



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

ELP

Docket No. 2500-98

14 April 1999

[REDACTED]

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 Naval Records, sitting in executive session, considered your application on 31 March 1999. 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.

The Board found that you enlisted in the Naval Reserve on 20 May 1991 for six years as an SN (E-3). At the time of your enlistment, you had completed more than two years of active naval service. You were temporarily advanced to CE2 (E-5) under the Navy Veterans Reenlistment Advanced Pay Grade Incentive Program.

The record reflects that you served without incident until 1 December 1993 when a warrant for your arrest was issued for molestation of two minor girls, the daughters of a married woman you were sleeping with. The warrant stated that you baby sat for the mother on occasion, the girls would lie in bed with you fully clothed, and you would put your hand inside their panties and touch their private areas. The warrant went on to say that you admitted to putting your hand inside the panties of one of the girls. One girl claimed that when she got in bed with you and her mother, you touched her "privates," and when you showered with their mother, both girls would get into the shower and you would wash their private parts.

The record further reflects that you entered into a pre-trial agreement and were charged with two counts of attempted child molestation in the third degree. The record also shows you executed two agreements, but only one is signed by the prosecuting attorney and the judge. In the first one, which is unsigned, you stated "without admitting guilt, I am pleading guilty because there is a risk of conviction if I proceed to trial and I want to take advantage of the reduction and the prosecutor's recommendation." The second agreement which was accepted by the prosecuting attorney and the judge, shows that you pled guilty to the following: "Between January 1, 1993 and May 31, 1993, I touched CA and EA in an improper sexual way but without a sexual purpose..." You were convicted in civil court on your plea of guilty to the foregoing charges on 31 January 1994.

On 29 April 1994 you were notified that you were being considered for discharge under other than honorable conditions by reason of misconduct due to your conviction by civil authorities of child molestation, and commission of a serious offense. You were advised of your procedural rights and elected to present your case to an administrative discharge board (ADB).

On 16 May 1994, the court sentenced you to 12 months of confinement on each count. However, all confinement in excess of six months was suspended and you were placed in a work release program. You were also ordered to pay court costs and crime victims compensation fees, register as a sex offender for a period of 10 years, and refrain from contacting any minor outside your family under the age of 18 without court approval.

You appeared before an ADB with counsel on 23 July 1994. The ADB heard testimony to the effect that you met the mother of the girls you allegedly molested, when you did some electrical work at her house in the Fall of 1992. She was separated from her husband and was in the process of getting a divorce. You were also married with two daughters, ages 18 and 14, but were separated from your wife. Sometime late in 1992 or early 1993, you began seeing this woman and a relationship began. Her husband, a merchant mariner, apparently learned of your relationship with his wife and that you had taken inappropriate liberties with his daughters during his visitation with them. He allegedly put flyers out all over the town that you had taken over his home, given him a venereal disease, and molested his children. He left harassing phone messages on your answering machine and went to your residence and threatened your wife. Your lawyer stated that he filed a lawsuit against him, but he was persistent with the prosecutor's office and charges were eventually filed against you. By this time, the girls were adamant in their testimony and could not be shaken.

The lawyer who represented you in the civil case testified that you did not want a plea bargain and desired a day in court. However, the charges pending at the time were for child rape and had the potential for two consecutive prison terms of 8-10 years each. The lawyer indicated that even though he felt you had a solid case, there was a risk of conviction. He stated that he encouraged you to take the offer to plead guilty with no felony conviction, and ultimately you consented. As part of the plea agreement, you would be evaluated and treated, if appropriate. Your lawyer further indicated that although you may not have committed a crime in the sense of molesting children, you certainly used very poor judgment in being involved with people you did not know very well.

The command senior chief testified that your performance of duty had been exceptional. He stated that you had worked with him on more projects than anyone else at the center and if a job was not completed on the weekend, you often stayed Monday or Tuesday to finish the job since you owned your own business. He stated he had very limited contact with you socially and little knowledge of the events and circumstances leading to the ADB proceedings.

You testified regarding your military history, Vietnam service, separation and subsequent reconciliation with your wife, and your affair of approximately five months. You asserted that the girl's allegations were false and explained that you pled guilty to the reduced charges on the advice of counsel because it appeared to be the only opportunity you had to salvage your electrical contractor business, retain your status in the Naval Reserve, and avoid a felony conviction. You stated that in the work release program you were able to continue your job and attend reserve weekend drills.

After a review of all the evidence the ADB, by a vote of 3-0, found you had committed misconduct due to a civil conviction and commission of a serious offense and recommended a general discharge. The commanding officer concurred with the ADB proceedings and recommended your discharge. On 13 March 1995, the Chief of Naval Personnel approved the recommendation and directed a general discharge by reason of misconduct and assignment of separation code "GKL." This code means that the misconduct which resulted in separation was "...indecent acts with or assault upon a child..." You were so discharged on 17 March 1995.

On 1 August 1996, the civil court allowed you to withdraw the finding or plea of guilty to the two counts of attempted child molestation in the third degree and enter a plea of Not guilty. The court dismissed the charges.

On 17 August 1998, the Board requested that you submit appropriate documentation to show the basis for which the "Order of dismissal" was issued, i.e., a clemency action, an impropriety in the trial, or a specific finding of innocence. Additionally, a member of the Board's staff contacted you by telephone. However, neither you nor designated counsel have provided the documentation requested.

In its review of your application, the Board carefully weighed all potentially mitigating factors such as your prior honorable service, Vietnam service, letters of reference, and the letters written to Navy recruiting officials by the lawyers who represented you in the civil and ADB proceedings. The Board particularly noted the "Order of Dismissal" and your contention that you were wrongfully subjected to an ADB due to false charges brought against you by the civilian legal system, and the charges were subsequently dismissed. You assert that since the charges were dismissed, your discharge is now improper since the basis for your discharge no longer exists.

The Board concluded that the foregoing factors and contentions were insufficient to warrant recharacterization of your discharge given the serious nature of the charges of which you were convicted by civil authorities. The Board noted that after reviewing all the evidence, listening to the testimony and arguments of counsel, the ADB was convinced that you had committed misconduct. In this regard, the Board noted that you admitted you were guilty of touching the girls in a sexual way, in order to escape the full extent of punishment that could be awarded by the court. The fact that the state court apparently allowed you to change your plea, after successful completion of a court-ordered program, and dismissed the charges against you does not invalidate the reason for your discharge which was for misconduct due to commission of a serious offense of indecent acts with a child. The action of a state court does not compel the Board to change the basis for your discharge. The Board believed that you were fortunate that you were recommended for a general discharge since most individuals discharged by reason of misconduct receive discharges under other than honorable conditions. Your administrative separation was accomplished in compliance with applicable regulations and there is no indication of procedural errors which would have jeopardized your rights. The Board concluded that both the reason for discharge and characterization of discharge were appropriate and no changes are warranted. Further, there is no basis for reinstatement once an individual's enlistment contract has expired. 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