



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

TRG
Docket No: 571-00
12 December 2001

[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 4 December 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 Navy on 8 January 1991 at age 19 for four years. On 31 July and 17 September 1992 you received nonjudicial punishment (NJP) for disrespect, disobedience, making a false official statement and failure to go to restricted musters. You then served without incident for almost two years. On 1 September you received NJP for use of LSD. The punishment imposed included forfeiture of pay and a suspended reduction in rate.

You appealed the NJP contending that you were innocent of drug abuse. You believed that there was a chain of custody problem with the urine sample or the drug laboratory must have made an error. In his endorsement on your appeal, the commanding officer (CO) addressed these issues as follows:

.... He states that he had a problems providing a sample so he left the urinalysis site and returned on a number of occasions until he submitted a full sample. Although the sample may not have been in his sight the entire time, it was under the control of the urinalysis coordinator which is well with the OPNAV urinalysis

guidelines. If he had any concern over custody of his sample, he should have provided a new complete sample. Although precautionary, this is not necessary under the OPNAVINST.

... Next (he) states that the threshold level is 200 micrograms and one dose of LSD would be approximately 160 micrograms. The relevancy of this point is questionable but upon my further investigation the Naval Drug Laboratory reported that the actual threshold for LSD is 200 peakograms. They also stated that LSD has a distinct "finger print" which is like no other substance, thus making it impossible to be mistaken with any other substance. In addition, each sample is tested three separate times with (his) reporting the same positive result each time.

... Finally, whether the urinalysis test itself is 100% scientifically accurate or not, no one onboard has the definite answer. What I do know is that the testing holds up in military and civil courts ...

... The bottom line is that (he) provided a sample, attested that it was indeed his sample, and that sample came back positive for LSD. There was no breach of the urinalysis procedures or the chain of custody.

On 15 September 1994, the Commander, Combat Logistics Group TWO denied the NJP appeal concluding that the testing procedure in your case was adequate and reliable, and that a preponderance of the evidence showed that you had use LSD.

On 16 September 1994 you were notified of separation processing by reason of misconduct due to drug abuse, commission of a serious offense, and a pattern of misconduct. An administrative discharge board (ADB) convened on 9 December 1994. During the ADB several individuals testified concerning the handling of your urine sample. The urinalysis coordinator testified, in part, as follows:

... I vaguely remember (his) sample being taken. It was incomplete when he initialling (sic) went. The sample was then locked in the refrigerator. It was sitting on his ID card the whole time it was in the refrigerator. I did not touch his sample while it was kept in my possession. No one else has access to that refrigerator at that time until the urinalysis testing is complete. We had a label on his bottle. It had the date, the batch number, specimen number, ... and his social security number. It was sitting on top of his ID card. There is no chance that it would be sitting

in the refrigerator without his ID card. The bottle is not sealed until a full sample is provided. Nobody else has access to that refrigerator If someone only provided a partial sample and he came back to finish providing the sample, the member would get the bottle out of the refrigerator. I unlock the refrigerator, open the door and have him retrieve his sample from on top of his ID card.

In response to questions from the ADB members, the coordinator testified as follows:

..... The refrigerator is locked when I leave the lab, but while I'm sitting in there it is left open.

The refrigerator is physically located to the right of the desk. I am able to absolutely watch the evolution of the person who takes the bottle and places it in the refrigerator (He) placed his sample in the refrigerator first, the other individual who was unable to provide a full sample placed the bottle in the refrigerator after him. I don't recall if it was locked in between the two samples being put in.

I only recall those 2 samples that were in there together. There was no one else that entered the refrigerator.

The executive officer of the drug screening laboratory, who was also a staff chemist, testified extensively about LSD, drug testing in general, testing for LSD in particular, and the maintenance of the chain of custody within the drug laboratory. He believed that the sample at issue was processed correctly and the report of a positive results for LSD was correct.

Subsequently, your roommate and former girlfriend, who had become your wife, testified that they were with you most of the time before the urinalysis and that they never saw you use or act like you had used LSD. You testified about your past record and stated that you had not used LSD. You concluded your testimony stating that you would not have used LSD because you were looking forward to getting married and your early discharge had been approved so that you could go to college.

The ADB unanimously concluded that you had committed misconduct due to drug abuse, a pattern of misconduct, and commission of a serious offense; and recommended discharge under other than honorable conditions. After review, the discharge authority directed discharge under other than honorable conditions due to a pattern of misconduct. You were so discharged on 6 January 1995.

In your application you contend that the urine collection process did not comply with the regulations, essentially raising the same issues used in the NJP appeal and the ADB. You also contend that even if it is conceded that you used LSD, the Navy violated Department of Defense Directive (DODDIR) 1010.4 and 32 C.F.R. Section 62.4 which required treatment and rehabilitation of drug abusers. You argue that the Navy's directives that created a "zero tolerance" drug policy and mandatory discharge processing was in conflict with the requirements of 32 C.F.R. Section 62.4, and you have been denied due process of law, because neither the separation authority or the ADB considered your rehabilitation potential. Finally, you argue that the Navy violated its regulations because you were never evaluated immediately after the drug abuse was discovered as required by enclosure (7) to OPNAVIST 5350.4B.

The Board was aware that under the terms of the then existing version of DODDIR 1010.4, the armed forces had a responsibility to treat and counsel drug abusers and rehabilitate, for the purposes of retention, the maximum feasible number of those abusers. The question, then, is whether your rehabilitation was feasible. The Board believed that it was not feasible in your case because you have never admitted to using LSD. The Board believed that an individual cannot be rehabilitated unless he or she admits to drug use and expresses a desire to overcome the problem. Only then is rehabilitation "feasible" within the meaning of the pertinent provisions of DODDIR 1010.4. Accordingly, the Board concluded that it was proper to process you for separation due to drug abuse.

The Board also noted your contention that corrective action should be taken in your case because no drug evaluation was accomplished as required by enclosure (7) to OPNAVINST 5350.4B. Appendix A to that enclosure indicates that such an evaluation should be accomplished immediate after the individual is deemed to be a drug abuser, and before any disciplinary or administrative action. When it was issued with OPNAVINST 5350.4B, in September 1990, the appendix was clearly designed to be a "road map" for the commanding officer's use in deciding whether separation processing or retention was appropriate in a given case. However, the February 1992 issuance of Navy Administrative Message (NAVADMIN) 18/92 obviated the need for such guidance since it mandated separation processing for all drug abusers. The Board concluded that since the CO did not have to decide whether to process you for separation, there was no need for an evaluation prior to such action.

The Board believed that the urinalysis was conducted in accordance with regulations and was sufficient to support the NJP and discharge processing. However, you were actually discharged by reason of misconduct due to a pattern of misconduct. A record

of three nonjudicial punishments is sufficient to support discharge processing for that reason. Therefore, the Board concluded that the discharge 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