



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

AEG
Docket #648-01
19 November 2002

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 13 November 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 dated 24 September 2002 from the Judge Advocate Division, Headquarters Marine Corps (HQMC), 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.

You were commissioned a second lieutenant (O-1) in the Marine Corps Reserve on 14 August 1981 and immediately began a period of extended active duty. On 7 January 1982 you requested assignment to aviation training. In connection with your application for this program, you signed a pre-printed Student Naval Aviator Training Agreement, dated 15 January 1982, that reads, in part, as follows:

RESERVE OFFICER

In connection with my request for assignment to aviation training in the Naval Aviator Program, I agree to serve on extended active duty for forty-eight (48) months from the date of my designation as a Naval Aviator Officer, and understand that a request for release from active duty prior to completion of that minimum period will normally be rejected.

In this agreement, the pre-printed words and figures "forty-eight (48)" have been lined out and the handwritten words and figures

"fifty-four (54)" have been written in. These changes have been initialed, but the initials are illegible.

You successfully completed training and, on 3 June 1983, were designated a naval aviator. About a month later, you were advanced to first lieutenant (1STLT).

On 26 October 1983 you reported for duty with Heavy Helicopter Squadron (HMH) 463. On 8 February 1984, the command queried HQMC concerning the lack of a service agreement in your record. HQMC responded on 28 February 1984, citing the service agreement of 15 January 1982 and, based on your designation as a naval aviator on 3 June 1983, calculated that your active service obligation extended to 1 December 1987.

For more than two years after assignment to HMH-463, you served in a satisfactory manner. However, the fitness reports in the record reflect that you were ranked below your peers and had problems getting along with others.

On 8 May 1986, while temporarily assigned to Medium Helicopter Squadron (HMM) 364 on a unit deployment program, you requested mast with the Commanding General (CG) First Marine Aircraft Wing. In that request, you cited a letter of 22 March 1986 in which you complained of harassment and verbal abuse by the executive officer (XO) of HMM-364, a Major (MAJ; O-4) S. On 10 May 1986 a Lieutenant Colonel (LTCOL; O-5) E was appointed to investigate your allegations.

On 27 May 1986 the Commanding Officer (CO), Marine Aircraft Group (MAG) 24 requested that you receive a psychological evaluation and cited your behavior while deployed, such as making allegations against other members of the squadron which resulted in an early return from deployment. A psychological evaluation was conducted and disclosed nothing significant. A notation on the CO's request states that you were returned to flight status.

LTCOL E submitted a report of his investigation on 30 May 1986 and concluded that although MAJ S was disliked by many members of HMM-364, he was a competent officer. LTCOL E further found that "there is no evidence of other than well-intentioned counseling of (1STLT P; [you]) by (MAJ S)." LTCOL E also pointed out that you had been counseled by others, had a record of poor cooperation and disrespect, and were late to work without justification on two occasions. LTCOL E recommended you be disciplined for failure to go to your place of duty at the appropriate time.

Meanwhile, on 19 May 1986 the CO, MAG 36 received an anonymous letter containing allegations of misconduct against the CO and the XO of HMM-364. Accordingly on 22 May 1986, a LTCOL R was appointed to conduct an investigation. His report on 10 June 1986 concluded that the XO, MAJ S, "is a respected and accomplished aviator," but that his "intensity of effort was not

conducive to good results from all, and alienated a few officers, although those questioned agree that (he) was working for the betterment of the squadron and the professional development of Junior Officers." LTCOL R also cited an incident that could have escalated into fraternization by MAJ S but, due to his "prudent judgment," did not.

LTCOL R did not let you off so lightly, finding, in part, as follows:

That (1STLT P) was not a well thought of officer, even disliked by some.

That (1STLT P) was counseled on his attitude on several occasions by both seniors and peers.

That (MAJ S) exercised broad latitude and tolerance for (1STLT P).

That (!STLT P) lies.

That (1STLT P) was uncooperative, manipulative and argumentative.

That (1STLT P) violated Article 86 UCMJ (Uniform Code of Military Justice) on two occasions, 5 and 6 May 1986.

That (1STLT P) violated uniform guidance.

That (1STLT P) was belligerent and disrespectful to superior officers, those being (MAJ S) and Captain (CAPT; O-3) [Pe].

That (1STLT P) disliked (MAJ S).

Concerning the allegation of lying, LTCOL R cited a statement from CAPT Pe to the effect that you initially told him the flight jacket you were wearing was not Navy issue, but later admitted that it was.

In his report, LTCOL R opined that you were "possessed of an extremely poor attitude, tended towards anger, (were) belligerent, and violated the UCMJ." He recommended charges be filed for absence without leave, disrespect to a superior officer and conduct unbecoming an officer.

Despite the recommendations of LTCOLs E and R, no disciplinary action was action was taken against you as a result of their investigations. Documentation in the record indicates that on 1 July 1986 you were promoted to CAPT.

On 17 December 1986, nonjudicial punishment (NJP) action was initiated against you for the following specifications of

disrespect, disobedience and dereliction of duty, in violation of UCMJ articles 89, 90, and 92, respectively:

In that (CAPT P; [you]) . . . did, . . . on or about 11 December 1986, behave himself with disrespect toward (MAJ B), his superior commissioned officer, . . . by contemptuously turning from him and walking away from him while . . . (MAJ B) was talking to him, . . . and by saying to (MAJ B), "yes sir," or words to that effect in a contemptuous tone of voice while coming to an exaggerated position of attention after having been commanded to return by (MAJ B).

In that (CAPT P), . . . having received a lawful command from (LTCOL P), his superior commissioned officer, . . . to "give me that paperwork," or words to that effect, did, . . . on or about 11 December 1986, willfully disobey the same.

In that (CAPT P), who knew of his duties as Squadron Duty Officer . . . from about 0745, 8 November 1986 to about 0745, 9 November 1986, was derelict in the performance of those duties in that he willfully failed to: eat one meal at Pless Hall; inventory the keys in the key locker; inspect the Squadron hanger; inspect the Squadron working spaces; inspect the Squadron flight line; informally inspect building 1604, the Squadron barracks, twice during the day; inspect the grounds of building 1604, the squadron barracks, prior to 0630; make a logbook entry that the orders pertaining to the Squadron duty have been read and understood; make a logbook entry that all keys in the key locker have been inventoried; make logbook entries commenting on the results of his inspection of the Squadron Barracks, the Squadron hanger, the Squadron working spaces, and the Squadron flight line; and make a logbook entry noting the quantity and quality of the food served at Pless Hall, as it was his duty to do . . .

The Notification and Election of Rights pertaining to the charges reflects that they were based on the squadron's duty log and orders pertaining to the duties of the officer of the day, and statements from LTCOL P and a 1STLT T.

On 24 December 1986, after an extensive NJP hearing, the CO, MAG 24 found that you had committed the above offenses and imposed a punitive letter of reprimand. You subsequently appealed the NJP, but the appeal was denied by the CG, 1st Marine Amphibious Brigade (MAB).

On 7 January 1987 a field flight performance board (FFPB) convened because of the allegations of misconduct lodged against you and a medical grounding chit submitted by the squadron CO, apparently due to stress caused by those charges. In connection with the FFPB, you were directed to undergo a second psychological evaluation to determine your fitness for duty. That

evaluation found no abnormal behavior and recommended your return to flight duty. In its report of 14 January 1987, the FFPB concurred, citing your "sound reputation as a pilot," and the fact that you had met all applicable aviation requirements. However, the FFPB also noted "antagonistic and rude behavior towards all authority, specifically, your threat to "get (MAJ S) if it's the last thing I do," and recommended disciplinary action. Upon review of the FFPB, higher authorities non-concurred with the recommendation for restoration of your flight status due to the NJP and other instances of inappropriate behavior.

On 3 March 1987 the CO, MAG 24 reported to HQMC that he had imposed NJP on you. This report was subsequently endorsed by the CG, 1st MAB, who recommended initiation of administrative separation action because of your "poor professional attitude and demeanor, coupled with . . . complete disregard for anyone in a position of authority . . ."

Meanwhile, documentation in the record indicates that NJP action was initiated in February 1987 based on allegations of misconduct that occurred on 9 January 1987. On 17 February 1987 you requested that the CG, 1st MAB conduct NJP proceedings in lieu of your CO. However, a charge sheet reflects that on 4 March 1987 court-martial charges were preferred against you alleging the following specifications of disrespect and disobedience, in violation of UCMJ Articles 89 and 90, respectively:

In that (CAPT P), . . . did . . . , on or about 9 January 1987 , behave with disrespect toward (MAJ B) . . . by contemptuously ignoring (MAJ B) while he was talking to (Petitioner); by contemptuously refusing to respond to questions directed toward him by (MAJ B); and by contemptuously placing smokeless tobacco juice and saliva into (MAJ B's) motorcycle helmet.

In that (CAPT P), . . . having received a lawful command from (MAJ B) . . . , to "look over part 'A' of your fitness report and verify the accuracy of the information contained therein," or words to that effect, did . . . on or about 9 January 1987, willfully disobey the same.

In that (CAPT P) . . . , having received a lawful command from (MAJ B) . . . to "stay in my office until I get back" or words to that effect, did . . . , on or about 9 January 1987, willfully disobey the same.

As required by Rule for Courts-Martial (RCM) 307(b), an accuser swore that he had personal knowledge of the charges or had investigated them and believed them to be true. On 5 March 1987 the CO, MAG 24 appointed an officer to conduct an investigation pursuant to UCMJ Article 32.

On 31 March 1987 the Commandant of the Marine Corps (CMC) initiated administrative separation action against you by reason of misconduct, including commission of serious military offenses, poor performance resulting from gross indifference, and discreditable involvement with military authorities; and substandard performance of duty, including leadership deficiencies, lack of proficiency, failure to discharge duties, sustained poor performance as shown by your fitness reports, and failure to comply with standards of deportment. In support of these allegations, CMC cited the CO's report of 13 March 1987 and the preferred charges of 4 March 1987, and your entire military personnel file. The CG, 1st MAB was directed to convene a board of inquiry (BOI).

On 22 April 1987 the CO withdrew the charges preferred on 4 March 1987 "in consideration of (CAPT P's) pending (BOI) which will consider (his) performance and conduct, including the conduct which forms the basis for the charges preferred on 4 March 1987."

On 8 May 1987 you submitted a request for resignation, citing your "complete lack of confidence in the judgment, integrity and abilities of my senior officers." However, you withdrew this request shortly before the BOI met.

The BOI, whose voting members were a Colonel (O-6), a LTCOL and a MAJ, met on 18 and 26 May 1987. After an extensive *voir dire*, your counsel declined to challenge any of these members for cause. The BOI then considered a voluminous amount of documentation, including the charge sheet of 4 March 1987, which was admitted in evidence over the objection of your counsel. The verbatim record contains nearly 250 pages of testimony, including that of MAJ B, and a CAPT K, who testified about the events resulting in the court-martial charges. The BOI also considered a statement from CAPT K concerning those events.

During closing argument, without objection, the recorder stated as follows concerning some of the misconduct of record:

(D)isrespect to (LTCOL LaR) . . . acting (CO) in July of 1986, by throwing a set of captain bars on the colonel's desk, telling the colonel to keep them, and walking out of the office.

(D)isrespect to (MAJ B) on 11 December 1986 by walking away from him when being spoken to, and when called back, by assuming an exaggerated position of attention and shouting, "Yes, sir."

(D)isrespect to (MAJ B) on 9 January 1987 by contemptuously refusing to acknowledge his presence, by contemptuously refusing to answer his questions, (and) by contemptuously placing smokeless tobacco juice in (MAJ B's) helmet.

(D)isrespect to (MAJ S) on 22 April 1986, by throwing down a pencil, throwing down a schedule, gathering up his gear and walking out of the room.

(L)ying to a senior officer, (CAPT Pe), by stating that his Navy issue flight jacket was an imitation he bought in Korea.

(F)raternization with his crew chief, a corporal . . . by calling the corporal by his first name and by allowing the corporal to call him Pete.

(O)btaining and wearing a tee shirt that said "Nail the Knife," and depicting a knife having a nail driven into it with a knife bleeding, and by showing this shirt and describing its implication to junior Marines during the fall of 1986, indicating that it depicted (MAJ S), a senior officer.

(L)ying to either (LTCOL P) or (MAJ H) or both, in December 1986 by telling (MAJ H) that his child lost his pilot's logbook, and by telling (LTCOL P) that the pilot's logbook was in the mail.

After considering all the evidence of record, the BOI unanimously found that you had committed misconduct as alleged, and were guilty of the allegations of substandard performance of duty, except those charges pertaining to a lack of proficiency and failure to discharge duties. By a 2-1 vote, the BOI recommended a general discharge. The minority member recommended discharge under other than honorable conditions.

On 1 June 1987 you requested release from active duty, citing the 15 January 1982 training agreement and contending as follows:

No service contract exists for any obligated service. My attempts to be released from active service have been either rejected or not acted upon. (The training agreement) implies a modification to a non-existent contract, yet, it too, expires on this date (1Jun87).

Since any obligated service, either implied or otherwise, does not exist, I request an immediate release from active duty.

Your CO endorsed this request on 3 June 1987 and noted that you "signed a training agreement to serve on active duty for 54 months from the date of designation as a naval aviator." The CO then expanded on your contention as follows:

(CAPT P) claims that the period of extended active duty of 54 months was pen changed by person or persons unknown from

48 months, thus his service agreement expired 870601 vice 871201 as contained in his service records.

On 2 July 1987 CMC disapproved your request for release from active duty.

After the CG, 1st MAB concurred with the majority recommendation of the BOI for a general discharge, the case was submitted to HQMC. On 20 July 1987 the Deputy Chief of Staff for Manpower recommended such action to the Secretary of the Navy (SECNAV). On 21 July 1987 the Assistant Secretary of the Navy (Manpower and Reserve Affairs), acting for SECNAV, approved this recommendation. Accordingly, you received a general discharge on 3 August 1987.

The Board first considered your contention that the service obligation in the agreement of 15 January 1982 was improperly changed from 48 to 54 months and, accordingly, you were improperly held on active duty after 1 June 1987, four years after your designation as a naval aviator. However, the Board rejected this contention, in part, for the reasons set forth in paragraphs 4a(1) and 4a(2) of the HQMC advisory opinion. The Board also noted that the comment in the footnote to paragraph 4a(2) concerning your mental state was superfluous and added nothing to the otherwise cogent analysis.

The Board also found that 54 months clearly was the correct service obligation. Marine Corps Order (MCO) 1542.1C called for a 48-month obligation for a student naval aviator, however, Marine Corps Bulletin (MCBUL) 1542 of 11 July 1980 changed this obligation to 54 months, effective 1 January 1981, and stated that this change would be reflected in an upcoming revision to MCO 1542.1C. Such a revision, MCO 1542.1D, issued on 16 July 1981, called for 54 months of obligated service. MCBUL 5215 of 19 March 1990 shows that this directive was not superseded by MCO 1542.1E until 18 July 1988. Additionally, an active duty service obligation history maintained by the Manpower Policy and Plans Division of HQMC reflects that from 1 January 1981 until 15 July 1989, the service obligation for student naval aviators was 54 months. Copies of the foregoing documentation are enclosed.

The Board also rejected your allegation that as a result of LTCOL R's investigation, you were ordered to undergo a psychological examination. The record is clear that your CO ordered such an examination on 27 May 1986, less than a week after LTCOL R was directed to investigate the anonymous letter, and about two weeks before he submitted his report. Further, the evaluation apparently was favorable and, although LTCOL R's report is very critical of you, it does not come to any conclusion concerning your medical or mental state.

The Board also could not find that any of the adverse actions taken against you resulted from any sort of conspiracy or agreement between MAJ S and LTCOL LaR, or any harassment or anti-

semitism by either officer. The record contains no such evidence, in fact, the investigation reports of LTCOLs E and R state that MAJ S was not at fault, and no improper agreement, conspiracy or harassment was mentioned. Additionally, the record clearly shows that the CO of MAG 24 imposed the NJP of 24 December 1986, in part, as a result of your disrespect and disobedience toward MAJ B and LTCOL P. The court-martial charges of 4 March 1987 resulted from similar misconduct to MAJ B. Although the BOI considered the investigations of LTCOLs E and R which documented your antagonism toward MAJ S, the administrative separation action was primarily based on the NJP and court-martial charges. Further, you had an opportunity to explain your situation to the BOI, and did so. However, the BOI, composed of three senior unbiased officers, obviously found no merit in your assertions.

The Board also found no merit in your contention that the allegations set forth in the charge sheet should not have been raised at the BOI since those charges had already been withdrawn. Paragraph 10 of enclosure (8) to SECNAV Instruction (SECNAVINST) 1920.6A, which was in effect at the time, stated that at a BOI the rules of evidence do not apply; oral or written matter not admissible at trial may be accepted; and evidence need only be authentic, relevant, material and competent. Clearly, the charge sheet was admissible because it set forth offenses and was sworn to by the accuser. Additionally, testimony was presented from two witnesses on the allegations of misconduct set forth in the charge sheet.

Concerning the withdrawal of charges, the convening authority clearly took that action only because he intended that they be fully evaluated by the BOI. Rule for Courts-Martial (RCM) 604 states that charges may be withdrawn from a court-martial "for any reason." The discussion following that rule suggests that charges that are withdrawn should be dismissed. However, RCM 401(c)(1) states that dismissal does not bar further disposition of the charges in accordance with RCM 306. RCM 306(c)(2) specifically provides for disposition of charges through administrative action, and the discussion following that rule states that such action includes administrative separation. Accordingly, the Board concluded that even though the charges of 4 March 1987 arguably should have been dismissed after being withdrawn, this failure did not preclude the BOI from considering the charge sheet.

The Board also concluded that the action by the Judge Advocate General in February 1990, removing the charge sheet from the Officer Performance File maintained by an office within HQMC, does not compel its removal from your official record. In this regard, as previously noted, the charge sheet was properly introduced in evidence at the BOI, and the BOI is properly filed in your record.

In a related matter, the Board found no impropriety in the failure to try you by court-martial after you apparently refused NJP for the charges and specifications set forth on the charge sheet. Paragraph 4b(1) of Part V to the *Manual for Courts-Martial* states that even if a servicemember demands trial by court-martial, "it is within the discretion of the commander whether to forward or refer charges for trial . . . but in no event may (NJP) be imposed . . . unless the demand is voluntarily withdrawn."

The Board also considered whether your discharge should be set aside or recharacterized, but concluded that no such action should be taken. The BOI findings and recommendations were supported by the testimony and evidence introduced during the proceedings. Accordingly, separation was appropriate. Concerning the characterization of service, paragraph 1b of enclosure (5) to SECNAVINST 1920.6A stated that in a finding of misconduct by an officer normally requires a characterization of under other than honorable conditions. Therefore, you were fortunate to receive a general discharge, under honorable conditions.

Consequently, there is no reason to remove any documentation from your record, or set aside or change your discharge. 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

Enclosures:
JAM4 Memo of 24Sep02
MCBUL 1542 of 10Jul80
MCO 1542.1D of 16Jul81 (excerpts)
MCBUL 5215 of 19Mar90 (excerpt)
MPP-33 USMC ADSO History of 10Jul90