



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

CRS

Docket No: 3241-99

10 November 1999

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD [REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments

(2) Case Summary

(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a retired enlisted member of the United States Navy, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected by removing the nonjudicial punishment (NJP) awarded to him on 6 May 1996 and the ensuing fitness report.

2. The Board, consisting of Mr. Cali, Mr. Morgan, and Mr. McCulloch, reviewed Petitioner's allegations of error and injustice on 15 September 1999 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Although it appears that enclosure (1) was not filed in timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner reenlisted in the Navy on 29 November 1993 after more than 16 years of prior active service. He served without disciplinary incident for about 30 months during this last enlistment.

d. Documentation submitted by Petitioner shows that he requested and received permission to leave his ship, USS HOLLAND

(AS 32) on the morning of 6 May 1996. However, he was advised to be prepared to return if he was needed. Later on that morning, the executive officer (XO) directed that Petitioner be present at 1000 hours for a meeting. This direction was passed down through the chain of command, and an Ensign (ENS; O-1) R told a junior petty officer to go ashore to the bachelor enlisted quarters (BEQ) and tell him to return.

e. It appears that by the time the petty officer arrived at Petitioner's BEQ room, it was after 1000 hours. However, Petitioner was told that he was to return to the ship. However, by this time, Petitioner had overindulged in alcoholic beverages, and did not return to the ship until that afternoon. Upon his return, he failed a blood-alcohol test.

f. Based on the foregoing events, Petitioner received NJP on 18 May 1996 for the following violations of Articles 86, 90 and 134 of the Uniform Code of Military Justice (UCMJ):

In that (Petitioner) . . . did, . . . on or about 6 May 1996, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: 1000 appointment with the (XO) on board USS HOLLAND (AS 32).

In that (Petitioner) . . ., having received a lawful command from (ENS R), his superior commissioned officer, . . . to report to the (XO) on board USS HOLLAND (AS 32) at 1000, or words to that effect, did, . . . on or about 6 May 1996, willfully disobey the same.

In that (Petitioner) . . . was, on board USS HOLLAND (AS 32), on or about 6 May 1996, as a result of wrongful previous overindulgence in intoxicating liquor (BAC .158) incapacitated for the proper performance of his duties.

Punishment imposed at the NJP extended to letter of reprimand, restriction for 60 days and suspended forfeitures of pay. However, the record does not contain an Administrative Remarks (page 13) entry or a Court Memorandum (page 6) to document the disciplinary action.

g. The record does reflect that Petitioner received a fitness report on 1 July 1996, the comments section (block 41) of which states, in part, as follows:

Reason for report: To record declining performance and Commanding Officer's (NJP) held on 18 May 1996 for violation of Article 86 (Failure to go to appointed place of duty), Article 90 (Disobeyed a commissioned officer), Article 134 (Drunkenness-incapacitation for performance of duties through prior wrongful indulgence of intoxicating liquor).

h. On 30 June 1997 Petitioner was released from active duty and transferred to the Fleet Reserve.

i. In his application, Petitioner contends that he was not guilty of any of the charged offenses at the NJP of 18 May 1996. Along these lines, he states that he did not know of the meeting that the XO had scheduled for 1000 hours on 6 May 1996. Further, he asserts that he tried to reach the division officer to confirm the order to return to the ship, and did not want to return since he had been drinking. He also contends that he was in a liberty status on that morning and, therefore, could not be punished for being under the influence of alcohol when he returned aboard HOLLAND. Finally, he contends that he was improperly denied assistance of counsel prior to the imposition of NJP.

j. Paragraph 0109 of the Manual of the Judge Advocate General (JAGMAN) states that there is no right for an accused to consult with counsel prior to the imposition of NJP, although commanding officers are encouraged to permit an accused to do so subject to the availability of counsel.

k. Paragraph 10b(1) of Part IV to the Manual for Courts-Martial (MCM) states in order to prove the offense of failure to go to an appointed place of duty, it must be shown that proper authority appointed a certain time and place of duty; the accused knew of that time and place; and, without authority, failed to go to that place of duty at the appointed time. Paragraph 10c(2) emphasizes that the offense failure to go to the appointed place of duty requires "proof that the accused actually knew of the appointed time and place of duty."

l. Paragraph 14b(2) of Part IV to the MCM states that the offense of disobeying the order of a commissioned officer may be proven by showing that the accused received a lawful command from an individual he knew to be a superior commissioned officer, and willfully disobeyed the order. Paragraph 14c(2) states that the accused must have actual knowledge of the order, and the disobedience must be intentional.

m. Paragraph 76b of Part IV to the MCM deals with the offense of incapacitation for the performance of duties through prior indulgence of intoxicating beverages. To prove this offense, it must be shown that the accused had certain duties to perform and was incapacitated for the proper performance of those duties because of previous wrongful indulgence in intoxicating liquor.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief.

The Board first concludes that in accordance with the JAGMAN, NJP was properly imposed even if Petitioner did not have an opportunity to consult counsel. Further, Petitioner clearly was guilty of violating UCMJ Article 134 by incapacitating himself for the proper performance of duty by overindulging in alcoholic beverages on 6 May 1996. In this regard, the Board rejects Petitioner's contention that since he was in a liberty status, he could not be punished for this offense. The record clearly shows that although he had permission to be away from HOLLAND on that morning, he was told to be ready to be recalled. He was incapacitated to perform that duty and, accordingly, he was properly punished. Finally, he also committed the offense of disobeying ENS R by failing to return to the ship in a timely manner when the order to do so was relayed by the petty officer.

However, the Board does not believe Petitioner committed the offense of failure to go to his appointed place of duty since he was not advised that he was to be back aboard HOLLAND at 1000 hours on 6 May 1996 until after that time had passed. Accordingly, since he had no knowledge of the time and place of that duty, he was not guilty of violating UCMJ Article 86. The Board also notes that this specification alleges exactly the same misconduct as the specification alleging disobedience of ENS R. Accordingly, it seems to the Board that Petitioner was unnecessarily charged twice for the same transgression.

Since the fitness report of 1 July 1996 is the only documentation in the record which reflects the NJP, it should be modified to remove the reference to a violation of Article 86.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by making the following change to block 41 of the fitness report for the period 1 October 1995 to 1 July 1996:

1. Delete the words "Article 86 (failure to go to appointed place of duty)."

b. That no further relief be granted.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file

maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFENFFER
Executive Director