



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

ELP
Docket No. 870-01
24 January 2002

[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 Navy Records, sitting in executive session, considered your application on 16 January 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. In addition, the Board considered the advisory opinion furnished by the Navy Personnel Command Enlisted Performance Branch (Pers-832), dated 6 August 2001, a copy of which is attached.

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 record reflects that you were born in the Philippines and your father, who was a lawful permanent resident of the United States, applied for an immigrant visa on your behalf. Thereafter, you petitioned for an immigrant visa and registration as an unmarried son of a lawful permanent resident, and entered the United States on 3 February 1979. However, you had been married since 10 November 1976.

You enlisted in the Naval Reserve on 21 March 1979 and were ordered to active duty for a period of three years. You returned to the Philippines and went through another marriage ceremony on 27 July 1979 with the same woman you married in 1976, apparently in an effort to conceal the prior marriage. You filed a petition for an immigrant visa for your wife and son on 12 March 1981. You reenlisted in the Navy on 6 May 1981 for six

years as an MSSN (E-3). You were advanced to MS3 (E-4) on 16 July 1981.

On 3 March 1983 the Immigration and Naturalization Service (INS) submitted a request to a district director that you be issued a "show cause" order for visa fraud. Thereafter, you were investigated by both the Naval Investigative Service (NIS) and the INS for visa fraud, false statement, conspiracy, and fraudulent alien registration. That investigation revealed that when you applied for an immigrant visa and alien registration, you stated that you were "single, never married." As a result of your statement, you were issued an immigrant visa as an unmarried son of a lawful permanent resident. When you filed for immigrant visa for your spouse and child, records revealed the marriage of 10 November 1976, and that you were married at the time of your enlistment in March 1979. As a result of this investigation, you were convicted on 17 April 1986 of alien registration fraud. On 21 May 1986, the Department of Justice informed your command that your enlistment on 21 March 1979 and reenlistment on 6 May 1981 were obtained with a fraudulent alien registration card. The purpose of this letter was to advise the command that it had no plans to deport you as long as you remained in the Navy.

On 22 January 1987 the commanding officer (CO) advised Commander, Naval Military Personnel Command (CNMPC) of your conviction of alien registration fraud. The CO stated that you had no other military or civil disciplinary action pending, your performance since reporting on board had been outstanding, and no administrative separation action was planned because he highly recommended your retention in the Navy. On 21 February 1987, CNMPC decided to take no action, and directed that you be retained but warned that any further misconduct could result in administrative separation.

You reenlisted again on 25 November 1988 for four years as an MS2 (E-5). After completing MS "C" school, on 31 March 1989, you reported for duty at the Naval Security Group Activity, Adak, AL.

In January 1990, a military lawyer at the Naval Legal Service Office (NSLO) in San Diego, CA, acting as counsel for a woman who claimed to be your wife, contacted NIS and requested an investigation. An NIS agent interviewed this woman on 23 January 1990 and she provided a marriage certificate, which showed that you had married her on 14 March 1987, and a birth certificate for a child born of this marriage on 5 January 1988. She claimed to have received phone calls from your first wife and stated that when confronted, you admitted to marrying and having two children with her, but said that you had divorced her. The Records of

Emergency Data (RED) on file in your record list the woman you first married in 1976 as your wife. The last RED shows that you then had three children with this woman, the last of which was born on 6 September 1988. The record contains no evidence that you ever divorced your first wife or had the marriage annulled.

Thereafter, NLSO San Diego informed your command that you were apparently married to two women. The matter was then referred to the NIS for further investigation, and it was discovered that your initial enlistment was fraudulent; that you had married again, without benefit of a divorce; and had a son from this second marriage.

Shortly after arriving at Adak, you became romantically involved with a female MSSN (E-3), who later became pregnant by you. On 26 March 1990 you were involved in a fire of a suspicious nature, which put your pregnant girlfriend in the hospital with serious burns and destroyed your barracks room. Given the circumstances surrounding the fire, NIS began an investigation into the incident. The investigation was completed in June 1990 and disciplinary action was contemplated.

On 25 July 1990 you were notified that administrative separation under other than honorable conditions was being considered by reason of fraudulent enlistment and misconduct due to the commission of serious offenses, to include bigamy and the willful destruction of government property. You were advised of your procedural rights, declined to consult with legal counsel, and waived the right to present your case to an administrative discharge board (ADB).

On 6 August 1990 the CO recommended separation under other than honorable conditions. He noted that the convening of judicial proceedings had been considered, but discussions with the station judge advocate indicated that the costs of a court-martial would be astronomical, and the government's case rested on weak evidence or witnesses who would have to travel great distances to testify. Accordingly, the command elected against court-martial proceedings. The CO stated that fraudulent entry into the United States and the Naval service could be overlooked if an individual demonstrates that he is worthy of retention, but you had proven that perjury, dishonesty and wanton disregard for your lawful responsibilities were in character for you. Your behavior and deception were unacceptable in the Naval service and merited separation.

On 24 August 1990 your legal counsel requested that administrative action against you be rescinded and asserted that the decision to resort to administrative processing, with its relaxed

rules of evidence and lower standard of proof, should not be used as a means to circumvent an individual's due process rights. The CO forwarded counsel's request with the discharge package and stated that whether you accepted nonjudicial punishment or elected a trial by court-martial for destruction of government property, those proceedings would have been followed by administrative separation action for fraudulent enlistment. Such action was in no way meant to circumvent your right to due process. The CO asserted that the evidence was clear that you fraudulently enlisted in the Navy and that you were married to two women.

On 7 September 1990, CNMPC directed a general discharge by reason of fraudulent entry and assignment of an RE-4 reenlistment code. You were so discharged on 7 November 1990.

In its review of your application the Board carefully conducted a careful search of your records for any mitigating factors which would warrant recharacterizing your third period of service, or changing the reason for discharge and reenlistment code. However, no justification for such changes could be found. The Board noted your contentions to the effect that if a former command waived administrative proceedings against you, the next command cannot process you for separation based on the very same offense; the bigamy charge was dropped because the marriage was annulled; the charge of destruction of government property was dropped because your roommate admitted to owning the Coleman fuel which caused the fire; counsel's letter contesting administrative processing in lieu of trial by court-martial should have resulted in a due process hearing; the command abused its authority when it decided to discharge you for fraudulent enlistment when the charges were dropped by a Federal court; and fraudulent entry may be overlooked if an individual proves he is worthy of retention.

After your conviction in 1986 of alien registration fraud, the command declined to process you for separation given your otherwise excellent record, and CNMPC retained you in the Navy. Normally, an individual cannot be processed for separation based on conduct for which an individual was previously processed and retained. However, you were never processed for separation in 1987. Further, your third enlistment was also fraudulent since you were married to two women at the time. You would not have been allowed to reenlist had this information been known prior to this reenlistment. Additionally, your RED's fail to reflect your second marriage, or the children born of that marriage. The Board found the record disturbing since it showed your second wife had a son in January 1988, your first wife had her third child in September 1988, and that your girlfriend in Adak became

pregnant shortly thereafter. Your contentions that the bigamy charge was dropped because the marriage was annulled and the destruction of government property charge was dropped because your roommate admitted culpability are not supported by the evidence of record. The charges were dropped due to the extreme cost of a trial and no guarantee of a conviction. While you had a right to request trial by court-martial, the Navy was not required to grant the request. You have submitted no evidence to show that your first marriage was annulled or ended by a divorce.

The Board also noted the aggravating factor that you waived your right to an ADB, the one opportunity you had to show that your last enlistment was not fraudulent, or that you did not commit a serious offense.

While your legal counsel requested that all separation processing be terminated since court-martial proceedings against you were dropped, he did not request a hearing before an ADB. Based on the evidence of record, had you appeared before an ADB, it most likely would have recommended discharge under other than honorable conditions. In this regard, the Board noted that the standard of proof at an ADB is a preponderance of the evidence and not beyond a reasonable doubt, the applicable standard at a trial by court-martial. It appeared to the Board that CNMPC considered your otherwise excellent service and gave legal counsel's request due consideration when it directed a general discharge.

The Board substantially concurred with the comments contained in the attached advisory opinion. The fact that the reason for discharge is somewhat stigmatizing or may impact on future endeavors does not provide a valid basis for changing the reason for discharge. Even if separation by reason of fraudulent enlistment was improper, you could have been discharged by reason of misconduct due to commission of a serious offenses, specifically, bigamy or destruction of government property. Regulations require the assignment of an RE-4 reenlistment code to individuals separated for fraudulent entry.

Based on the foregoing, the Board concluded that the characterization, reason for discharge, and reenlistment code were proper and no changes are 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

Enclosure