



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

BJG

Docket No: 1415-99

19 August 1999

PN3 [REDACTED] USN

Dear Petty Officer [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 18 August 1999. 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 opinion furnished by the Deputy Assistant Judge Advocate General (Criminal Law), dated 1 June 1999, a copy of which is attached. They also considered the results of your polygraph examination of 4 August 1999.

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 opinion. Since the Board found no basis to remove your contested nonjudicial punishment, or to set aside your reduction from petty officer second class to petty officer third class, they had no grounds to grant you "special" consideration for advancement to petty officer first class. In view of the above, 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

Enclosures



DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
WASHINGTON NAVY YARD
716 SICARD STREET SE SUITE 1000
WASHINGTON DC 20374-5047

IN REPLY REFER TO
1 Jun 99

From: Deputy Assistant Judge Advocate General (Criminal Law)
To: Chairman, Board for Correction of Naval Records

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IC [REDACTED]
[REDACTED]

Ref: (a) BCNR ltr BJJ Docket No. 1415-99 of 27 Apr 99

1. Per the reference the following comments and recommendation are provided concerning the request of [REDACTED] to remove the record of nonjudicial punishment (NJP) imposed 3 March 1997, from his service record.
2. BACKGROUND. On 3 March 1997, the Commanding Officer, USS LAKE ERIE (CG-70) imposed NJP on the then [REDACTED], reducing him in rate one pay grade. The NJP was based on disrespect to a superior petty officer, assault on a superior petty officer and dereliction of duty. The Commanding Officer did not impose punishment for an alleged four-day unauthorized absence or an allegation of disobeying lawful orders from two superior chief petty officers in connection with the unauthorized absence.
3. Prior to the imposition of NJP, the allegations were the subject of a JAG Manual investigation. The investigation was completed on 27 February 1997. The allegations were then forwarded to the command's Disciplinary Review Board and the ship's Executive Officer before ultimately being sent to the Commanding Officer for disposition.
4. PN [REDACTED] appealed his NJP to Commander, Naval Surface Group MIDPAC who, on 6 April 1997, upheld the punishment for dereliction and disrespect but dismissed the assault allegation. The punishment of reduction in rate one pay grade was determined to be proportionate to the remaining offenses.
5. On 3 July [REDACTED] filed an Article 138, UCMJ, Complaint of Wrongs against his Commanding Officer raising substantially the same issues as discussed in his current petition. On 12 September 1997, the Deputy Assistant Judge Advocate General (Administrative Law) found that no relief was warranted, noting that collateral attacks on NJP are not cognizable under Article 138.
6. On 23 July 1997, [REDACTED] submitted a grievance pursuant to U.S. Navy Regulations, 1150, against [REDACTED] to his Commanding Officer for resolution. In the grievance, [REDACTED] alleged that [REDACTED] had wrongfully amended the NAVPERS 1626/7 form in his service record that contained the specifications for which NJP was imposed. He also alleged that [REDACTED] was physically and verbally abusive toward him during the interview forming the basis for his NJP. He sought to have [REDACTED] held accountable for his allegedly hostile conduct during that interview [REDACTED].

Commanding Officer directed a JAG Manual investigation which was completed 28 August 1998. On 9 September 1998, the complaints were determined to be without merit.

7. DISCUSSION. The following comments are provided in regard to [REDACTED]'s current petition for relief, dated 25 February 1999:

a. The petition admits disrespectful language, specifically, swearing [REDACTED] but avers that [REDACTED] abandoned his rank when he "attacked, provoked, and intimidated" [REDACTED] during their interview. [REDACTED] points to results of a polygraph examination and the statements of [REDACTED] in, an [REDACTED] for support. PN3 [REDACTED] does not, however, submit any new evidence or raise any new issues concerning this incident. His argument that the Commanding Officer did not have sufficient evidence to impose NJP has been raised at NJP and during subsequent appeals. On 6 March 1997, three days after the imposition of NJP [REDACTED] submitted to a private polygraph exam. The results of that polygraph were not available at NJP, however they have been submitted by [REDACTED] in support of his various petitions for relief. The polygrapher opines that [REDACTED] was truthful to the four relevant questions related to the alleged assault on [REDACTED]. However, on 6 April 1997, the specification alleging assault was dismissed by Commander, Naval Surface Group MIDPAC, mooting this issue. The statements of [REDACTED] PNC Brahm, and [REDACTED] [REDACTED] by [REDACTED] do not shed new light on this incident. [REDACTED] and [REDACTED] were the only two persons other than the petitioner in the room at the time of the alleged assault and disrespect. Both made written statements during the initial investigation which were considered by the Commanding Officer prior to imposing NJP. The written statements now provided by [REDACTED] offer no new information, and tend to corroborate the statements of [REDACTED] and [REDACTED] that a short, loud, verbal exchange, between [REDACTED] [REDACTED] occurred during the interview on 20 February 1997. Abandonment of rank occurs when a superior's conduct is so outrageous or demeaning as to be undeserving of the respect that the UCMJ protects. In this case the Commanding Officer, USS LAKE ERIE was in possession of all relevant facts at the time of the NJP. The petitioner had the opportunity to raise the defense of abandonment of rank at NJP and on appeal. There is sufficient evidence in the record to support the Commanding Officer's conclusion that [REDACTED] conduct was not so outrageous as to result in abandonment of his rank and position of authority. There is also sufficient evidence in the record to support his decision to impose NJP for disrespect.

b. [REDACTED] also admits in his petition he was derelict in his duty by negligently failing to process thirty-two separation travel claims, failing to submit a detaching endorsement to the Disbursing Office resulting in a significant overpayment to a separated service member, and failing to forward DD Form 214s. He does not admit that he was derelict for failing to maintain "custody and control" of the command's Certificates of Discharge (Form DD-214). He cites as evidence the report of a Pay and Personal Assistance Team (PPAT) which inspected USS LAKE ERIE from 3-7 March 1997. The report notes that BUPERSINST 1900.8 requires custody and control of DD-214 forms to be performed by an E-7 or above. However, this information was contained in the initial JAG Manual investigation submitted to Commanding Officer, USS LAKE ERIE. Also, this issue was raised by the petitioner at the 3 March 1997, NJP proceedings. The Commanding Officer concurred with the petitioner and did not impose NJP for PN3 [REDACTED] failing to maintain custody and control of the DD-214 certificates. The

issue is, therefore, moot. In fact, the Commanding Officer directed the NJP specification be changed to omit the excepted language. However, when [REDACTED] amended the NAVPERS 1626/7 form in the petitioner's service record, the petitioner filed a U.S. Navy Regulations, 1150 complaint. The complaint was found to be without merit on 9 September 1998.

8. [REDACTED] case was carefully considered by Commanding Officer, USS LAKE ERIE, as evidenced by the fact that he found the evidence insufficient to impose NJP for a four-day unauthorized absence or disobeying orders from two superior chief petty officers. The Commanding Officer also excepted language concerning the "control and custody" of DD-214 certificates from the dereliction specification. On appeal Commander, Naval Surface Group MIDPAC also considered the evidence and gave relief in the form of dismissing the specification alleging assault on a superior petty officer.

9. RECOMMENDATION. Based on the above, I am of the opinion that the nonjudicial punishment imposed on the petitioner on 3 March 1997 is legally correct as modified on appeal.

[REDACTED]

LtCol USMC