



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

AEG
Docket No: 4591-99
20 September 2001

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 18 September 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. The Board also considered the advisory opinions, dated 6 July and 1 August 2001, furnished by the Military Law (JAM) and Separation and Retirement Branches of Headquarters Marine Corps. Copies of those opinions are enclosed.

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 began military service on 11 May 1998 by enlisting in the Marine Corps Reserve as a member of the Platoon Leaders Class (Law). In August 1989 you completed two months of officer training and were commissioned a second lieutenant (O-1) in the Marine Corps Reserve. After completing law school and passing the bar examination, you began a period of extended active duty on 11 December 1991 as a first lieutenant (O-2) in the Marine Corps Reserve. You then attended The Basic School from 12 April to 30 September 1992.

On 17 October 1992, you reported for duty under instruction to the Naval Justice School, Newport, RI. At that time, a Lieutenant (LT; O-3) Myra M was assigned to Officer Indoctrination School at the same location. She was married to a Gunnery Sergeant (GYSGT; E-7) M. LT M and you transferred from Newport on 30 October and 18 December 1992, respectively. She reported for duty to Naval Hospital, Beaufort, SC on 6 November

1992 and you reported to a unit at Camp Pendleton, CA on 8 January 1993.

You then served for more than two years in an excellent to outstanding manner as a judge advocate. You were promoted to captain (CAPT; O-3) in September 1993, augmented into the Regular Marine Corps in July 1995, were awarded two Navy Commendation Medals for outstanding performance of duty as a protocol officer in 1994-95, and received exemplary fitness reports.

LT M made several trips to California from January 1993 through June 1995, and was assigned periods of temporary additional duty at Camp Pendleton in December 1993 and April 1995. Subsequently, you actively sought reassignment to Parris Island, SC and, on 28 July 1995, you reported for duty at the Parris Island Law Center. At that time, LT M was still assigned to the nearby naval hospital and her husband, GYSGT M, was assigned to the support battalion of the recruit training regiment on Parris Island.

A subsequent investigation revealed that sometime in the Fall of 1995, GYSGT M confided in his battalion executive officer, Major (MAJ; O-4) H, that he suspected his wife was having an affair. GYSGT M later told MAJ H that a friend of his who worked for the Central Intelligence Agency (CIA) had confirmed this suspicion, and indicated that his wife's paramour was from California. GYSGT M subsequently told MAJ H that he had confronted his wife and she admitted to an affair, but did not disclose the identity of the other individual. On 4 January 1996 GYSGT M told MAJ H that he had learned, from his CIA friend, that you were the man with whom his wife was involved, and further said that he was going to the law center to confront you. MAJ H went with GYSGT M, and both individuals met with the staff judge advocate, Colonel (COL; O-6) B, who would not permit such a confrontation. When COL B asked GYSGT M for proof of his assertion that you were involved with his wife, GYSGT M said that LT M had admitted the affair to him and said that the relationship had begun when both of you attended school in Rhode Island. Later, when COL B confronted you with this allegation, you declined to comment but asked to speak to another attorney. According to a later statement of COL B, you were "visibly shaken" during this conversation.

Due to the allegations of GYSGT M, an investigation was directed by the Commanding General (CG), Marine Corps Recruit Depot, Eastern Recruiting Region. In his report of investigation dated 19 January 1996, the investigating officer stated that both LT M and you had invoked your right to remain silent under Article 31 of the Uniform Code of Military Justice. Further, GYSGT M indicated that he "did not want to get his wife in any trouble," and was "respectfully uncooperative." However, GYSGT M did state that he "learned of the affair and (CAPT C's; your) involvement through friends he has in the CIA." The IO interviewed and obtained statements from MAJ H and COL B, but in his report, noted that the amount of direct evidence was limited and the only

witness information was hearsay. Nonetheless, he believed that the information he obtained was reliable.

On 19 January 1996 you and your military counsel signed a Memorandum of Agreement in which you agreed "to accept disposition of the allegation against me at (CG's) nonjudicial punishment (NJP) and . . . not to contest the findings at that proceeding, or on appeal of that proceeding." You acknowledged that it was "expressly understood" that at NJP, the CG could impose "any lawful punishment permitted to be awarded . . ." You also attached a resignation from the Marine Corps to the memorandum and requested an honorable discharge, but acknowledged that a general discharge could be issued. You conditioned the resignation upon the CG's approval of the agreement and upon the issuance of no worse than a general discharge.

In return, the CG certified that he would dispose of the allegations against you by addressing only a single specification of adultery at NJP; permit you to accept NJP without entering a plea and allow you to remain silent during the proceedings; and would not require you to testify or provide information pertaining to allegations against LT M. The CG also certified that he would favorably endorse your resignation and recommend no worse than a general discharge, and that he would set aside the NJP if the Secretary of the Navy (SECNAV) disapproved your request for an honorable or general discharge. On 22 January 1996, the CG signed the Memorandum of Agreement.

On 22 January 1996 the CG initiated NJP action for the following violation of UCMJ Article 134:

In that (CAPT C) . . . , did, at an unknown location, between about October 1992 and about January 1996, wrongfully have sexual intercourse with (LT M), a married woman not his wife.

In the letter of that date notifying you of pending NJP action, you were advised that at the upcoming NJP hearing, you had the right "to be present during the presentation of all information against you, including the testimony of witnesses present . . ." You were further advised that if NJP was imposed, you had "the right to appeal to the next superior authority within 5 working days, if you consider the punishment unjust or disproportionate to the offense for which it is imposed."

Also on 22 January 1996, in accordance with the Memorandum of Agreement, you waived the right to demand trial by court-martial and accepted CG's NJP. On 25 January 1996 the CG held an NJP hearing, upon completion of which he imposed a punitive letter of reprimand. That letter, dated 27 January 1996, was delivered to you on 29 January 1996, at which time you declined to appeal the NJP or submit a statement concerning the letter.

On 30 January 1996 the CG reported to the Commandant of the Marine Corps that he had imposed NJP pursuant to the Memorandum of Agreement. The CG forwarded your resignation and recommended that it be accepted. He further recommended a general discharge. However, your resignation was disapproved because it was determined that the Memorandum was an integral part of the resignation, and it appeared to impermissibly limit SECNAV's authority to take action in the case. Accordingly, a board of inquiry (BOI) was convened to give you an opportunity to show cause for retention in the Marine Corps.

Apparently in response to the notification of BOI proceedings, you submitted a second resignation on 8 April 1996. In response, on 12 April 1996 the CG once again favorably endorsed your resignation and recommended a general discharge. On 16 May 1996 the Deputy Chief of Staff for Manpower and Reserve Affairs recommended that SECNAV accept the resignation and direct a general discharge. On 11 June 1996, acting for SECNAV, the Assistant Secretary of the Navy for Manpower and Reserve Affairs approved those recommendations.

The Certificate of Release or Discharge from Active Duty (DD Form 214) shows that on 19 July 1996 you were separated with a general discharge by reason of "resignation (unacceptable conduct)" and a separation code of "BNC1." At that time, you had completed nearly five years active service. However, the DD Form 214 fails to reflect the two Navy Commendation Medals you received.

The Board considered your contentions that the CIA improperly collected evidence that was used against you at NJP; there was insufficient evidence to find you guilty at NJP; the CG was not impartial; your service should be characterized as honorable; and the reason for separation should be changed. However, the Board concurred with paragraphs 3b through 3d, and 3f and 3g, of the advisory opinion from JAM to the effect that these contentions are without merit.

Concerning your contention that the Memorandum of Agreement improperly restricted your right to appeal the NJP, the Board disagreed with paragraph 3e of the JAM advisory opinion to the extent that it states that an individual may not appeal adverse findings against him at an NJP. Paragraph 7a of Part V to the *Manual for Courts-Martial* (1995) states that an appeal may be submitted by a servicemember who considers the punishment to be "unjust or disproportionate." Certainly, an individual who believes the findings were improper or unfair considers the NJP to have been unjustly imposed. Accordingly, the findings are subject to appeal. In this regard, the Board has seen numerous instances in which an individual has appealed an NJP on this basis, and the appeal authority has accepted the appeal and resolved the issue on its merits. Nevertheless, there was no error in the provision of the Memorandum precluding an appeal of the NJP findings since the Board concluded that you could properly bargain away this right during the negotiation process.

Moreover, the Board noted that you do not attack the provision of the Memorandum stating that you would not contest the findings at the NJP.

Based on the foregoing, the Board can find no basis to remove the NJP from your record, upgrade your discharge or change the reason for separation. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

The Board did not consider your request to change the DD Form 214 to reflect the two Navy Commendation Medals you received, since such action is an administrative correction that does not require action by the Board. You may request a Correction to DD Form 214 (DD Form 215) by writing to the National Personnel Records Center (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132-5100.

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