



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

TRG  
Docket No: 8967-05  
29 March 2007

[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 20 March 2007. 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 17 October 1994 after about 37 months of active service on a prior enlistment and served in an excellent manner for more than 10 years. In 2004, you were selected for chief petty officer. You were subsequently frocked and authorized to wear the uniform of a chief petty officer. At that time, you were in charge of the flag mess for Commander, Carrier Strike Group TWO (CSG2) on board USS THEODORE ROOSEVELT (CVN 71).

Subsequently, you were accused of sexual harassment and participating in indecent acts. An investigation was conducted and the investigating officer concluded that the accusations were true. On 11 April 2005, you received nonjudicial punishment (NJP) for violating the regulations prohibiting sexual harassment by wrongfully engaging in unwelcome verbal and physical conduct of a sexual nature; dereliction of duty by failing to maintain a work environment that was free from sexual harassment; and indecent assault. You plead guilty to sexual harassment and dereliction of duty, but not guilty to indecent assault. The punishment imposed was a punitive letter of reprimand.

In your appeal of the NJP, you contended that the investigation was done incorrectly and that witnesses were coerced into making statements. In his endorsement on your appeal CSG2 analyzed the evidence concerning the charge of indecent assault and stated that he believed a preponderance of the evidence supported his finding of guilty. He also pointed out that you plead guilty to the other charges and a punitive letter of reprimand constituted lenient punishment since he could have imposed a reduction in rate and forfeitures of pay. Subsequently, your appeal was denied by the Commander, Second Fleet.

In the performance evaluation for the period 16 September 2004 to 11 April 2005, you were assigned adverse marks of 1.0 in four categories and your recommendation for promotion to chief petty officer was removed. On 11 May 2005, CSG2 sent out a message to ensure that all concerned were aware that your advancement recommendation had been withdrawn.

On 11 April 2005, you were notified of separation processing by reason of misconduct due to commission of a serious offense. On 10 June 2005 an administrative discharge board (ADB) was convened to consider your case. During the ADB, several admirals for whom you had previously worked testified by telephone concerning your outstanding performance of duty. Other individuals testified about the sexual harassment and indecent assault charges. After deliberations, the ADB found by a two-to-one vote that you had not committed misconduct due to commission of a serious offense. The majority's rationale for its decision cited inconsistencies in the testimony pertaining to the allegations of physical contact, the good character of the witnesses who testified in your behalf, your long and faithful service, and the fact that eight of nine witnesses recommended your retention in the Navy. The dissenting member concluded that the preponderance of the evidence showed your guilt.

In the detaching evaluation from CSG2, the individual trait average was 3.0 and you were recommended for promotion and retention in the Navy. The evaluation comments state that you had shown progress and worked hard to overcome personal and professional obstacles. In a concurrent report from another command for the same period, the ITA was 4.43 with laudatory comments and you were recommended for early promotion.

On 30 October 2005, you reported to the USS CARR (FFG 52) and shortly thereafter applied to the Board requesting removal of a performance evaluation and advancement to chief petty officer. You pointed out that your performance of duty had been outstanding and alleged that an injustice occurred due to

improper and inconsistent application of rules, regulations and procedures.

During the preparation of your case, the Board requested the documentation concerning your case and CSG2's comment on your application. In his response, CSG2 stated, in effect, that you had admitted your guilt to most of the charges, and the NJP was properly conducted and reviewed. Concerning the ADB, he pointed out that the majority had ignored the testimony showing your guilt and your admission of guilt. He conceded that the evaluation at issue was erroneously prepared and indicated that action would be taken to file a corrected evaluation but strongly recommended that your application for advancement to chief petty officer be denied.

On 23 February 2006, the Director, Air Warfare Division (OPNAV N78) forwarded a recommendation in your behalf stating, in part, as follows:

(He) was the Leading Petty Officer of my mess when I was Commander, Carrier Strike Group TWO. During this time he was the model Sailor for his juniors and his peers. He proved himself to be a superior Sailor, a great leader and a valuable member of my staff.

... I supported (him) before his board and am aware of the details surrounding his case. I believe a review of his package is warranted. ... Return his Sailor to Khakis as soon as possible. I would want (him) to run my mess again.

Subsequently, the Board obtained three advisory opinion from the Navy Personnel Command (NPC). The Head of the enlisted Career Progression Branch concluded that the recommendation for advancement was correctly withdrawn. Concerning the performance evaluation, the NPC Records Examining Section concluded that it was properly filed and should not be removed, and points out that you had two years to submit a statement in response to the evaluation. Finally, the Enlisted Performance and Separation Section in NPC noted that a finding of no misconduct by an ADB precludes separation in most cases, but does not require a commanding officer to set aside an NJP imposed for the same misconduct. The opinion concluded by stating that given the no misconduct finding and the last performance evaluation in the record at the time of review, it had no objection to any relief that would be deemed appropriate by the Board.

In your rebuttal to the advisory opinion, you continue to claim, in effect, that the performance evaluation was improper and should not have been used to withdraw your recommendation for advancement and, absent the evaluation, you would have reached

your promotion date prior to the submission of the corrected evaluation. You have also submitted character references which support your request to be promoted to chief petty officer.

It is clear to the Board the evidence establishes that sexual harassment occurred in a work station under your charge and that you participated in that harassment. Accordingly, the NJP was proper and there was no abuse of command discretion.

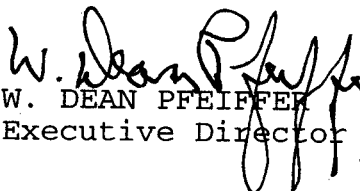
The errors made in the performance evaluation are relatively minor and are not considered sufficient to invalidate the removal of your recommendation for advancement. Accordingly, the Board substantially agreed with the comments contained in the advisory opinion concerning this matter.

Although, a majority of the ADB found that you had not committed a serious offense, the Board believed that the majority's intent in making this finding was to retain you in the Navy. In this regard, the Board noted that you admitted to committing offenses both at NJP and during your testimony at the ADB. Therefore, you were fortunate that you were allowed you to remain in the Navy. Finally, you should be aware that the findings of the NJP and the ADB are completely separate actions and there is no requirement for identical findings. In view of the foregoing, the Board concludes that you should not be advanced to chief petty officer.

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