



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

MEH
Docket No. 7857-09
20 Oct 2010

[REDACTED]

[REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of 10 USC 1552.


A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 18 October 2010. 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 opinions furnished by NPC memo 5000 Pers-43/072 of 16 Dec 09, and NPC memo 5420 PERS-43/009 of 23 June 2010, copies of which are attached. The Board also considered your response to the advisory opinions dated 19 September 2010.

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. In this connection, the Board substantially concurred with the comments contained in the advisory opinions. The Board agreed with PERS 43 that the whole intent of the Aviation Career Continuation Pay Program is/was to provide an incentive to qualified aviation officers to obligate through a Department Head tour (DH). Therefore, allowing an aviation officer who voluntarily elects to submit an "opt out" letter (to opt out of possible selection for DH) to receive and then retain ACP incentive payments does not further the stated goal of ensuring retention of aviation officers through a DH tour.

The Board understood and carefully considered your argument that the guidance published prior to 2008 lacked clarity regarding what was meant by the term "unearned portion." However, the Board found that the guidance was clarified by 2008 and that you knew of the clarification at the time you decided to opt-out. Thus, the Board found that your decision to opt out was voluntarily made with the knowledge that you would be expected to repay the bonus payments previously received. Moreover, the Board also found that you were not treated any differently from any other officer who opted out of consideration for department head school after 2008. As you were previously advised, they have all been required to repay the payments previously received as well. Finally, the Board also carefully considered the e-mails you received in 2007 when you were trying to obtain clarification as to what was meant by the term "unearned portion." In the Board's view, because allowing an officer who "opts out" to retain previous bonus payments squarely conflicts with the stated goals of the ACCP program, it should have been obvious to all, including [REDACTED] that such bonuses were not earned. And the Board regrets that the information that you received from them was unclear and/or erroneous on that point. However, the Board also notes that it is well settled that unclear or erroneous information received from agents does not serve as a basis for the payment of allowances in excess of those that are provided for by statute or regulation. For these reasons, 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 also 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