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

TRG
Docket No: 5500-00
26 February 2002

[redacted]

Dear [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 20 February 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 reenlisted in the Navy on 27 December 1995 for five years. On 1 May 1996 you were counseled and warned concerning your arrest by civil authorities on 18 March 1996 for driving under the influence of alcohol with a blood alcohol content of .14%. In a special performance evaluation for the period 1 December 1995 to 15 September 1996 you were assigned a 1.0 in the category of military bearing/character. However, you were recommended for promotion and retention. Subsequently, you were frocked to AEC (E-7). The detachment performance evaluation for the period ending 18 October 1996 indicated that you were an AEC and were recommended for early promotion.

On 12 November 1996 a hotline complaint was filed concerning your command's actions in a fraternization case, and its lack of action in removing your name from the chief petty officer selection list following your civilian conviction for drunk driving. Subsequently, the allegations made concerning the command's handling of both cases were found to be unsubstantiated. The investigating officer (IO) concluded in your case, in part, as follows:

... The commanding officer (CO) removed the petty officer's (your) base driving privileges. (The CO) deemed that this petty officer, who was his 1995 Sea Sailor of the Year, had potential for further service, and enrolled him in the CAAC Level III program. Upon returning to the squadron from Level III the petty officer was issued a Page 13 warning. No special evaluation was written as the civilian courts had not completed action on his case.

The petty officer was selected and promoted to Chief Petty Officer prior to his civilian conviction or sentencing. Following his civilian conviction and sentence, the DUI was fully documented in his service record. He received the Page 13, suspension of base driving privileges, CAAC Level III training, and an evaluation of 15 September 1996 signed by the Commanding Officer with a 1.0 in Military Bearing, a comment on his civilian conviction for DUI, and a Promotable Promotion Recommendation.

The IO concluded that the CO acted lawfully, properly and in accordance with current regulations, instructions an policies.

Because the report of the investigation did not include some information or thoroughly address the original allegation, it was decided on review to reopen the case and to review the IO's completion report. The new investigation found the hotline allegations in your case to be substantiated. The new IO found, in part, as follows:

> The material evidence established not only that (he) had a civilian conviction for DUI and hit and run in 1996, but that he also had a prior civilian conviction for DUI in 1990. ..... He plead guilty to DUI in 1990. He also pled guilty to DUI in April 1996, in part, because his test result was .16; twice the legal limit in California. He was required by his 1996 plea bargain to also plead guilty to hit and run. This may have been a result of his fleeing the accident and lying to the police officer about his conduct when he was caught and returned to the scene by the neutral civilian witness.
>
> The evidence also established that (the CO) knew that AE1 (A) had not one but two convictions for DUI at least as early as June 1996 ..... He was obviously concerned with his choices as he only decided to frock (him) on 16 September 1996 after discussing the issue

with Captain (M). AE1 (A) had actually been selected for Chief Petty Officer on 12 July 1996. .... It might be noted that the sole guidance provided to (the CO) by his superior, CAPT (M), was that frocking a sailor with two DUI's was technically correct, under Navy policy and (the CO's) judgment call.

CAPT (M) was not correct. Frocking a service members to Chief Petty Officer with DUI convictions is contrary to SECNAV and CNO policy. ..... "There is a "Zero Tolerance" of alcohol and other drug abuse. ..... The judgment of commanders, commanding officers and officers in charge is paramount in enforcing Navy alcohol and other drug abuse policy and ensuring proper disposition of individual cases. They must analyze all available evidence to determine whether alcohol or drug abuse exists, and must respond to unacceptable behavior or performance with appropriate corrective actions. ... Officers, chief petty officers, and all petty officers by virtue of their rank and position, must lead by example. Any drug abuse or irresponsible use of alcohol by those personnel is viewed as a grievous failure to meet navy standards. (emphasis in text)

Since you were convicted by DUI in April 1996 and frocked in September, the new investigation also found that the original IO was incorrect when he reported that you had been promoted prior to the DUI conviction. It was also noted that the original investigation contained no mention of the hit and run charge. The new IO stated as follows:

To verify the information and establish the sequence of events, we contacted the San Diego county Sheriff's Department on 18 and 21 November and discussed the case with them. They verified that AE1 (A) was arrested in February 1996 on five charges including DUI and hit and run. They furnished us with copies of the February 1996 Investigating Officer's Narrative Report. .... and DUI and hit and run Detention Facility Report. .... Their records also showed a prior arrest for DUI .....

The IO concluded, in part, as follows:

... (The first IO's) completion report did not meet the Inspector General's requirements for a thorough investigation because it: (1) did not completely address the allegations; (2) omitted material evidence; (3) contained misstatements of fact; and therefore, (4) had invalid findings and

conclusions. ....

... (The CO's) testimony concerning his knowledge of AE1 (A)'s DUI history was not credible. We reached this conclusion in part because (the CO) submitted a page 13 recording AE1 (A)'s April 1996 DUI and Hit and Run convictions and more importantly because (the CO) signed AE1 (A)'s Amended DAAR in June 1996. This document recorded a second DUI for (the CO's) number one first class petty officer who he knew had been selected as the Wing Sailor of the Year. Further, at the time the DAAR was signed, the Squadron DAPA files contained AE1 (A)') medical record of 8 August 1990, CAAC evaluation, that documented a DUI in 1990. ....

Because (the CO) did not act to notify BUPERS of the second conviction, AE1 (A)'s name remained on the Chief's list when it was published in July. (The CO) stated that the second DUI "didn't stick in my mind" or must have "dropped from my memory." It is not plausible that (the CO) overlooked or forgot these significant reminders of AE1 (A)'s two DUIs brought to his attention within such a short period of time. Even then however, it was not too late to prevent the current dilemma. CAPT (M) commented during our interview that in late July, he and (the CO) had discussed whether to frock AE1 (A) in view of the two DUIs. The CAPT's advice was it was a matter of (the CO's) command discretion. ....

... (The CO) disregarded Navy policy in frocking AE1 (A) to Chief Petty Officer in view of his DUIs and the hit and run convictions. Further, (the CO's) decision to frock AE1 (A) contradicted his adverse evaluation.

... AE1 (A) was not forthcoming about the status of his DUI or hit and run case. He was deliberately vague when discussing the case with the Commanding Officer and Legal Officer and led them to believe his case was on appeal, when it was not.

The IO recommended as follows:

... (The CO) correct and resubmit AE1 (A)'s 15 September 1996 evaluation ....

... COMNAVAIRPAC forward a copy of this investigation to the COMNAVAIRSYSCOM Inspector General for review and discussion with ..... [AE1 (A)'s current CO] with the recommendation that the CO:

(1) recommend BUPERS remove AEC (A)'s name from the Chief Petty Officer Selection list and defrock him in view of the 1990 DUI and 1996 DUI and hit and run convictions.

(2) issue AE1 (A) a Page 13 for his 1990 DUI .....

(3) forward a copy of AE1 (A)'s Page 13 dated 1 May 1996 to PERS-313C1 for inclusion in his microfiche record. .....

COMNAVAIRPAC take appropriate administrative action against CAPT (M), CAPT (H), and CDR (L)

Your record shows that a revised performance evaluation for the period 1 December 1995 to 15 September 1996 was submitted in June 1997. This report states that it was submitted to document withdrawal of your recommendation for promotion based on the civil conviction. Apparently in a related action, the ending date of that report was changed to 18 October 1996 because the originally submitted report for that short period indicated that you were a frocked chief petty officer.

On 9 July 1997, the Bureau of Naval Personnel informed you that they were considering removing your name from the chief petty officer selection list. Your current commanding officer stated that it was unreasonable to take such strong administrative action against you after so long a time. However, on 14 August 1997 you were administratively defrocked.

You transferred to the Fleet Reserve on 30 November 1998 in the rate of AE1 under the provisions of the Temporary Early Retirement Authority. At that time you had completed 17 years, 5 months and 7 days of active service.

You contend, in effect, that it was an injustice to humiliate you with the reduction to AE1 after serving almost a year as a chief petty officer. In addition, you contend that it was improper to submit a revised performance evaluation, showing that you were not recommended for promotion, for the original evaluation in which you were recommended for promotion. You also contend that contrary to the information contained in the investigations, you were never convicted of hit and run was in error. In support of this contention, you have submitted an undated municipal court record which shows that you were only convicted of one count of a violation of section 14601.1 of the California Vehicle Code. You request that the entries concerning the hit and run conviction be removed from the investigations and, in effect, that the Board evaluate the propriety of the reduction without that charge being

considered. You believe that the erroneous information in the second investigation showed that it was neither fair nor impartial. Finally, you contend that the CO properly exercised his discretion under regulations in effect at the time, when he elected to frock you to chief petty officer.

Concerning your contentions, the Board noted that the original performance evaluation for the period ending 15 September 1996 was in error because regulations state that less than a 3.0 mark in any evaluation category requires a non-recommendation for promotion. There is no evidence in the record that the original evaluation was ever accepted for file or placed in your record. It should have been returned to the reporting senior for correction. As indicated, the corrected evaluation for the same period, which is signed by the CO is the only evaluation in the record.

Concerning the hit and run charge, which you contend is erroneous, the Board noted that the municipal court record is undated but shows you were convicted of a violation of the California Vehicle Code section 14601.1. Research revealed that this is a conviction for driving on a suspended or revoked license. Since this is unrelated to a conviction for driving under the influence or hit and run, it apparently means you were convicted of driving on a revoked license on another occasion. In addition, the investigation shows that the IO discussed your case with the San Diego County Sheriff's Department, verified that you had been arrested on multiple charges included DUI and hit and run, and reviewed other documentation concerning this matter. Therefore, the Board concluded that you have not established that the hit and run conviction did not occur.

The Board found that if the performance evaluation had properly shown in September 1996 that you were not recommended for promotion, you would not have been frocked and would have been removed from the selection board list at that time. The Board noted the finding in the second investigation that indicates that you were not entirely forthcoming concerning the status of your civil case. Given the circumstances, the Board concluded that the actions taken against you were proper and no relief is 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