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

AEG
Docket No. 3434-99
28 February 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 27 February 2001. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary evidence 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 from Headquarters Marine Corps (HQMC) and the Deputy Assistant Judge Advocate General (DAJAG) for Administrative Law, copies of which are 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 Board found that you began your military service on 27 November 1979 by enlisting in the Marine Corps Reserve. You remained in that component and performed a three-month period of active duty, until you enlisted in the Regular Marine Corps on 23 December 1981. During the next 13 years, you served continuously on active duty in an enlisted status and compiled an enviable record of service, attaining the rank of staff sergeant (E-6), and earning three Navy and Marine Corps Commendation Medals and two Navy Achievement Medals.

On 1 February 1995 you accepted an appointment as a warrant officer, W-1. Secretary of the Navy Instruction (SECNAVINST) 1120.11A states that a selectee for warrant officer "shall be permanently or temporarily appointed by SECNAV in the grade of warrant officer, W-1 in the Regular Marine Corps, under 10 U.S.C. 555 or 5596 . . ." When that directive was issued on 26 November 1991, § 555(b) authorized the "permanent appointment of regular

warrant officers, W-1 . . ." § 5596(a) authorized certain "temporary appointments of officers designated for limited duty in the . . . Regular Marine Corps in grades not above captain," and further stated that "such appointments shall be made by warrant if in the grade of warrant officer, W-1 . . ." Your "Appointment Acceptance and Record" states that the statutory authority for appointment was "10 USC 555."

You completed the Warrant Officers Basic Course and the Personnel Officers Course, and were then assigned to a helicopter squadron located at Marine Corps Base (MCB), Hawaii. It appears that you performed satisfactorily for about a year. However, you received an adverse fitness report due to indebtedness for the period 22 June to 21 August 1996. In September 1996, a command investigation revealed that you were derelict in the performance of duties pertaining to the maintenance of pay and personnel records. As a result, you were relieved for cause and reassigned to a logistics support position aboard the MCB.

On 3 February 1997 you received nonjudicial punishment (NJP) from the Commanding General (CG), 1st Marine Air Wing (MAW), for a four-day period of unauthorized absence, assaulting your wife by kicking and striking her, and false swearing, in violation of Articles 86 and 134 of the Uniform Code of Military Justice. Punishment extended to a punitive letter of reprimand and forfeitures of $500 per month for two months. You appealed the forfeitures as being unduly harsh, but that appeal was denied. On 26 March 1997 the CG reported the NJP to the Commandant of the Marine Corps (CMC) and recommended that you be required to show cause for retention in the Marine Corps, based on the NJP and the results of the earlier command investigation.

On 21 July 1997 the Director of the Marine Corps Staff, acting for CMC, concluded that the allegations in the CG's letter of 26 March 1997 warranted administrative separation action. Accordingly, a board of inquiry (BOI) was directed to consider whether you should be separated by reason of misconduct and/or substandard performance of duty. On 22 August 1997 a BOI was appointed consisting of three officers serving in the grade of lieutenant colonel (LTCOL; O-5). A recorder, legal advisor and military defense counsel were also appointed.

It appears that after the BOI was appointed, but before it met, your counsel informally complained that no member of the BOI was in your competitive category. On 1 October 1997, the recorder to the BOI telefaxed a response to counsel which reads, in part, as follows:

> Paragraph 2d(3) of enclosure (8) to SECNAVINST 1920.6A, . . . requires that at least one member of the (BOI) be from the respondent's "competitive category," does not apply to Marine Corps . . . (BOIs).

When the instruction was issued (21 November 1983) the Marine Corps had two competitive categories for officers: unrestricted officers and limited duty officers (LDOs). In 1995, new competitive categories were established to better manage promotions of LDOs and warrant officers (WOs). We now have 1 competitive category for all unrestricted officers, 19 for LDOs and 59 for WOs (each military occupational specialty [MOS] for LDOs and WOs is a separate competitive category) . . .

Paragraph 2d of enclosure (8) to SECNAVINST 1920.6A, . . . establishes membership requirements for BOIs. When the respondent is a Regular commissioned officer . . . there must be at least t3 Regular officers in the grade of O-6 (colonel) as members . . . For . . . WOs, the members need not be O-6s, only senior to the respondent.

Paragraph 2d(3) then specifies that at least one member of the (BOI) shall be an "**unrestricted line officer** and that "one member shall be in the same competitive category as the respondent . . . however, if the respondent's competitive category does not contain officers in the paygrade of O-6 or above, an O-6 from a closely related **designator** shall be used . . . if there is not a **designator** closely related . . . then an **unrestricted line officer** shall be used (emphasis added). The Marine Corps has "unrestricted officers" not "unrestricted line officers." We have "MOSs" not "designators." We also do not have O-6s in the LDO or WO community. This language in paragraph 2d(3) literally makes no sense in a Marine Corps context and only has application to the Navy staff corps.

What confuses the issue, is the next sentence which states " . . . DC/S (M&RA) [the Deputy Chief of Staff of the Marine Corps for Manpower and Reserve Affairs] may waive each of these requirements on a case by case basis when compliance would result in undue delay." This sentence is misplaced in paragraph 2d(3) and really belongs in a separate paragraph. For the Marine Corps, it should be read as only applying to the requirements in the preceding paragraphs 2d(1) and (2), which do not contain their own provisions for waiver.

If we were to read paragraph 2d(3) as applicable to the Marine Corps--despite its plain language--the only real issue in the the case of . . . WOs is whether to assign an unrestricted officer to the (BOI) with the MOS most closely related to the respondent.

The BOI met on 22 October 1997. During preliminary proceedings, after he was advised of his right to challenge any member of the BOI for cause, your counsel declined to do so. However, during his opening statement, he commented as follows on the composition of the BOI:

> . . . I believe that (SECNAVINST 1920.6A) indicates . . . that an officer pending a (BOI) such as this is entitled to have an officer within his specialty group, his field. And that's why I think, at least for . . . the record, that if we're going to evaluate a warrant officer, that perhaps one of the members of the (BOI) should have been a chief warrant officer or someone within his specific MOS field of admin. Now, I'm not taking anything from the (BOI) members that we have here now, but I believe that if you step back and examine . . . yourselves, if someone was questioning your proficiency and ability, that it might be pertinent to have one of the (BOI) members be someone who, in this case, is an admin specialist, that could provide special insight to the (BOI) to say, . . . I'm familiar with how an admin officer can let the shop go and these problems happen. So I just wanted to indicate that for the (BOI) just to preserve it.

Extensive documentation was then introduced by the recorder and your counsel pertaining to the misconduct for which NJP was imposed and your substandard performance of duty. The live testimony presented by the recorder focused primarily, although not exclusively, on the deficiencies in your duty performance. Toward the end of the proceedings, the recorder introduced in evidence a law enforcement report pertaining to allegations of adultery against you. After considering all of the evidence, the BOI unanimously concluded that you had committed both misconduct and substandard performance of duty, and also unanimously recommended discharge under other than honorable conditions.(UOTHC).

Subsequently, the case was forwarded to Headquarters Marine Corps (HQMC) through the chain of command. All commanders echoed the recommendation of the BOI for discharge UOTHC. Upon arrival at HQMC, a representative of CMC's staff judge advocate also submitted such a recommendation. On 23 February 1998 the Deputy Chief of Staff for Manpower and Reserve Affairs, acting for CMC, also recommended a UOTHC discharge. On 5 March 1998 the Assistant Secretary of the Navy (Manpower and Reserve Affairs), acting for SECNAV, approved that recommendation. Accordingly, on 31 March 1998, you were discharged UOTHC after about 16 years and 6 months of active service. The narrative reason for separation set forth on the Certificate of Release or Discharge from Active Duty (DD Form 214) is "involuntary discharge (unacceptable conduct) with board."

A few days before discharge, you submitted a request for reenlistment in the Marine Corps to CMC, through the chain of command, and supplied the information required by the governing directive. On 15 May 1998, this request was considered and denied by the Reserve Staff Noncommissioned Officer and Officer/Former Officer Enlistment/Reenlistment Evaluation Board at HQMC. You were so advised by letter of 2 June 1998.

The Board found no merit in your contention that you were not subject to the BOI procedures in SECNAVINST 1920.6A since you were a temporary warrant officer and the directive only applied to permanent warrant officers. However, this contention is without merit. As previously stated, the statutory authority for your appointment was stated as 10 U.S.C. § 555, which authorized the appointment of permanent regular warrant officers. Although this statute had been repealed by the time of your appointment, its provisions were reenacted in § 571.[1] Had you been appointed a temporary warrant officer as you claim, the statutory authority would have been § 5596.

With regard to your contention that the BOI was improperly constituted because no member was a chief warrant officer in your competitive category of Personnel (MOS 170), the Board noted that subparagraph 2d(1) of SECNAVINST 1920.6A stated that in the cases of regular officers other than limited duty officers and warrant officers, the BOI members must be serving in paygrade O-6. Subparagraph 2d(2) stated that for reservists, limited duty officers and warrant officers, the BOI need only be composed of officers "senior to the respondent," unless SECNAV directed otherwise. Subparagraph 2d(3) required that "one member . . . be in the same competitive category as the respondent." The Board then noted the next two sentences of that subparagraph, pertaining to the authority to use an officer in a closely related designator if there are no officers in paygrade 0-6 in the respondent's competitive category, and the authority to use an unrestricted line officer if there is no such designator. However, the Board concluded that these sentences were irrelevant to your case since there was no requirement to use officers in paygrade 0-6 on your BOI in the first place. Accordingly, after careful consideration, the Board disagreed with the HQMC advisory opinion and concluded that subparagraph 2d(3) called for one of the BOI members to be in your competitive category. Since no one in authority waived that requirement, the BOI was improperly constituted.

Having found an error in the composition of the BOI, the Board then turned to the issue of whether it was jurisdictional in nature, thereby rendering the discharge proceedings null and void. There is case law to the effect that an improperly constituted military board is a fatal defect which invalidates the action of that board.[2] Other cases, however, reject this reasoning and state that a reviewing authority such as the

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[1] Department of Defense Authorization Act of 1992, Pub.L. 102-190, § 1112(a), 105 Stat.1492.

[2] *Henderson v. United States*, 175 Ct.Cl. 690, 701 (1966), *cert. denied*, 386 U.S. 1016 (1967); *Ricker v. United States*, 184 Ct.Cl. 402, 407, (1968); *Doyle v. United States*, 599 f.2d 984 (Ct.Cl. (1979), *cert. denied*, 446 U.S. 982 (1980); *Evenson v. United States*, 654 F.2d 68 (Ct.Cl. 1981).

correction board should set aside the initial action only if the potential for prejudice cannot reasonably be denied.[3]

After considering the facts and circumstances of your case and the applicable case law, the Board agreed with the DAJAG advisory opinion to the effect that improper composition of a BOI is not jurisdictional in nature. The Board noted with approval the following judicial admonition:

> There is nothing . . . that can be construed, by any stretch of the imagination, as signaling the adoption of a per se rule invalidating Correction Board action when it chooses not to correct a military record that follows procedures containing defect . . . A Correction Board's determination that a procedural defect did not prejudice a member, and thus does not require it "to correct an error or remove an injustice" will be overturned only if such a determination is arbitrary.[4]

Having concluded that the improper composition of the BOI was a procedural and not a jurisdictional defect, the Board then considered whether you waived that defect. Once again, the Board was unable to concur with HQMC and concluded that no such waiver occurred. It is clear that your counsel raised this issue with the recorder prior to the BOI. The HQMC advisory opinion correctly points out that during the BOI, counsel did not challenge any of the BOI members for cause when advised of his right to do so. However, none of the individual members were subject to challenge--each one was qualified for membership. Although the Board believed it would have been appropriate for counsel to raise the issue of the BOI's composition at this time, he preserved the issue for review by raising it during his opening statement.

The Board then proceeded to consider whether the failure to have an officer in your competitive category on the BOI was substantially prejudicial or constituted harmless error. An error may be deemed harmless only if the reviewer is convinced that the error did not influence the final decision, or had only a very slight effect.[5] After careful consideration of the facts and circumstances, the Board concluded that the foregoing error was harmless. In this regard, there is no evidence that any of the officers who sat on the BOI were prejudiced against you in any way. Although you were processed for separation, in part, due to unsatisfactory performance of duty, and a warrant officer

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[3] *Dilley v. Alexander*, 603 F.2d 914, 921 (D.C. Cir. 1979); *Neal v. Secretary of the Navy*, 639 F.2d 1029 (3rd Cir. 1981); *Wolfe v. Marsh*, 835 F.2d 354, 358-59 (D.C. Cir. 1987); *Sargisson v. United States*, 913 F.2d 918, 923 (Fed. Cir. 1990).

[4] *Wolfe, supra*, at 359.

[5] *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979); *Burd v. United States*, 19 Cl.Ct. 515 (1990).

in your competitive category might have had some insight into the merits of these allegations not shared by the unrestricted line officers on the BOI, you were also processed based on allegations of misconduct that had no relation to your military duties, and this misconduct eventually was designated as the reason for your discharge and not the deficiencies in your performance.

The Board rejected the contention that SECNAV and not the board at HQMC was required to act upon your request for reenlistment. In this regard, the Board first considered the assertion in the HQMC advisory opinion that the Board need not reach this issue because your request was deficient, specifically, you failed to request a waiver of the applicable reenlistment criteria and also failed to note that you were pending discharge UOTHC. However, the Board could not agree with HQMC. The applicable directive, Marine Corps Order (MCO) 1130.63C, states that waiver of the reenlistment criteria will be considered if such action is recommended by the individual's commanding officer. It does not require the individual to specifically request a waiver. Further, that regulation goes into considerable detail concerning the information that an applicant must submit, but there is no requirement to disclose a pending administrative separation. Additionally, your request was submitted through the chain of command, and at least some of the endorsers also reviewed the BOI proceedings. Obviously, you could not conceal he pending separation action from these individuals or the final decision makers.

Proceeding to the merits of your contention, 10 U.S.C. § 515 authorized the reenlistment of a warrant officer discharged for cause "in the discretion of the Secretary concerned." SECNAV exercised such discretion as follows in subparagraph 6d of enclosure (4) to SECNAVINST 1920.6A:

> A permanent Regular warrant officer, who is not eligible for retirement, may apply for enlistment in the highest enlisted grade previously held pursuant to (§ 515) if Honorably discharged because of (Substandard Performance of Duty) . . .

Since you were discharged UOTHC by reason of misconduct, your reenlistment under § 515 simply was not authorized, and it was proper for HQMC to deny your request.

Finally, with regard to your contention that discharge UOTHC was unduly harsh given your overall record of service, the Board concluded that this characterization of service was appropriate. Although you had outstanding performance while serving in an enlisted status, which was recognized by the honorable discharges you received, your service as a warrant officer was marred by a disciplinary action for relatively serious offenses and by substandard performance resulting in relief for cause, which warranted the characterization of UOTHC.

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 applies 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 a probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to: Mr. [redacted]