



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

TRG
Docket No: 5608-01
10 October 2002

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

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

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Navy, filed an application with this Board requesting that his record be corrected by removing the nonjudicial punishment (NJP) of 1 March 2001.

2. The Board, consisting of Mr. Brezna, Mr. Kastner and Mr. Pauling, reviewed Petitioner's allegations of error and injustice on 1 October 2002 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 was filed in a timely manner.

c. Petitioner reenlisted in the Navy for three years on 15 February 2002 after more than four years of active duty on a prior enlistment. At the time of the NJP at issue, he was assigned to the Naval Medical Clinic, Pearl Harbor, HI.

d. The clinic log shows that on 10 February 2001 Petitioner reported for duty at 0805 with an odor of alcohol, and that a DR M would perform a competence for duty examination. In his report of the examination, performed at 1000, Dr M stated that Petitioner had used alcohol late into the previous evening and had not had adequate sleep. It appears that a blood sample was taken from Petitioner at this time. Dr. M then concluded that Petitioner "was not competent or safe to stand duty today." The clinic log, however, shows that at 1030, Dr W, apparently

Petitioner's supervisor, "evaluated (Petitioner) and stated that (he) is fit for duty."

e. A preliminary inquiry apparently was made into allegations of Petitioner's misconduct. A supplement to that inquiry, dated 27 February 2001, stated that interaction between Petitioner and a Ms. T was consensual, and alcohol was not involved.

f. The court memorandum on file in the record shows that on 1 March 2001 Petitioner received NJP for two specifications of failure to obey an order or regulations; and drunkenness and being incapacitated for the performance of his duties; in violation of Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ). The charge of disobedience apparently resulted from allegations that he improperly provided alcohol to Ms. T and wrongfully interacted with her. The punishment imposed at NJP was 45 days extra duty, forfeitures of pay totaling \$1386, and a reduction in rate from hospital corpsman third class (HM3; E-4) to hospitalman (HN; E-3). The performance evaluation for the period 16 June 2000 to 28 February 2001 is adverse, with a 1.0 mark in the category of military bearing/character and comments referencing the NJP and reduction in rate.

g. Petitioner's appeal of the NJP is unavailable. However, in his action denying the appeal, the Commander, Navy Region, Hawaii, concluded that the commanding officer (CO) did not abuse his discretion, and the punishment imposed was proportionate to the offenses committed. This action states, in part, as follows:

.... Your first grounds for appeal are moot because records indicate that though discussed, NJP was not imposed for either providing alcohol to a minor or soliciting an unprofessional relationship.

.... Your CO did impose NJP for your incapacitation for the performance of your duties through prior wrongful indulgence in intoxicating liquor in violation of the UCMJ, Article 134. The record of proceedings supports the CO's determination that you committed the misconduct charged. Further, additional investigation supports that decision in confirming that the officer on duty at the time of the misconduct removed you from your primary official duties for a period of time based on his determination that due to your voluntary intoxication you were unfit to see patients. This action was supported by the fact that blood drawn three hours after your reporting for duty showed that you still had a blood alcohol level of .07.

Since the NJP, Petitioner has served in an excellent manner and, on 16 June 2002, he was readvanced to HM3.

h. Concerning the two specifications of disobedience, Petitioner states in his application that he was found not guilty of those offenses but they appear on the NJP documentation filed in his service record. Concerning the incapacitated for duty charge, he contends that he was mentally and physically capable of performing his duties, was not asked to leave, and performed his duties until the close of business. In this regard, Petitioner has submitted a statement from a petty officer second class who states that the chain of events began in the morning of 10 February 2001 when a patient commented that Petitioner smelled of alcohol. However, he was not evaluated until 1030 because the clinic was busy because of the USS GREENVILLE incident. The petty officer further states that after Petitioner was found fit for duty, he returned to duty and worked the rest of the day.

j. Paragraph 76 of part IV to the Manual for Courts-Martial (MCM) states that the elements of the offense of incapacitation for performance of duties are as follows:

- (1) That the accused had certain duties to perform;
- (2) That the accused was incapacitated for the proper performance of such duties;
- (3) That such incapacitation was the result of previous wrongful indulgence in intoxicating liquor or any drug; and
- (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

"Incapacitation" is defined as being unfit or unable to perform properly. A person is unfit to perform duties if, at the time the duties are to commence, the person is drunk, even though physically able to perform the duties. "Drunk" means any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the majority, consisting of Mr. Brezna and Mr. Kastner, concludes that Petitioner's request warrants favorable action. The majority first notes that the appeal authority agrees with

Petitioner that NJP was not imposed for the disobedience charge. Therefore, that charge and its specifications should be removed from the court memorandum in the record.

The majority also believes that despite the fact that Petitioner had a blood alcohol level of .07 at 1030, it was inappropriate to impose NJP for incapacitation for duty. Although he smelled of alcohol when he reported for duty, the majority does not believe that Petitioner was unfit or unable to perform due to drunkenness. He was referred for a competency for duty examination only because of a smell of alcohol on his breath. At no time was his performance of duty called into question. Further, he was returned to his duties after the fitness for duty examination, and apparently performed his duties until the end of his shift. Accordingly, the majority concludes that the NJP and the related performance evaluation should be removed from Petitioner's record.

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

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected to show by removing all evidence of the NJP of 1 March 2001 from his record. This should include but not be limited to the following:

(1) The court memorandum (NAVPERS 1070/607, dated 1 March 2001;

(2) The performance evaluation for the period 16 June 2000 to 28 February 2001.

b. That Petitioner's naval record be further corrected to show that he was not reduced from HM3 (E-4) to HN (E-3) on 1 March 2001.

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 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.

MINORITY CONCLUSION:

~~XXXXXXXXXX~~ disagrees with the majority and concludes that Petitioner's request only warrants partial favorable action. The minority member agrees that the court memorandum in the record is in error because it states that Petitioner was found guilty of the two specifications of disobedience. Accordingly, that verbiage should be removed.

Nevertheless Petitioner was referred for a competency examination shortly after reporting for duty, and he did not provide a blood sample and was not otherwise evaluated until several hours later. The minority believes that a blood alcohol level of .07 at 1000 shows that Petitioner was drunk when he reported to duty at about 0800. Given the circumstances, Mr. Pauling concludes that Petitioner was incapacitated for duty as alleged, and the NJP should not be removed from his record. He further concludes that even after removal of the disobedience charge, the punishment imposed was not overly severe and should not be changed since the CO imposed that punishment only for incapacitation, and the verbiage concerning disobedience was only included on the court memorandum due to an administrative error. when he imposed the reduction in rate.

In view of the foregoing, the minority finds that partial relief is warranted.

MINORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the following words and figures from the 1 March 2001 court memorandum (NAVPERS 1070/607); "92 (FAILURE TO OBEY ORDER OR REGULATION - TWO SPECIFICATIONS) AND"

b. That remainder of Petitioner's request be denied.

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 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

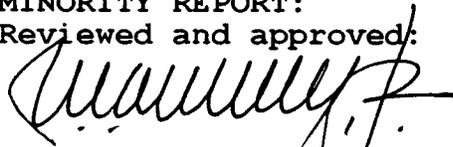
5. The foregoing report of the Board is submitted for your review and action.



W. DEAN PFEIFFER

MAJORITY REPORT:
Reviewed and approved:

MINORITY REPORT:
Reviewed and approved:



William A. Navas, Jr.
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)