that had an ADB found that you committed a serious offense, it would have forwarded its findings to the Assistant Secretary of the Navy for Manpower and Reserve Affairs with a recommendation that you "receive a pay grade reduction going to the Fleet Reserve Status since [you] had reached the 20 year point." He recommended that you "be allowed to retire [sic] at the pay grade of E-5 without ceremony." He did

not explain the basis for his opinion, or indicate whether or not the Commander, NPC concurred with his personal feelings about how your case should be resolved by the Board.

The author of the 6 December 2007 opinion, an assistant legal counsel to the Commander, NPC, advised the Board that since there is no evidence in your application or the documents submitted in support thereof that you "ever voluntarily requested transfer to the Fleet Reserve", you should submit your "voluntarily request" to the NPC for action in accordance with the provisions of the Navy Military Personnel Manual article 1910-166, which applies to requests for transfer to the Fleet Reserve of Sailor's undergoing administrative separation processing. Those provisions no longer apply to you since you have been discharged from the Navy and are ineligible for administrative transfer to the Fleet Reserve at this time.

The Board concluded that you have not demonstrated that you did not rape RC, that you were discharged in error, or that the interests of justice demand that your record be corrected to show that you were transferred to the Fleet Reserve rather than discharged from the Navy.

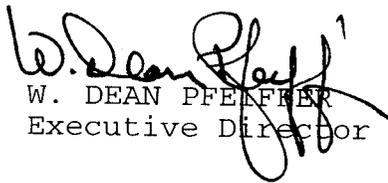
The Board found that transfer to the Fleet Reserve is permissive, rather than mandatory. Transfers are governed by Chief of Naval Operations Instruction (OPNAVINST) 1811.3, Voluntary Retirement and Transfer to the Fleet Reserve of Members of the Navy Serving on Active Duty, dated 17 December 2005, which announces the cancellation of Secretary of the Navy Instruction (SECNAVINST) 1811.3M. The OPNAV instruction provides, in effect, that authority to approve requests for voluntary retirement and transfers to the Fleet Reserve rests with the Secretary of the Navy and the President. Pursuant to a delegation of authority, the Commander, NPC, is authorized to approve the transfer of enlisted members of the Regular Navy to the Fleet Reserve who request such action after completing twenty years or more of qualifying service. Requests shall normally be held in abeyance pending resolution of investigations. The instruction specifies in paragraph 3b that transfers to the Fleet Reserve of enlisted members in lieu of administrative separation is covered by MILPERSMAN article 1910-166. The version of that article which was in effect on 10 March 2007 provided, in effect, that personnel awaiting disciplinary action, civil action, family advocacy action, administrative discharge action, or who were serving the sentence of a court-martial, could request waiver of administrative separation processing in order to be eligible to request transfer to the Fleet Reserve. Such requests did not preclude or suspend disciplinary action, at the discretion of their commanding officers. In all cases, the service member was to be informed of the right to present a case to an administrative board, which would make a recommendation to the

Secretary of the Navy concerning the member's pay grade at transfer, regardless of any other recommendation made by the command, an administrative board, or the Commander, NPC. The Secretary had discretion to transfer the member to the Fleet Reserve in the grade held on the date of transfer or in a reduced pay grade, as the Secretary deemed appropriate. In those cases where the member did not immediately request a waiver of administrative separation processing, the command would continue the processing, and requests received thereafter could be denied by the command or the Commander, NPC. The version of article 1910-166 which became effective on 11 October 2007 is substantially the same as the previous version, although it adds a discussion of the Secretary's discretion to characterize the service of a member being transferred to the Fleet Reserve in lieu of separation processing as "Other Than Honorable", if warranted in cases of misconduct. You were informed of your right to request transfer to the Fleet Reserve in lieu of separation processing, as well as of the opportunity to extend your enlistment so that there would be sufficient time to conduct an administrative separation board, which could have determined that you did not commit the alleged misconduct. You declined to request transfer to the Fleet Reserve in lieu of separation processing or to extend your enlistment, thereby waiving the opportunity to be transferred to the Fleet Reserve in a reduced pay grade, or upon the completion of administrative separation processing.

In view of the foregoing, your application has been denied.

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

Enclosures