



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

RDZ:ecb
Docket No. 07210-10
29 October 2010

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This is in reference to your request that the Board reopen your case and reconsider its earlier decision. A three-member panel of the Board for Correction of Naval Records, sitting in executive session, initially considered and denied your application on 22 July 2008. In July 2010 the Board agreed to reconsider its earlier decision and on 13 October 2010 a second three member panel of the Board again reviewed your case. None of three members who had voted to deny your application on 22 July 2008 sat on the panel that re-reviewed your case on 13 October 2010.

The record shows that in June 1999 during the course of a training session on sexual harassment several of your shipmates aboard USS CONSTELLATION complained that you had sexually harassed them on more than one occasion. At the time USS CONSTELLATION was deployed in Korean waters. When the commanding officer of the ship was informed of these charges he directed that an investigation be conducted and that it be supervised by the ship's legal officer who held the rank of commander (O-5) and was a member of the Navy's Judge Advocate General Corps. Using senior noncommissioned officers who had both training and experience in investigatory matters the investigation resulted in seven of your shipmates giving sworn statements that you had engaged in homosexual harassment and assault. After the statements had been gathered an informal disciplinary review board consisting of senior noncommissioned officers examined the statements and conducted individual

interviews of the seven Sailors who had accused you of sexual misconduct. The investigation was then forwarded up the chain of command via the ship's equal opportunity officer and chaplain to the executive officer who then individually interviewed each of your seven accusers. A noncommissioned officer who witnessed the interviews later testified that each of the seven Sailors had to stand at attention in front of the executive officer while being subjected to aggressive and lengthy questioning. In effect the executive officer was challenging the witnesses to convince him that they were being truthful. After the executive officer concluded his questioning the matter was referred to your commanding officer for his evaluation. Like the executive officer he also individually questioned all seven Sailors and then determined that the evidence before him warranted that you be taken to nonjudicial punishment (NJP). Prior to commencement of NJP proceedings you were informed of the charges against you, provided with copies of your accusers' statements, advised of your right to call witnesses to testify on your behalf and to have a personal representative chosen by you to be present at these proceedings.

When your NJP began in July 1999 your commanding officer reviewed the evidence against you. Although you failed to produce any witnesses to rebut the evidence against you, you insisted you were innocent and that your accusers were engaged in a conspiracy based on their personal dislike of you and their desire to get you off the ship. At this point your commanding officer stopped the proceedings and directed his operations officer who was also a Navy captain (O-6) to look into your allegations of a conspiracy. The operations officer, with assistance of his most senior enlisted servicemember, re-interviewed your accusers as well as their supervisors and those who participated in the initial investigation. The operations officer reported back to your commanding officer that he had uncovered no evidence of a conspiracy. To the contrary he found that your seven accusers were not a very "close-knit group" and in fact several of them appeared to dislike each other. NJP proceedings resumed and you were informed of the operations officer's findings. At this point, in an effort to give you every chance to defend yourself your commanding officer offered to fly you off the ship to the naval base in Yokosuka, Japan where you would be given a polygraph examination by the Naval Criminal Investigative Service. At first you said you wanted such an opportunity but later that same day you told your commanding officer you had changed your mind. On 11 July 1999 at the conclusion of NJP proceedings your commanding officer

found that you had committed the misconduct with which you were charged and imposed punishment consisting of forfeiture of pay, restriction, extra duty and reduction in rate. You chose not to appeal your punishment to the reviewing authority but instead complained to a member of the United States Senate. On 16 September 1999 your commanding officer wrote a letter to the senator summarizing the evidence against you and the reasons for his imposing punishment. A copy of his letter is enclosed.

Based on the frequency and seriousness of your misconduct your commanding officer recommended that you be issued an other than honorable discharge (OTH). An administrative discharge board (ADB) was convened to consider this matter and a member of the Navy's Judge Advocate General Corps was appointed to act as your counsel. Prior to the actual convening of the ADB your counsel was given the opportunity to question your accusers as well as all potential witnesses either in person or by telephone. It was during the course of these activities that your counsel received testimony from five witnesses over the telephone that were tape recorded. Transcripts were made of three witnesses' tape recorded statements and later introduced into evidence at the ADB. The tape recorded testimony of the remaining two witnesses was later played at the ADB. All five stated that they had never seen you sexually harass or assault anyone, however one did admit that he was present when verbal exchanges of a homosexual nature occurred between you and other members of the crew but neither he nor anyone else appeared to take it seriously.

The ADB convened on 2 November 1999 and the recorder introduced into evidence the official documents pertaining to the NJP which included the sworn statements of your accusers. The first witness called to the stand was the leading chief petty officer of the division to which you were assigned while serving aboard USS CONSTELLATION. He testified as to the events that precipitated the investigation, the manner in which it was conducted and your performance of duty. Your commanding officer also testified before the ADB. His testimony centered around the investigation, the evidence it produced and his reasons for imposing punishment. Both witnesses underwent thorough cross examination by your counsel. Upon conclusion of your commanding officer's testimony and in rebuttal to the statements of your accusers your counsel submitted the transcripts of the testimony of the three witnesses previously obtained by telephone and played the taped recorded testimony of the remaining two witnesses. You were then called to the stand. You insisted you

were innocent of the charges and repeated the claim you made at the NJP proceedings that your seven accusers had conspired to get you off the ship because they suspected you of being homosexual. Upon conclusion of your testimony the ADB adjourned the proceedings and began its deliberations. Upon completion of deliberations the three members of the ADB unanimously found that you had committed the misconduct with which you were charged and recommended that you be discharged. Two recommended that you receive an OTH. On 8 December 1999 the reviewing authority approved the findings and recommendations of the ADB. He specifically found the evidence of your guilt to be overwhelming and because of the serious and pervasive nature of your misconduct believed an OTH was more than appropriate. The reviewing authority concluded by noting that although your counsel indicated that he would be submitting an appeal in the form of a letter of deficiency no such letter was ever received and you thereby waived your right to appeal.

In its reconsideration of your case the Board after careful and impartial examination of all the evidence of record including your most recent submission finds as follows. First off it emphatically rejects your contention that the investigation conducted aboard USS CONSTELLATION was untimely and inaccurate. To the contrary the evidence clearly shows that the investigation was started soon after several of your shipmates in the operations division complained of your behavior. The investigation was conducted under the direct supervision of the ship's legal officer an experienced and senior member of Judge Advocate General Corps. The investigators consisted of senior noncommissioned officers whose training and experience in investigative matters made them well qualified to question and conduct follow up interviews of the Sailors assigned to your division. The thoroughness of the investigation can be seen in part by the fact that the group of several Sailors accusing you of misconduct eventually grew to seven. After taking the sworn statements of your accusers the investigation was reviewed by the ship's disciplinary review board, equal opportunity officer and chaplain. Additionally the executive officer, commanding officer and operations officer conducted indepth individual interviews of each of your accusers. The Board believes that evidence of record shows that the investigation was timely, thorough and fair. Moreover it resulted in a substantial amount of credible evidence that persuaded your commanding officer and the members of the ADB that you had in fact committed the misconduct that you were charged with. The Board therefore concludes that the investigation and subsequent proceedings were

legally sound and fair. Thus it can find no error or injustice that would warrant changing your discharge.

Turning its attention to the issue of whether your discharge should be upgraded as a matter of clemency based on your post service conduct and achievements the Board concludes that these commendable matters cannot overcome the fact your misconduct was both serious and frequent. Simply put your illegal behavior was persistent, personally intrusive and demeaning to your shipmates and physically aggressive. There can be no doubt that it had an adverse impact on morale and the ability of your shipmates to perform their military duties. Equally important some of this misconduct occurred while your ship was deployed at sea, an environment which even under the best of circumstances is both physically and emotionally demanding.

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