



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

AEG  
Docket No: 7496-98  
18 May 1999

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

Encl: (1) Case Summary  
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former officer in the Navy, applied to this Board requesting that his naval record be corrected by setting aside his discharge, reinstating him in the Navy and restoring his name to the promotion list for lieutenant commander. Alternatively, he requests a change in the narrative reason for separation and constructive service until a lawful separation is directed.

2. The Board, consisting of, Mr. [REDACTED], Ms. [REDACTED] and Ms. [REDACTED] reviewed Petitioner's allegations of error and injustice on 11 May 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. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner was commissioned in the Naval Reserve on 18 November 1988 after about 15 months of active service as a naval aviation cadet. After completing an additional period of training in naval aviation, he served in an exemplary manner with several operational units and was designated a naval aviator. He was promoted in due course to lieutenant junior grade and to lieutenant and received comments on his fitness reports such as "my #1 lieutenant (junior grade)", "up and coming front runner",

and "will be a . . . superstar." In March 1995 Petitioner reported for duty to Tactical Electronic Warfare Squadron (VAQ) 136. The award of the Air Medal and Navy-Marine Corps Achievement Medal recognized outstanding performance of duty in this assignment. In 1997, he was augmented into the Regular Navy and received an award from VAQ-136 for his outstanding leadership.

d. On 1 April 1997 VAQ 136 was embarked aboard USS INDEPENDENCE (CV 62), which had just completed a port call in Sydney, Australia. On that evening Petitioner was serving as landing signal officer (LSO). At about 2045 hours an aircraft landed to the right of the centerline and damaged two helicopters. There is no indication in any of the material of record that Petitioner's acts or omissions caused or contributed to this incident.

e. In accordance with applicable directives, all personnel directly or indirectly involved in the foregoing incident were required to submit to a urinalysis later in the evening of 1 April 1997. However, the urine samples apparently remained aboard INDEPENDENCE until early July 1997, since the chain of custody document reflects that they were not received at the Armed Forces Institute of Pathology (AFIP) until 11 July 1997.

f. On or about 21 July 1997 AFIP reported to the Commanding Officer (CO), Carrier Air Wing Five (CVW-5), that Petitioner's urine sample had tested positive for cocaine. The positive urinalysis was later confirmed by an independent civilian laboratory. On 30 July 1997 Petitioner underwent an evaluation by the CVW-5 flight surgeon, who noted that Petitioner "specifically denies any history of use or exposure to cocaine," and that a physical examination conducted immediately after the incident of 1 April 1997 was "unremarkable for any physical traits suggestive of drug use or influence." In a letter to the CO of CVW-5, the flight surgeon noted that during the port call which preceded the incident, Petitioner "engaged in social drinking at large, crowded bars. He drank mixed drinks from open and occasionally unattended containers." Based on the foregoing, the flight surgeon concluded, "there existed a significant potential for (Petitioner) to unknowingly ingest an undetermined amount of cocaine, the effects of which were obscured by the use of alcohol."

g. On 21 August 1997 the CO of VAQ 136 notified the Chief of Naval Personnel (CNP) of the evidence of Petitioner's unlawful drug involvement. In his letter of that date, the CO also advised CNP as follows concerning a possible inconsistency in the governing directives:

. . . Paragraphs 4b and 5c(5) of enclosure (4) to (Chief of Naval Operations Instruction [OPNAVINST] 5350.4B) state

that "a urinalysis as part of a mishap/safety investigation cannot be used in disciplinary proceedings, (as a) basis for separation or (in) characterization of discharge." Accordingly, the urinalysis obtained from (Petitioner) cannot serve (as) the basis for discharge. (Department of Defense Directive [DODDIR] 1010.1), paragraph C4a(2) states that a urinalysis conducted as part of a mishap safety investigation "may be used in administrative actions, including separation, but not in an action under the UCMJ (Uniform Code of Military Justice) or be considered in the issue of characterization of service in a separation proceeding."

Nevertheless, the CO recommended that CNP convene a board of inquiry (BOI) in Petitioner's case.

h. On 2 October 1997 CNP notified Petitioner of administrative separation action. Such action was initiated by reason of misconduct due to commission of an offense which could result in confinement of six months or more under the UCMJ and substandard performance of duty, both reasons evidenced by the use of drugs as shown by the positive urinalysis. He was also advised that "the least favorable outcome of your case is that you be separated . . . with an Honorable discharge." In a letter of that date to the Commander, Naval Forces Japan directing the convening of a BOI, CNP noted that DODDIR 1010.1 set forth this limitation on characterization of service.

i. Prior to the BOI, a considerable amount of evidence was gathered which was later admitted at that proceeding. A number of officers submitted statements to the effect that Petitioner was a fine officer and not the kind of individual who would use drugs. Also, a former CO of VAQ 136 stated that Petitioner "is the finest Lieutenant with whom I have ever served." Additionally, an officer stated that Petitioner had done some social drinking while on liberty in Sydney. A memorandum from AFIP stated that cocaine metabolites could be detected in urine for up to 48 hours after a single use. Petitioner, his defense counsel and the recorder to the BOI also executed a stipulation of fact to the effect that the urine sample which left INDEPENDENCE was the same sample that arrived at AFIP, it was processed with Petitioner's name and social security number, and it was properly tested and found to have trace amounts of cocaine metabolites.

j. Petitioner's BOI met on 5 December 1997. Included in the evidence introduced by the recorder was an excerpt from the *U.S. Naval Flight Surgeon's Manual*, which mandated the collection of urine samples after most mishaps. However, that manual did not specify any procedures to be utilized, except that the samples should be collected "in the controlled environment of a medical facility."

k. The first government witness was the flight surgeon, who confirmed that Petitioner's comments concerning his activities in Sydney while on liberty resulted in his statement to the effect that Petitioner may have unknowingly ingested cocaine. However, the flight surgeon also stated that based on his background and observation of Petitioner, "my feeling is that I am not looking at an individual who recreationally uses cocaine." The flight surgeon also stated that although applicable directives mandated a urinalysis on the evening of 1 April 1997, they did not set forth any specific procedural requirements for such a test. However, he also opined that the urine sample which tested positive did, in fact, come from Petitioner's urine since there were only eight or ten individuals giving urine on that night and "that's not an overwhelming situation for our clinic." However, on cross-examination, the flight surgeon confirmed as follows an earlier comment to defense counsel that sample-switching was possible:

. . . (T)hat possibility exists because this . . . is not a command sponsored urinalysis. This is not a system that has direct protocol for watching the sample of urine through every stage. It is a system which is set up to deal with a bigger issue which is the causal factors to the mishap, not who's using a substance for instance . . . So yes, the potential is there.

He further elaborated:

. . . (A)nything's possible. Is it highly likely, I don't know. Would it be easy to do? It would be easier to do than if it were a command sponsored urinalysis. Is it easy to do, no. The urine samples are brought back directly by that individual, they're placed on top of a desk. I've seen other mishaps, and the samples are collected on a desk, and then the individual corpsman will walk them over. Can samples be switched around while the corpsman's busy, yes it could, but again, it's in the middle of a room about half this size with numerous people walking around, I think . . . someone playing with a bunch of urine bottles would probably catch someone's attention.

. . . (A)gain, it's not a . . . very strict program. So, could they have unintentionally been switched over, yes, that exists. Could they have been mislabeled, yes, that exists. Could someone have taken labels and switched two samples, yes, that exists. All those possibilities exist.

l. The next individual to testify was the hospital corpsman who was involved in the collection of urine samples on the night of the incident. He could not remember the specifics of the urinalysis at issue, but testified as follows concerning the usual procedure:

. . . (W)e type up labels for them. Once the person is down there, then we have them do the urinalysis if they can, given them a cup, and . . . have them go to the bathroom, they come back, we put the label on there, and we'll get that over to the lab . . . to process.

. . . (T)hey bring back the cup from the bathroom and then we put the label on it, that way, if they miss and it gets wet or something, then it's not all smeared and the name is still legible, and it's usually typed. We put that on after they bring it back to us and give it to us.

Depending on what's going on, how many people are coming in, . . . sometimes we'll store them in the same area, like in the same room we're doing them, and then once we have (the samples) together, we'll take those all over at once to the laboratory.

The lab techs process them for getting shipped out. Some of them have to be shipped off to (AFIP), and some of them they have to process right there on the ship . . .

The corpsman went on to say that the individuals were not observed while urinating, the sample bottles were not sealed in front of the individuals, the bottles were not sealed with tamper-proof tape, and he did not watch the bottles the entire time. Despite this, the corpsman opined that there was only "a slim chance" of tampering and explained his opinion as follows:

(T)he reason I say slim is for one, we usually tell the people that the reason we're doing the drug screening is for medical reasons and for safety reasons. Up until I was notified about this case, I honestly didn't know that it could be used against the guy, and usually, that's what we tell the people also . . . (W)e tell them, if you have problems, like say you've used a drug or something, when you do the interview with the doctor, you can tell him that stuff and it shouldn't come back to haunt you.

The corpsman pegged the chances of a sample being mislabeled as "less than five percent," and also noted that once a label is affixed to a bottle, it cannot easily be removed. He also noted, however, that when he signed as receiving a specimen, he could not be certain that the specimen was, in fact, the urine of the individual whose name appeared on the bottle.

m. The corpsman then testified that he had participated in command sponsored urinalyses, and that specific procedures governed such tests. He testified as follows concerning the sequence of events during such a urinalysis:

You take your I.D. card and you give it to the Master-at-

Arms, he makes sure your name is on a list and that he's got a bottle with a label, they put it in a log book. When you get done with the urinalysis, that label is going to go on your bottle. It's going to go on the form identifying you in his lab book, and then you're going to go to the bathroom. He has to watch (the urine) come out of you, put the lid on it, and as you're walking back, you have to hold it up so he can see the bottle the whole time, and then you watch him put the red strip on it, and then you sign your initials saying that that's you're specimen with those numbers on there.

Nevertheless, the corpsman continued to express confidence in the procedures used on 1 April 1997 "because the other corpsmen in the room know that the specimens are not to be played with by just everybody." He also said that no one who gives a sample is permitted to walk away before it is labeled. He then revised his earlier estimate of a five percent error rate to "in a thousand specimens, maybe two. Ten thousand, less than ten for sure." In an effort to encapsulate the urinalysis procedure at issue, the recorder posed the following question to the corpsman:

. . . My understanding is, you have five corpsmen there, you have about eight people, approximately, who are being tested. Now, we've heard earlier testimony saying that they try to stagger them. So basically you almost have a one to one ratio . . . , give or take a couple of people, and you have one corpsman who's floating around making sure that everybody else is doing their job. So to me it doesn't appear that there's much of an opportunity for anybody to be unsupervised, and the only other people that may be there are high ranking officers, squadron CO's and CO's of the ship, who are just there to make sure that their people are okay . . . (I)s that a correct picture?

To this question, the corpsman answered "yes sir." The corpsman then admitted that the paperwork documenting the urinalysis on 1 April 1997 was in error in that it stated that the sample was taken on "01 April 70," instead of the correct date.

n. The next individual to testify was the corpsman responsible for storing the urine samples. He testified that from the date of sample collection, 1 April, until 10 June 1997, the urine samples were kept in the ship's laboratory, which was locked when it was not manned. However, the samples were stored in an unlocked refrigerator. He confirmed that the sample bottles were not sealed with tamper-proof tape, and were sealed only with paraffin to prevent leakage. This corpsman stated that such samples were retained in the refrigerator until the ship completed its cruise, and then he took them to be shipped. However, he did not observe the packing process.

o. Testimony was then received from a lieutenant in VAQ-136 who stated that Petitioner tended to "party" in the earlier part of a liberty period, and not so much later. He said that he was with Petitioner during the last night of liberty in Sydney, and they had several beers, probably draft beers. He also stated that he had not seen nor heard of any illegal drug use in Sydney. He also said that he would "find it very hard to believe" that Petitioner used drugs, and would believe him if he denied such use.

p. A lieutenant serving as a clinical psychologist in an alcohol and drug evaluation facility then testified that no widely known profile associated with recreational users of cocaine exists, and such a user has a better chance of escaping detection because the metabolites of the substance do not remain in the system for very long. He further stated that such an individual may be an outstanding performer on the job and have a good family life. He stated that "it would be very difficult" to identify a recreational user of cocaine simply by outward appearance or demeanor.

q. Petitioner's wife then testified that she did not believe that he would use drugs and if she thought he did, she would leave him. Other favorable testimony was adduced from the current CO and Maintenance Officer of VAQ-136, both of whom opined that Petitioner would not knowingly ingest drugs. During his testimony, the CO was then questioned about a possible perception of favoritism if Petitioner was retained in the Navy, given the Navy's strong policy against drug abuse. The CO responded that about 50% of the officers in the squadron knew of the positive urinalysis, but the only enlisted individual who knew about it was the command master chief. He testified as follows when asked whether Petitioner's retention would set a "bad example":

No, because I don't think anybody's rubber stamping anything here. The fact that its going to a (BOI), the fact that there's witnesses being called, testimony identifying the weaknesses in the system, (Petitioner's) been given a lot of scrutiny in this case and the fact that it wasn't three guys doing the high five, yes, he's okay because he's an officer. I think people are aware of . . . how critical this is. I mean, I have a lot of guys in the squadron who know how important this is, to his career, and the fact that the Navy is, I wouldn't say bent over backwards, but they're going in as detailed as this thing is supposed to.

r. Petitioner then testified under oath, categorically denying any in-service drug use and reciting his service history. Petitioner gave the following version of events on the evening of 1 April 1997 after the flight mishap:

. . . I proceeded down to the room . . . where they did the flight physicals. It was a small area and there were a lot of people down there. There were the five people from the E-2 (aircraft), the three of us LSO's, and I recall two corpsmen down there that I actually saw, and Doc (H) and Doc (W) would come in and out at that time. So there were quite a few people down there. The time I was down there, I did not see any . . . CO's or anybody else down there, and I think that was because for the mishap report, they couldn't really talk to the people about it. A lot of things were going on . . . Some guys were over here filling out their 72 hour history, another guy's over getting his hearing checked, eyes, a lot of things were happening. I was surprised about that, but then, not really because there were so many people down there in a small space. I went in, I was handed a bunch of forms, start filling these out, roger that, sat down. When they asked if I had given my urinalysis yet, I said no, so they gave me the cup with a lid and I asked where the head was. I wasn't really familiar with that part of the ship, and one of the corpsmen said down the hall and to the right, so I went out there and did my job in the cup. I came back and as I walked back in he said go ahead and sit it down right there. So I sat it on the desk and I walked over to the chair, which is probably five to six feet away, roughly, and started filling out the rest of my paperwork . . . I had started doing my paperwork, they'd say hey, did you get your eyes checked yet, no I haven't, and this guy down here was going to do this, and to me it was mayhem. A lot of things moving around. I didn't know that there was, up until today, there was a different procedure for a mishap urinalysis. I thought they were all the same, like a command urinalysis. I'm very familiar with the command urinalysis, because I've had seven urinalysis (sic) since I've been here in Japan. I was surprised that . . . no one went with me and that there was no seal put on it or anything like that. Nothing to ring any bells at the time, and say hey, there's something wrong here, because . . . I don't have anything to hide so . . . here's my sample and continue on. I had my physical . . . (T)his all occurred at 2300 . . ., and so, from 2300 to roughly 2400, I was probably down there, roughly an hour. At one point, Doc (H) came out . . . and he said, I need to interview you and just give you the once over for the physical, roger that. So we went into another room. He asked me about what does a controlling LSO do, what was your job out there, and then he examined me, gave me the full doctor examination. I was told that I could go and that's when I left, probably around midnight.

Petitioner then said he had no knowledge of anyone tampering with his sample or slipping anything in his drink, and did not

experience any signs of cocaine use. He also said that the cup with his urine did not leave his possession until he put it on the table, but could not recall if other samples were already there. However, he never saw anyone place a label on the bottle. Petitioner testified that during the 48 hours prior to the mishap, he mostly drank beer, some of which was from a tap and not from cans or bottles, and he also had two mixed drinks. When asked to guess how his sample might have tested positive, Petitioner said he would guess that someone tampered with his drink on the last night he was in Sydney. However, he later said "I think there's a possibility that it's not my sample."

s. Prior to arguments, Petitioner's counsel addressed the BOI as follows:

Sir, I just would . . . (like) for the (BOI) to take note that there is an existing OPNAV Instruction which is dated previous to the DOD Instruction, that is (OPNAVINST) 5350.4B, that this instruction has not been officially removed or altered or changed in any way, and that (OPNAVINST) 5350.4B . . . has the limitation . . . under enclosure (4) paragraph 4(b), that urinalysis results from a mishap investigation cannot be used for any purposes, including an administrative board or (BOI). That instruction, again, is in conflict with the DOD Instruction dated in 1994 . . .

However, both the recorder and the senior member of the BOI opined that the DOD directive took precedence over the OPNAV instruction.

t. The recorder and Petitioner's counsel made final argument, after which the BOI closed for deliberations. After about an hour, the proceedings were reopened and the senior member of the BOI announced unanimous findings that Petitioner had committed misconduct and substandard performance of duty as evidenced by the positive urinalysis. The BOI further unanimously recommended separation. No recommendation was made concerning characterization of service.

u. On 25 February 1998 Petitioner's case was forwarded to CNP for further action. On 24 March 1998 Petitioner submitted a statement asserting that a preponderance of the evidence failed to show that he used cocaine. He cited portions of the BOI transcript to support his contentions that either the urine sample tested by AFIP was not his, or unknowing ingestion took place. Petitioner also stated that "I have never used cocaine in my life." However, on 9 April 1998 a board of review met and concluded that Petitioner should be separated with an honorable discharge. On 17 April 1998 CNP forwarded the case to the Secretary of the Navy, recommending separation with an honorable discharge. On 30 April 1998 the Assistant Secretary of the Navy

(Manpower and Reserve Affairs) approved the recommendation.

v. Petitioner's Certificate of Release or discharge from Active Duty (DD Form 214) reflects that on 30 June 1998, he was honorably discharged by reason of misconduct after about eleven years of active service. In connection with his discharge, Petitioner submitted a statement in which he disagreed with the reason for separation and separation code on his DD Form 214, and stated that his acceptance of that form did not constitute waiver of any administrative or judicial remedies.

w. On 21 August 1998 CNP sent Petitioner a letter notifying him that he had been selected for promotion by the Fiscal Year (FY) 1998 Active Line Lieutenant Commander Selection Board and was on the promotion list, but his name had been withheld from the message promulgating the results of the board after adverse information was received. He was further notified that his discharge had rendered him ineligible for promotion. This letter is not a part of Petitioner's record. Informal contact with a representative of the Navy Personnel Command (NAVPERSCOM) reveals that Petitioner was actually selected for advancement by the FY 1999 lieutenant commander selection board, which reported out on 29 April 1998, and the adverse information mentioned in the letter referred to the administrative separation proceedings. Further, Petitioner's name was never sent to the U.S. Senate for confirmation.

x. Petitioner applied to the Board on 19 October 1998. Through counsel, he alleges that he was improperly discharged for the following reasons:

1. In accordance with subparagraph 1b(2) of enclosure (3) to Secretary of the Navy Instruction (SECNAVINST) 1920.6A, he could have been retained in the Navy despite the finding that he had used drugs, but the Navy did not explain the decision to discharge him.
2. He was not advised of the nature of the proceeding against him and was denied a hearing on the characterization of his service.
3. The urinalysis result was inadmissible at the BOI because specimen collection, handling and storage were inadequate to insure authenticity or competence.
4. The use of the urinalysis at the BOI violated the Fifth Amendment to the Constitution and Article 31 of the UCMJ because the urine sample was provided under order and thus constituted compelled production of self-incriminating evidence.
5. The use of the urinalysis at the BOI violated DODDIR

1010.1 and OPNAVINST 5350.4B since it was collected as part of a limited use safety mishap investigation.

6. The finding of the BOI that he used drugs was not supported by a preponderance of the evidence.

Counsel elaborates on the foregoing in a lengthy brief submitted with Petitioner's application.

y. SECNAVINST 1920.6A sets forth binding guidance on the administrative separation of officers in the naval service. Subparagraph 1b of enclosure (3) to the directive states that officers may be processed for separation as follows by reason of misconduct:

(1) Commission of a military or civilian offense which, if prosecuted under the UCMJ, could be punished by confinement of six months or more . . .

(2) Unlawful drug involvement. Processing for separation is mandatory. An officer shall be separated if an approved finding of unlawful drug involvement is made. Exception to mandatory processing or separation may be made on a case-by-case basis by (SECNAV) when the officer's involvement is limited to personal use of drugs and the officer is judged to have potential for further service and is entered into a formal program of rehabilitation . . .

Had Petitioner been tried and convicted by general court martial of using cocaine, in violation of UCMJ Article 112a, the sentence could have included confinement for five years. Para. 37e(1)(a), Part IV, *Manual for Courts-Martial* (1995 ed.). Additionally, at least two cases essentially state that if a regulation sets forth a general rule requiring discharge but also provides exceptions to the rule, a decision to discharge the individual must be accompanied by an explanation of why the exceptions are inapplicable. *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978); *Kindred v. United States*, 41 Fed.Cl. 106 (1998).

z. Subparagraph 1c(2) of enclosure (8) to SECNAVINST 1920.6A states that after a BOI is directed, the officer must be informed as to the reason for such action. More detailed notice is required by subparagraph 2e of the enclosure, which states that the officer shall be advised "in writing . . . of each of the reasons for which he or she is being required to show cause for retention . . . , (and) the least favorable characterization of service that may be recommended by the (BOI)." Concerning evidence which may be introduced at a BOI, subparagraph 2j of enclosure (8) states that the rules of evidence applicable to courts-martial do not apply to such proceedings, and material not

admissible at trial may be accepted if the BOI determines it is relevant, material authentic and competent.

aa. In 1974 the Court of Military Appeals (now the Court of Appeals for the Armed Forces) held that an order to provide a urine sample violated the prohibition against self-incrimination set forth in UCMJ Article 31. *United States v. Ruiz*, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). In at least one case arising in the federal courts, *Ruiz* was cited for the proposition that compelled urinalysis results were inadmissible in administrative separation proceedings. *Giles v. Secretary of the Army*, 475 F.Supp. 595 (D.D.C. 1979), *aff'd*, 627 F.2d 554 (D.C. Cir. 1980). However, in 1980 *Ruiz* was implicitly overruled by *United States v. Armstrong*, 9 M.J. 374 (CMA 1980). Military Rules of Evidence (MRE) 313 and 314, originally issued in 1980, state that evidence from inspections and inventories, and certain searches not requiring probable cause, are admissible at courts-martial. In 1984, MRE 313(b) was amended to specifically permit orders to produce urine. Accordingly, certain urinalysis results have been held to be admissible at courts-martial on numerous occasions. *Murray v. Haldeman*, 16 M.J. 74 (CMA 1983); *United States v. Bickel*, 30 M.J. 277 (CMA 1990); *United States v. Gardner*, 41 M.J. 189 (CMA 1994); *United States v. Campbell*, 50 M.J. 154 (1999).

bb. DODINST 6055.7 sets forth guidance on mishap investigation, reporting and record keeping within DOD. That directive states that limited use safety mishap investigation reports are "close hold, internal communications of (DOD) whose SOLE purpose is prevention of subsequent DOD mishaps." Further, such reports "shall not be used as evidence for disciplinary action, in determining the misconduct or line of duty status of any personnel, before any evaluation board, or to determine liability in administrative claims against the government."

cc. Paragraph 602 of the Naval Aviation Safety Program, OPNAVINST 3750.6Q, provides for aircraft mishap investigations for the purpose of "hazard detection, to identify the cause factors of the mishap and the damage and/or injury occurring in the course of the mishap." Paragraph 607 states, in part, that in the course of such an investigation, "biological sampling should take place immediately after a mishap," and that "sufficient blood and urine specimens shall be taken for the determination of . . . drug screen . . . and urinalysis." This is the only provision of OPNAVINST 3750.6Q which authorizes the collection of biological samples. Chapter seven of the directive requires a mishap investigation report, which is classified as a limited use safety mishap investigation report.

dd. DODDIR 1010.1 outlines the military drug abuse testing program within DOD. Subparagraph C3e states as follows concerning urinalysis testing after a safety mishap:

Following any incident that may be considered a safety mishap under the regulations of the Service involved, a specimen may be collected from any individual directly or indirectly involved. Samples so collected may be used for any lawful purpose, including but not limited to : . . . disciplinary action under the UCMJ . . . or inclusion as independently collected evidence in a safety mishap investigation or other investigations. Specimens subsequently collected as part of a mishap investigation, formally convened in accordance with Service regulations, will be collected tested and reported out in a manner consistent with (DODINST) 6055.7 . . . and applicable service instructions. The results of the testing of those specimens may be protected and of limited use as determined by applicable service regulations.

Subparagraph C4a of the directive states that with certain exceptions, urinalysis results may be used as evidence in disciplinary or administrative proceedings. Subparagraph C4a(2) sets forth one such exception as follows:

A service member is tested for possible drug use as part of a limited use safety mishap investigation undertaken for accident analysis and the development of countermeasures. Testing procedures and requirements prescribed by (DODINST) 6055.7 . . . shall apply. Results may be used in administrative actions, including separation, but (may) . . . not be considered in the issue of characterization of service in a separation proceeding.

ee. DODDIR 1010.1 is implemented in the naval service by SECNAVINST 5300.28B. Paragraphs 3 and 4 of enclosure (3) to this directive state, in part, as follows:

3. A Comprehensive Urinalysis Program. . . . Mandatory urinalysis testing of all officers and enlisted members for controlled substances is authorized under the following circumstances:

. . .

d. Fitness for Duty--a command-directed examination or referral of a specified member for valid medical purpose, . . . when there is . . . (an) examination of a specified member incident to a mishap or safety examination . . .

4. Limitation on Use of Urinalysis Test Results. Results obtained from urinalysis testing under

paragraph 3d may not be used against the member in actions under the UCMJ or as the basis for characterization of a discharge in separation proceedings . . . Subject to the above . . . , the results of mandatory urinalysis may be used . . . to establish the basis for separation . . . in separation proceedings in accordance with applicable laws and regulations . . .

ff. The Navy has implemented SECNAVINST 5300.28B by issuing OPNAVINST 5350.4B. Subparagraph 3a(3) of enclosure (4) to that regulation states that mandatory urinalysis testing may be used as part of the following examinations:

- a. A command-directed examination or referral of a . . . member to determine the member's competency for duty and need for counseling, rehabilitation or treatment . . .
- b. An examination in conjunction with a servicemember's participation in a DOD drug treatment or rehabilitation program.
- c. An examination regarding a mishap or safety investigation undertaken for the purpose of accident analysis and development of countermeasures.

Subparagraph 3b of enclosure (4) states that subject to the limitations set forth in paragraph 4 of the enclosure, urinalysis results may be used in disciplinary actions and to establish the basis and characterization in administrative separation actions. Paragraph 4 states, in part, as follows:

- a. . . . (R)esults obtained from urinalysis under subparagraph 3a(3), above, may NOT be used for disciplinary purposes nor for characterization of service in separation proceedings . . . Such results may, however, be used as a basis for separation.
- b. Results obtained from urinalysis under subparagraph 3a(3)(c) shall not be used for any punitive or administrative action by the Department of the Navy against the member.

The foregoing provisions of paragraphs 3 and 4 of enclosure (4) are essentially restated in subparagraph 5c of that enclosure. In this regard, subparagraph 5c(5) states that although urinalysis tests may be ordered as part of a mishap or safety investigation, "such tests may not be used for any punitive or administrative action taken by the Department of the Navy against the member."

gg. Paragraph 9 of enclosure (4) to OPNAVINST 5350.4B states that commands must collect and transport urine samples under chain of custody procedures set forth in appendix B to the enclosure. That appendix mandates a number of procedures to protect the servicemember by ensuring a proper chain of custody, including but not limited to designation of a urinalysis coordinator, use of a detailed urinalysis ledger, use of tamper proof tape on all sample bottles, and requiring the coordinator to prepare the samples for shipment. Naval Administrative Message (NAVADMIN) 159/95 of 13 July 1995, Change 3 to OPNAVINST 5350.4B, stated that its purpose was to bring the Navy into compliance with DODINST 1010.16 by incorporating DD Form 2624 into the Navy's urinalysis program in lieu of the then-existing chain of custody form, OPNAV 5350/2.

hh. On 7 December 1998 NAVPERSCOM was asked to provide advisory opinions on several issues, including the use of Petitioner's urinalysis at the BOI. In an advisory opinion of 15 January 1999, the Drug and Alcohol, Fitness, Education and Partnerships Division (Pers-603) noted that DODDIR 1010.1 states that a urinalysis collected after a mishap could be used "for any lawful purpose." Pers-603 also stated that the apparent conflict between this directive and OPNAVINST 5350.4B was resolved by the issuance of NAVADMIN 159/95, which incorporated the provisions of DODDIR 1010.1 into OPNAVINST 5350.4B. A further advisory opinion of 22 February 1999 was submitted by the Office of Legal Counsel (Pers-06). After analyzing the provisions of DODDIR 1010.1 and OPNAVINST 5350.4B concerning the use of urinalyses collected during a mishap investigation, Pers-06 concludes as follows:

(DODDIR 1010.1) promulgates DOD policy concerning the use of urinalysis results obtained in conjunction with safety/mishaps investigations. It requires further implementation by service specific regulations and allows for more restrictive use of test results by each service. It allows for the use of urinalysis results as it was used in (Petitioner's) discharge. (OPNAVINST 5350.4B) is the Navy instruction implementing (DODDIR 1010.1). It prohibits the use of urinalysis results as it was used in (Petitioner's) discharge.

(The foregoing directives) are not in conflict. (DODDIR 1010.1) allows for the more restrictive provisions of (OPNAVINST 5350.4B). Clearly, Navy personnel must follow Navy instructions and accordingly the use of the urinalysis results was in error.

Pers-06 then goes on to comment as follows on the collection and testing of Petitioner's urine sample and other relevant issues:

. . . (T)he handling of the urine sample during

collection and testing . . . causes concern. The record indicates that the collection of the samples was conducted in a manner not in accordance with generally accepts (sic) standards for control. Further, the samples were stored for almost three months without being properly secured. Finally, the chain of custody was noticeably lacking in detail. Any decision on granting relief to (Petitioner) should consider these facts as well as the remainder of the record that evidences; little likelihood that (Petitioner) knowingly ingested cocaine, his outstanding military record and his fine professional and personal character.

ii. Petitioner's counsel has responded to the advisory opinions by concurring, in large part, with the opinion submitted by Pers-06. However, counsel continues to contend that use of Petitioner's urinalysis at the BOI was precluded by DODDIR 1010.1 as well as OPNAVINST 5350.4B.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. Specifically, the Board has concluded that use of the urinalysis results in the administrative separation action was precluded by OPNAVINST 5350.4B. Furthermore, even if such use was not precluded, the evidence of record fails to prove by a preponderance of the evidence that Petitioner used drugs.

The Board finds no merit in counsel's contention that since subparagraph 1b(2) of enclosure (3) to SECNAVINST 1920.6A contains an exception to the general rule that all officers guilty of drug involvement will be discharged, Petitioner's discharge is erroneous since no explanation was given as to why the exception did not apply to him. The Board notes the case law on this issue, but believes that the short answer to this contention is that Petitioner was not processed under subparagraph 1b(2) due to unlawful drug involvement, but under subparagraph 1b(1) because of his commission of an offense which could have resulted in confinement for at least six months. Although the offense Petitioner allegedly committed, use of cocaine, certainly constitutes unlawful drug involvement, even if the exception in subparagraph 1b(2) could be deemed to apply, it states that retention is authorized only if the officer "is entered into a formal program of drug rehabilitation." The record does not reflect that Petitioner ever was entered into such a program. In fact, it appears that separation processing was begun shortly after the urinalysis result was received from AFIP.

The Board also finds there is no merit to the contention that

Petitioner was improperly advised of the nature of the proceeding against him and denied a hearing on the characterization of service. CNP's letter of 2 October 1997 to Petitioner fully complied with the notice requirements of subparagraphs 1c(2) and 2e of enclosure (8) to SECNAVINST 1920.6A since he was told of the general bases for separation, misconduct and substandard performance of duty; the specific basis for separation, drug use as shown by the positive urinalysis; and the least favorable characterization of service, honorable. The Board notes that in his brief, counsel uses the word "characterization" to apply to the narrative reason for separation on the DD Form 214, which is "misconduct." Counsel correctly notes that Petitioner was never specifically advised that this term could be placed on that form, but neither SECNAVINST 1920.6A nor any other regulation imposes such a requirement. The Board is aware that courts have held that a stigmatizing narrative reason for separation on a DD Form 214 is sufficient to invoke due process protection. *Casey v. United States*, 8 Cl.Ct. 234 (1985); *Rogers v. United States*, 24 Cl.Ct. 676 (1991). However, Petitioner received the full panoply of due process in the BOI proceedings and had every opportunity to show that he did not commit misconduct as alleged. Accordingly, no due process violation occurred.

Turning to counsel's contention that the urinalysis results should not have been admitted at the BOI due to deficiencies in the collection, handling and storage of the specimens, the Board notes subparagraph 2j of enclosure (8) to SECNAVINST 1920.6A, which indicates that the rules of evidence applicable at courts-martial are inapplicable at a BOI, and almost any relevant evidence is admissible at the latter proceeding. Accordingly, the Board believes consideration of the urinalysis results was allowed by this provision of the regulation.

The Board rejects counsel's broad-based contention to the effect that the results of a compulsory urinalysis may never be used in a BOI. Counsel bases this contention primarily on *United States v. Ruiz* and *Giles v. Secretary of the Army*, both *supra*. However, these two cases no longer reflect the current state of the law, given the provisions of MRE 313 and 314 and the pertinent case law. If certain urinalysis results are admissible at trial by courts-martial, at which confinement, forfeitures of pay and a punitive discharge may be imposed, then certainly they may be used at a BOI, which has the authority only to recommend an administrative separation.

However, the Board finds merit in counsel's more narrowly focused contention that the urinalysis result in Petitioner's case was inadmissible at the BOI because it was collected as part of a mishap investigation. In this regard, the Board adopts, in large part, the rationale of the Pers-06 advisory opinion and rejects the opinion furnished by Pers-603.

The Board begins its analysis of this issue with the statement in DODINST 6055.7 that the sole purpose of a limited use safety mishap report is prevention of subsequent mishaps, and their use is extremely limited. OPNAVINST 3750.6Q requires that urine samples be collected as part of the mishap investigation, and only for that purpose. Although the samples are to be collected immediately after the incident, this requirement is clearly driven by the necessity for a mishap investigation. This investigation will result in the preparation of a mishap investigation report, which is a limited use mishap investigation report.

Turning to DODDIR 1010.1, the Board notes that paragraph C3e dealing with urinalysis testing after a safety mishap, authorizes collection of urine samples following any incident that may be considered a mishap, and during the course of a mishap investigation. As noted by Pers-603, the results of the former may be used for "any lawful purpose, . . . including disciplinary action under the UCMJ . . . or inclusion as independently collected evidence in a mishap investigation or other investigations." Results from the latter "may be protected and of limited use as determined by applicable Service regulations." The Board believes that collection of Petitioner's urine sample falls within the latter provision. Although the sample was taken immediately after the mishap, such action is directed by that part of OPNAVINST 3750.6Q which relates to mishap investigations. Accordingly, the urine sample was not independently collected evidence, but evidence collected pursuant to the mishap investigation.

Even if one concludes that the foregoing paragraph gives the services considerable leeway concerning the use of urinalysis results such as Petitioner's, subparagraph C4a(2) appears to specifically authorize the use of such a result in separation actions, so long as the characterization of service is unaffected by such use. However, the Board declines to interpret this paragraph as restricting the authority granted to the services in paragraph C3(e). The Board believes that reading these two provisions together indicates that a service may limit the use of such a urinalysis result as it sees fit, but in no case may such a result be used to impose disciplinary action or characterize service.

Since the services have the latitude to deal essentially as they see fit with urinalysis results such as Petitioner's, SECNAVINST 5300.28B and OPNAVINST 5350.4B must be examined in order to determine how the Navy has decided to handle these results. In looking at the former directive, the Board initially notes that its provisions were never considered in the processing of Petitioner's case. The limitations set forth in paragraph 4 of enclosure (3) to SECNAVINST 5300.28B essentially set forth a presumption that such results may be used as a basis to

administratively separate a servicemember, but not to characterize service. However, that paragraph also states that such use must be "in accordance with applicable laws and regulations." Clearly, OPNAVINST 5350.4B, which implements DODDIR 1010.1 and SECNAVINST 5300.28B, is such a regulation. Accordingly, the Board believes that SECNAVINST 5300.28B affords the Navy and Marine Corps with the discretion to provide guidance on this issue.

The Board believes that OPNAVINST 5350.4B resolves the issue at subparagraphs 4b and 5c(5) of enclosure (4), which clearly state that urinalysis results from an examination regarding a mishap or safety examination will not be used for any punitive or administrative action. Other parts of the directive are somewhat unclear and, absent the foregoing provisions, could be interpreted to allow such results to be used to form the basis, but not determine the characterization, of an administrative separation. However, the repetitive and unambiguous prohibition in these subparagraphs of the directive leaves little, if any, doubt that these urinalysis results cannot be used against the individual in any way.

The Board believes that the provisions of DODDIR 1010.1 and its implementing instructions are controlling on the issue of whether Petitioner's urinalysis could be used against him at the BOI. However, the Board also cannot help but note that in accordance with OPNAVINST 3750.6Q, a urinalysis collected as part of a mishap investigation will be reported as part of a limited use mishap investigation report. DODINST 6055.7 states that the sole purpose of such a document is the prevention of future mishaps. Accordingly, the Board believes that the prohibition set forth in OPNAVINST 5350.4B is consistent with the intent of this DOD instruction.

Therefore, the Board concludes that the use of the urinalysis results as evidence against Petitioner at the BOI was improper. Since these results were the only evidence introduced at the BOI to support the allegation of drug use, their use was clearly prejudicial to Petitioner.

Even if use of the urinalysis results at the BOI was not precluded by OPNAVINST 5350.4B, the Board also finds considerable merit in counsel's contention that a preponderance of the evidence fails to show that Petitioner used cocaine. After weighing the evidence and making allowances for not having personally observed the witnesses, the Board is not convinced, by a preponderance of the evidence, of Petitioner's guilt. The factors which form the basis for its conclusion are the same factors set forth in the advisory opinion from Pers-06, specifically, Petitioner's fine military record, overall character, the absence of any indication that he would use cocaine, and especially the chain of custody problems in

collection, storage, and shipment of Petitioner's urine sample.

Based on the foregoing, the Board concludes that all documentation concerning Petitioner's discharge by reason of misconduct must be removed from the record, the discharge must be set aside and he should be reinstated in the Navy. Concerning his request to be restored to the FY 1999 lieutenant commander promotion list, the Board notes the statement in the letter of 21 August 1998 to the effect that his name was not removed from that list. Thus, it would appear that after Petitioner is restored to active duty, further action on the promotion issue may be taken by Navy authorities. If Petitioner is dissatisfied with such action, he may reapply to the Board.

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 to show that he was not discharged on 30 June 1998 by reason of misconduct, but has served continuously and without interruption on active duty since that date. This correction should include removal of all documentation from Fiche 5, the DD Form 214 reflecting discharge by reason of misconduct, and Petitioner's written response to the DD Form 214 of 25 June 1998.

b. That Petitioner be reinstated in the Navy in the rank of lieutenant. In this regard, the Board intends that any appropriate action be taken given his selection for advancement by the FY 1999 lieutenant commander selection board and the placement of his name on the promotion list.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner 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 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. The foregoing action of the Board is submitted for your review and action.

  
W. DEAN PFEIFFER

Reviewed and approved: OCT 29 1999



Carolyn H. Becraft  
Assistant Secretary of the Navy  
(Manpower & Reserve Affairs)