



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

TRG
Docket No: 3392-01
4 April 2002

[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 26 March 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.

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 18 January 1994 and reenlisted on 26 June 1998. The record shows that during the period from 8 March 1998 until 1 March 1999 you served as a corpsman with the 2nd Marine Division in an excellent manner. During this period, you were advanced to HM2 (E-5). In the performance evaluation for the period ending 1 March 1999, you were assigned an individual trait average (ITA) of 4.0 with a recommendation for early promotion.

On 3 March 1999 you reported to the Naval Hospital, Jacksonville, Florida. In the performance evaluation for the period ending 15 March 2000, you were assigned an ITA of 3.57 with a "must promote" recommendation. However, on 30 October 2000 you were counseled concerning disrespect towards a commissioned officer and warned of the possible adverse consequences of continuing that behavior. Subsequently, you were counseled on several occasions concerning your disrespectful and disruptive behavior in the hospital.

On 25 January 2000, LT H, the Physical Therapy Division Officer submitted a memorandum for the record concerning your behavior which states, in part, as follows:

... if (his) behavior continues to be unbecoming of an E5, he should be separated from the Navy. He has been given ample opportunity to correct his behavior and to make a positive impact on the PT department. His actions are on the borderline of insolence and disrespect to an officer. As of yet, his behavior and actions have not changed and he continues to be a detriment to the department.

On 25 January 2001, Petty Officer W stated that he did not believe you were disrespectful since you were raising legitimate issues concerning duty assignments. However, he further stated that LT H may have had a different perception of the conversation. Petty Officer W also stated that a Mrs. D told him that you had called LT H a "fucking bitch" after she left the room and that he had informed LT H of this comment. Later, Petty officer S stated that he was present during the conversation with Petty Officer W and he did not believe you were disrespectful. On 29 January 2001, at the request of LT H, Ms. Sherry L D submitted a statement to the effect, that you were disrespectful to LT H, were neglecting your physical therapy patient, and were very angry. She stated that after LT H left the room you called her a "fucking bitch".

Subsequently, charges of disrespect, dereliction of duty and disobedience were preferred against you. Additional charges of disobedience and making a false official statement were later dropped. Prior to the nonjudicial punishment (NJP), members of your chain of command submitted comments. The leading chief petty officer stated that your repeated inappropriate behavior, despite counseling and warnings, had caused conflict with the department. The chief felt the charges were valid and that you should not be retained in the Navy. The department head stated that you had repeatedly challenged department personnel and, despite verbal and written counseling, had failed to demonstrate improved teamwork.

You received NJP on 22 February 2001. During the NJP, individuals in your chain of command apparently testified essentially as set forth in their written comments. In connection with the NJP, you submitted a statement from a retired chief petty officer who was present during at least part of the period at issue. He stated that you helped him with his physical therapy, he did not consider you derelict in the performance of your duties, and he had not seen any disrespectful conduct from anyone. After considering all of the evidence, the commanding officer imposed punishment of a reduction in rate from HM2 (E-5) to HM3 (E-4); forfeiture of \$413 pay per month for two months, of which the second month was suspended; and 45 days of extra duty.

You appealed the NJP on 27 February 2001. You claimed that Ms. D fabricated the whole scenario due to a previous difference of opinion with you. You pointed out that Petty Officer W stated that he did not believe you were disrespectful, and another petty officer agreed that you were not disrespectful but merely pointing out things that needed to be fixed. You also point out that a patient who was present had submitted a statement to the effect that you were not derelict in the performance of your duty and were not disrespectful. You also complained that you were improperly denied witnesses, were not allowed to see all documents prior to accepting NJP, and were not allowed to make a statement in your defense at NJP.

The commanding officer stated in the endorsement on your appeal, in part, as follows:

.... I took into account all of the oral and written evidence presented. in my opinion a preponderance of the evidence showed that (he) did in fact commit the charged offenses and at the time of the hearing understood the ramifications of his decision to appear at NJP.

... Although (he) was not provided with a copy of the comments prior to NJP, it was not prejudicial to his defense, nor did it make the punishment unjust or disproportionate. The members of the chain of command were present, made statements and were available to answer questions During NJP, I asked (him) if he would like to comment on or ask any questions to the members of his chain of command who had spoken, but he declined.

(He) states that he was not allowed to fully make an oral statement in his defense at NJP. I asked a series of questions to (him) with regard to the charges against him. Only when he did not direct his answer to the question I posed was he asked to give a "yes or no" or "true or false" response. When asked if he would like to make a statement, (he) chose not to address the issues before me, but rather, chose the hearing to voice his concerns about the chain of command. Only once he went outside the defense to the charges presented did I ask him to address the issues. No other restraint was placed on his freedom to make a full statement. Additionally, (he) provided me with a detailed letter and evidence that spoke to the offenses charges. In other words, (he) was provided with an adequate opportunity to present evidence and testify in his own defense.

(He) was counseled by LT Frank (G), JAGC, USNR, who was aware that the command was contemplating court-martial charges. (He) was never promised anything to accept NJP, but was made aware of the consequences associated with a finding of guilt at a court-martial.

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On 9 March 2001, the Commander, Navy Region Southeast denied the NJP appeal.

On 26 April 2001 you agreed to remain on active duty beyond the expiration of your enlistment to receive medical treatment. In the performance evaluation for the period ending 22 February 2001 you were assigned an adverse mark of 1.0 in military bearing/character and were not recommended for retention in the Navy. You were honorably discharged on 18 August 2001. At that time, you were not recommended for reenlistment and were assigned an RE-4 reenlistment code.

In your application you contend that you were unfairly treated, essentially raising the same issues as in the NJP appeal. You contend that you were coerced into giving up your right to have the charges against you considered by a court-martial. You claim that representatives of the command told you that if you were convicted by a court-martial, you could receive a severe sentence and have a felony conviction on your record. Further, you alleged that you were led to believe that if you accepted NJP, the charges would either be dismissed or you would receive minimal punishment. You also contend that you were denied leave until you agreed to accept NJP, and point out that none of your requested witnesses were present. You state that you were directed by the commanding officer to answer a series of "true or false" and "yes or no" questions. Concerning the statements made by individuals in the chain of command that you were disruptive and created a hostile environment since your arrival at the command, you point out that you were never counseled about any problems until 30 October 2000. You again assert that you are innocent of the charges, Ms. D. has a reason to make a false statement, and statements from others showed that you were not guilty of the charges.

The Board weighed your excellent service prior to reporting to the naval hospital against the documentation concerning your difficulties with your superiors at the hospital. However, the Board concluded that you were on notice that your behavior was unacceptable, but you persisted in that behavior. The Board reviewed the statement of Ms. D but noted that there did not appear to be any motivation for her to make a false statement. The Board also noted that Petty Officer W stated that Ms. D told him of the disrespectful comment shortly after it was made. He then told LT H, who then called Ms. D. The Board also considered

the statement of the retired chief petty officer who stated that you were not derelict in your duties while you were treating him and that he did not see any disrespect. Finally, the Board noted that there was no evidence that you were coerced into accepting NJP. The advice you received concerning the possible severity of a court-martial sentence and felony conviction was certainly accurate. The Board concluded that there was sufficient evidence for the commanding officer to conclude, by a preponderance of the evidence, that you were guilty of disrespect, disobedience and dereliction of duty, and there was no abuse of discretion in this regard. Further, given the adverse comments of members of your chain of command, the Board could not conclude that a punishment that included a reduction in rate was too severe. The NJP and adverse performance evaluation were found to be sufficient to support the assignment of the RE-4 reenlistment code.

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