DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-186

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FINAL DECISION

AUTHOR: Andrews, J.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on September 29, 2006, upon receipt of the completed application.

This final decision, dated May 31, 2007, is approved and signed by three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant asked that Board to correct his record by removing his reduction in rank from MK2/E-5 to MK3/E-4 on January 24, 2005.[1] The applicant stated that when he was taken to mast on October 22, 2004,[2] part of his non-judicial punishment (NJP) was a reduction in rank to MK3/E-4, which was suspended. After an M240B machine gun he was loading discharged accidentally on December 17, 2004, he was taken to mast on new charges on January 24, 2005.[3] His commanding officer (CO) dismissed the new charges with a warning but then vacated the suspended sentence from October 22, 2004, so that the reduction in rank was imposed. The applicant alleged that his CO vacated the suspension of the reduction in rate as a result of the report of a Class D mishap investigation into the accidental discharge of the M240B.

The applicant argued that Enclosure 10 of COMDTINST M5100.47 "states that 'Persons involved in mishaps, either directly or indirectly, cannot be disciplined or punished based on the

[1] The applicant made no allegations about his subsequent advancement to MK1.
[2] The applicant was charged with submitting a false travel claim with intent to defraud, a violation of Article 132(2)(c) of the Uniform Code of Military Justice (UCMJ), and with making false official statements about the travel claim in violation of Article 107(B)(3) of the UCMJ. At mast, he was awarded as NJP an oral admonition, a written reprimand, 30 days of extra duty, and a reduction to MK3/E-4, which was suspended for 6 months.
[3] The applicant was charged with violating Article 92.A.3. of the UCMJ for failing to obey an order and Article 134 of the UCMJ for discharging a weapon through negligence.

findings of the mishap investigation.'" Therefore, it was improper for his CO to vacate the suspension of his reduction in rank as a result of the findings of the mishap investigation.

In support of his allegation, the applicant submitted a copy of the mast report (CG-4910), which shows that on January 24, 2005, the applicant's CO held a hearing and dismissed the new charges against the applicant with a warning, but then vacated the suspension of the applicant's reduction in rate. The report bears a notation by the investigating officer, LT S, that states, "Ref: My memo 1616 of 4 Jan 2005."

The applicant also submitted a copy of a transcript of the mast, which shows that the report by LT S was included in the evidence at the hearing on January 24, 2005. On page 9 of the transcript, the CO is quoted as saying that "there is insufficient evidence to indicate that you committed the alleged misconduct. These allegations are dismissed."

In addition, the applicant submitted a copy of LT S's report on his investigation, dated January 4, 2005. The report does not indicate what type of investigation LT S conducted. It states that on December 17, 2004, as a member of a boat crew preparing to get underway, the applicant

> mounted the ammunition can before performing operational checks of the weapon. This was a departure from the unit's standard method of operation. While inspecting the weapon's chamber [the applicant] was distracted by the ammunition shifting within the can. He left the bolt to the rear with the safety off and adjusted the ammunition. He then proceeded to place links of ammunition on the feed tray with the bolt still locked at the rear. Both [the applicant and another crewmember] stated that the bolt shot forward of its own accord, stripping off one round in the process and firing that round. The bolt then locked back to the rear. … The round landed between Elliott Bay … and the center of Duwamish Head.

The report also states, however, that the applicant had not completed the qualification factors for the M240B and "was not qualified nor authorized to handle or load the M240B at the time of the mishap." In addition, LT S stated that he had examined the M240B with a chief gunner's mate and a first class gunner's mate at the Pacific Area armory. Their examination showed that it "appeared to be in new condition and held the bolt during jostling, even while not fully locked. The weapon appeared to be in good working order," and they were "unable to reproduce a failure that made the bolt slide forward without pulling the trigger."

LT S concluded that the applicant's conduct did not meet the criteria for the charge under Article 92.A.3. because there was no regulation or guidance about loading an M240B. He recommended that the charge under Article 134 be handled at mast because the applicant had loaded the weapon in a negligent manner, which resulted in the accidental discharge.

The applicant also submitted statements by the other members of the boatcrew and by other members at his station:

- MK3 V stated that when the M240B discharged, he was standing nearby watching the applicant mount and arm it. The applicant "opened the feed tray cover, pulled the charging handle to the rear and inspected the chamber. I visually checked the chamber and saw that it was clear. At that time he picked up the can of ammunition and placed it

in the weapon mount. The belt of ammunition was twisted and falling in on itself in the can, so [the applicant] removed the belt, straightened it, and placed it back in the can. He then placed the end of the belt on top of the feed tray with both hands keeping the belt from twisting again. As he put the rounds on the feed try, the bolt went forward stripping and discharging one round. Never at any time did I see his finger on or near the trigger."

- BM2 G stated that he was in the cabin adjusting a chart plotter when he heard the M240B discharge. When he looked out the cabin window, he "could see the feed tray cover in up/open position, with the bolt locked to rear and the ammunition belt flipped back and away from the weapon." He told the applicant and MK3 V to step away from the weapon.

- GM1 W, who worked at the armory, stated that because the M240B was a newly acquired weapon, there was "no policy for loading or unloading the M240B at the time of the discharge."

- LCDR S, the applicant's new CO, submitted a letter arguing that because the prior CO dismissed the charges against the applicant with a warning, "there were no violations of the UCMJ to satisfy the condition precedent to vacating the suspended punishment. Based upon the fact that there is no record of any conditions associated with the suspended punishment, and due to the fact that my predecessor dismissed the charges with a warning, I am of the opinion that the suspended reduction in rank was improperly vacated."

VIEWS OF THE COAST GUARD

On February 28, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case.

The JAG stated that the applicant's CO "vacated the suspended punishment in error because there was no finding that the applicant violated a punitive article of the UCMJ." The JAG stated that the mast report dated January 24, 2005, indicates that the CO "found that there was insufficient evidence that he committed misconduct with regard to the accidental discharge of a firearm on December 17, 2004. Where the command determined that there was no violation of the UCMJ, there was no basis to vacate the suspended portion of the prior NJP." The JAG cited Chapter 1.E.5.b. of the Military Justice Manual, which states that

> [u]nless otherwise stated, an action suspending a punishment includes a condition that the member not violate any punitive Article of the UCMJ. Vacation of a suspension may be based on an offense under the UCMJ or other appropriate conditions of the suspension specified in writing by the NJP authority.

The JAG argued that because on October 22, 2004, the applicant's CO failed to specify in writing any conditions of the suspension, under Chapter 1.E.5.b. of the Military Justice Manual, "the only condition on the suspension of the reduction in rate was that the applicant not violate any punitive Article of the UCMJ." However, the transcript of the mast shows that the applicant's CO found that there was insufficient evidence and dismissed the charges. The JAG argued

that "[w]ithout a violation of the UCMJ there was no basis for vacating the suspended portion of the earlier NJP."

The JAG stated that in light of this error, he would not address the applicant's allegations about his CO's reliance on a mishap investigation. The JAG recommended that the applicant's record be corrected to show that the suspended portion of his October 22, 2004, NJP was not vacated.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 1, 2007, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The applicant was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that his CO erroneously and unfairly relied on the report of a mishap investigation when deciding to vacate the applicant's suspended sentence from a prior mast. However, nothing in LT S's report indicates that his investigation was a mishap investigation as opposed to an administrative investigation. As disciplinary measures may be based on the findings of an administrative investigation, the applicant has not proved that his CO's reliance on LT S's investigation was erroneous or unjust.

4. As the JAG and the applicant's new CO have pointed out, however, when the applicant's prior CO suspended the applicant's reduction in rate on October 22, 2004, the CO did not specify in writing any particular conditions of the suspension. Thus, under Chapter 1.E.5.b. of the Military Justice Manual, only an offense under the UCMJ could justify the vacation of the suspension of the NJP. Since at mast on January 24, 2005, the CO expressly stated that there was insufficient evidence to find that the applicant had violated the UCMJ at the time of the accidental discharge of the M240B and dismissed the charges against him, there was no legal basis on which the CO could vacate the suspension. Therefore, the Board finds that the preponderance of the evidence shows that the applicant's reduction in rate on January 24, 2005, was erroneous and should be corrected.

5. Accordingly, relief should be granted by removing the vacation of the suspension of the applicant's reduction in rate on January 24, 2005, so that his record shall show that he remain an MK2/E-5 until he advanced to MK1/E-6 on September 1, 2006. He should also receive any back pay and allowances he may be due as a result of the correction.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted. The January 24, 2005, vacation of the suspension of his reduction in rate shall be removed from his record so that his record shall show that he was not reduced in rate on that date but remained an MK2/E-5 until he advanced to MK1/E-6 on September 1, 2006. The Coast Guard shall pay him any back pay and allowances he may be due as a result of this correction.

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Donald A. Pedersen

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