

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-069

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 February 8, 2008, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 14, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to remove from his record a Court Memorandum indicating that he was placed on report for violating the Uniform Code of Military Justice (UCMJ) and awarded nonjudicial punishment (NJP) on May 10, 2006. He alleged that the entire document was a clerical error because no mast took place. He was simply counseled about his conduct by the Executive Petty Officer (XPO) of the unit, since the Officer in Charge (OIC) of the unit was away on leave. In addition, he was told that the charges were dismissed. However, someone sent the Court Memorandum to the Sector Personnel Office, which made database entries in his record as if he had been taken to mast and reprimanded. He did not learn of these errors until he inquired about getting a Good Conduct Medal and was told that the NJP had terminated his eligibility for one. In support of his allegations, the applicant submitted a statement signed by the OIC of his unit, a chief petty officer, who wrote the following:

I endorse [his] request to have the Court Memorandum removed from his record. I was the Officer in Charge during the dates in question and I was either TDY or on leave. In my absence, I require the "Acting Officer in Charge" contact me if he/she has intentions to conduct a mast. To the best of my knowledge, no mast was held. In addition, we have no files onboard my unit to support that a mast ever took place. I request the Court Memorandum be removed from his records.

SUMMARY OF THE RECORD

Print-outs from the Coast Guard's database indicate that on May 10, 2006, the applicant received NJP for violating Article 86 of the UCMJ by being absent without leave (AWOL) when

he failed to attend a physical therapy appointment on May 3, 2006, and Article 134 of the UCMJ by making a false statement to a watch stander. Other database entries indicate that the pay grade of the member conducting the mast was E-6 (first class petty officer), that the applicant was advised of his right to counsel, and that he was issued a “reprimand/admonition letter.” Another print-out indicates that the applicant did not receive an Enlisted Employee Review (EER) as a result of the recorded NJP.

VIEWS OF THE COAST GUARD

On June 18, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief by removing all references to the May 10, 2006, NJP from the applicant’s record. In so doing, the JAG adopted the findings and analysis in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant’s record contains a Court Memorandum reflecting violations of Articles 86 and 134 of the UCMJ. CGPC further stated that although the Court Memorandum indicates that the applicant was issued a “reprimand/admonition letter,” no such letter appears in his record. In addition, CGPC noted that when a member receives NJP, the unit is required by Article 10.B.5.b.3. of the Personnel Manual to prepare an EER, but no such EER is in the applicant’s record.

CGPC stated that on May 10, 2006, the OIC was not at his unit because he was attending training in Petaluma, California, from April 22 to May 24, 2006. Moreover, the OIC’s statement indicates that he was “unaware that a mast took place.” CGPC stated that “[w]hile the Military Justice Manual (MJM) bestows NJP authority to successors, i.e., XPO acting as OIC, [the applicant’s OIC] indicates that he required the XPO to brief him of any intentions to conduct a mast, and no such briefing occurred.” Moreover, under Article 1.E.1.c. of the MJM, the “alleged punishment awarded, ‘reprimand/admonition’ is not an authorized punishment that can be imposed by an enlisted officer-in-charge. ... Therefore, even if such NJP took place, the punishment awarded was not within the scope of authority for an enlisted officer-in-charge or his successor to command. Therefore, it is recommended that all references to the May 10, 2006, NJP be removed from [the applicant’s] record as null and void.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 8, 2008, the applicant responded to the advisory opinion and stated that he agreed with the recommendation for relief therein.

APPLICABLE LAW

Under Article 15 of the UCMJ, commanders, at their discretion, may impose NJP for minor violations of the UCMJ to maintain good order and discipline when court-martial seems excessive. Part V, paragraph 2, of the Manual for Courts-Martial (MCM) states the following regarding NJP authority:

- a. *Commander.* As provided by regulations of the Secretary concerned, a commander may impose nonjudicial punishment upon any military personnel of that command. ... “Subject to sub-

paragraph 1d(2) and any regulations of the Secretary concerned, the authority of a commander to impose nonjudicial punishment as to certain types of offenses, certain categories of persons, or in specific cases, or to impose certain types of punishment, may be limited or withheld by a superior commander or by the Secretary concerned.

b. *Officer in charge.* If authorized by regulations of the Secretary concerned, an officer in charge may impose nonjudicial punishment upon enlisted persons assigned to that unit.

Part V, paragraph 5.c.(1), of the Manual for Courts-Martial states that admonitions and reprimands are forms of censure that criticize a member's conduct. If imposed at NJP, they are considered "punitive" rather than administrative. Admonitions or reprimands of enlisted members may be made orally or in writing, unless the Secretary prescribes otherwise.

Chapter 1 of the Military Justice Manual (MJM; COMDTINST M5810.1D) contains the Coast Guard's regulations governing NJP. Chapters 1.B., 1.C., 1.D., and 1.F. provide procedures for masts, including the investigation of the charges; the appointment of a representative to speak for the member; the required phases of a mast hearing; and the right to appeal. Chapter 1.A.3.a. states the following:

All commanding officers may impose NJP upon personnel assigned to their units. All officers-in-charge may impose NJP upon enlisted members assigned to their unit, unless their authority is limited by an officer exercising general court-martial jurisdiction [OEGCMJ]. Throughout this chapter, references to commanding officers as NJP or mast authorities include officers-in-charge, except where specifically noted. The authority of a commanding officer to impose NJP for certain types of offenses, certain categories of members, in specific cases, or to impose certain types of punishment may be limited or withheld by a superior commanding officer or the Secretary concerned. A Coast Guard unit is a separately identified Coast Guard organizational entity, under a duly assigned commanding officer or officer-in-charge, provided with personnel and material for the performance of a prescribed mission.

Chapter 1.A.3.c. states the following regarding the delegation of NJP authority:

The power to impose NJP is inherent in the office and not in the individual. Any officer who succeeds to command in the absence of the assigned commanding officer because of death, incapacitation, illness, TAD, or leave has the power of the assigned commanding officer to impose punishment, but the maximum punishment is limited by the rank of the successor. For example, a LT who succeeds to command in the absence of the assigned commanding officer who is a LCDR, may impose the amount of punishment allowed a commanding officer in the grade of LT or below.

Chapter 1.E.1.a. states that the "maximum punishment that may be imposed depends upon the rank of the authority imposing punishment, the rank or grade of the member being punished, and in some situations by the combination of punishments awarded The limitations shown in the following two tables apply to each instance of NJP and not to each offense." Chapter 1.E.1.c. states that "[s]ubject to the limitations in subparagraph 1.E.1.d. below [which is inapplicable to this case], the following table depicts the maximum punishments that may be awarded at mast to an enlisted member." The table shows that when NJP is being imposed by an enlisted OIC, the enlisted OIC may not punish the member with an admonition or reprimand.¹

¹ One of the Coast Guard's on-line versions of the MJM (COMDTINST M5810.1D) shows in the table in Chapter 1.E.1.c. that enlisted OICs are authorized to impose an admonition or reprimand at NJP. Upon inquiry by the BCMR staff, the Coast Guard's Office of Military Justice stated that this on-line version contains a typographical

Chapter 1.E.2.a. states the following regarding punitive admonitions or reprimands:

- (1) Punitive admonition and reprimand are two forms of censure intended to express adverse reflection upon or criticism of a person's conduct. A reprimand is a more severe form of censure than an admonition. Punitive admonition and reprimand should not be confused with nonpunitive censure and other forms of administrative corrective measures.
- (2) In the case of commissioned officers and warrant officers, admonitions and reprimands awarded at NJP must be administered in writing. In other cases, they may be administered either orally or in writing. The punitive letter of admonition or reprimand shall be similar in form to enclosure (6b).
- (3) While punitive letters of admonition or reprimand are not considered generally appropriate in the case of enlisted personnel below the grade of E-7, their use against lower ranking personnel is not precluded.
- (4) If a punitive letter is appealed and not sustained on appeal, a copy of the letter will not be filed in the official record of the member concerned.

Article 8.E.2.a. of the Personnel Manual requires a copy of any punitive letter of censure to be entered in the recipient's military record unless the NJP is successfully appealed.

Chapter 1.G.1.d. of the MJM states the following:

Nonpunitive administrative letters of censure are not punitive and may be administered either orally or in writing. Nonpunitive letters of censure are private in nature and, other than administrative letters of censure issued by the Commandant, shall not be forwarded to the Chief of Personnel, quoted in, or appended to, performance reports, included as enclosures to investigative reports, or otherwise included in official Coast Guard records of the recipient.

Chapter 1.G.3.a. of the MJM states the following regarding record entries made pursuant to an NJP:

The Court Memorandum provides input to the service records of officer and enlisted personnel for all masts resulting in the imposition of punishment. If mast was held, but no punishment as described under Article 15, UCMJ, was awarded, then Article 15 punishment (or NJP) was not awarded. No Court Memoranda shall be prepared if, instead of imposing punishment, the matter is dismissed, dismissed with a warning, dismissed with administrative action taken, referred to court-martial, or results in recommendation for general court-martial because these actions are not considered the imposition of punishment.

Article 5.A.1.a. of the Medals and Awards Manual states that it is "[a]warded for proficiency in rating, sobriety, obedience, industry, courage, and neatness throughout such period of service. Effective 1 July 1983, the required period of service is 3 years." Article 5.A.1.a.(2)(c) states that "[w]hen an infraction of discipline results in non-judicial punishment, a new period will commence the day following the date non-judicial punishment is awarded."

Article 10.B.5.b.3.a. of the Personnel Manual states that a special EER must be prepared "on the date a member is awarded non-judicial punishment (NJP)." Under Article 10.B.2.a.1., an EER documenting NJP must be accompanied by supporting comments for low marks.

error and that, as stated in the advisory opinion, the authorized MJM, which was issued in 2000 and has not been revised in the interim, does not authorize enlisted OICs to impose admonitions or reprimands at NJP.

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 submission, and applicable law:

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

2. The applicant alleged that a Court Memorandum and other records of an NJP dated May 10, 2006, were erroneously entered in his record. The Officer in Charge (OIC) of the unit, a chief petty officer, was away at a Coast Guard training center at the time of the alleged offenses on May 3, 2006, and of the recorded mast. Therefore, the Executive Petty Officer (XPO), a first class petty officer, was serving as the OIC's successor, or "Acting OIC." Under 33 C.F.R. § 52.24(b), the Board begins its deliberations presuming that the applicant's military record is correct and that the XPO acted properly in taking the applicant to mast and awarding him NJP, and the applicant must prove by a preponderance of the evidence that the NJP is incorrect or unjust.

3. The applicant failed to submit a statement by the XPO or anyone else who was present at the unit during the pertinent period (aside from himself) to support his allegation. However, he submitted a statement from the OIC, who wrote that when he is absent from his unit, he "require[s] the 'Acting Officer in Charge' [to] contact [him] if he/she has intentions to conduct a mast" and that "[t]o the best of [the OIC's] knowledge, no mast was held."

4. Under paragraph 2.b. of Part V of the MCM and Chapter 1.A.3.a. of the MJM, the OIC of a unit has authority to award NJP. Under Chapter 1.A.3.c. of the MJM, when an OIC is away from his unit on temporary duty orders, his successor inherits the OIC's authority to impose NJP, although the maximum punishment may be limited by the rank of the successor. However, Chapter 1.A.3.a. provides that "[t]he authority to impose NJP for certain types of offenses, certain categories of members, in specific cases, or to impose certain types of punishment may be limited or withheld by a superior commanding officer." The OIC's statement indicates that, although he had authorized the XPO to impose NJP on unit members, he had limited that authority by requiring the XPO to consult him before exercising the authority. Although this kind of limitation is not expressly mentioned in Chapter 1.A.3.a., the Board finds that it reasonably falls within the implied authority of a commanding officer or OIC to limit his successor's authority to impose NJP under that chapter.

5. In light of the OIC's statement, the Board finds that the XPO's authority to impose NJP on the applicant during the OIC's absence was limited, in accordance with Chapter 1.A.3.a. of the MJM, in that the XPO was required to consult the OIC before holding the mast. In addition, the preponderance of the evidence in the record indicates that, if the XPO convened a mast for the applicant on May 10, 2006, he did so improperly because he had not consulted the OIC.

6. As the Coast Guard stated, there are other indicia of improper or incomplete procedures with respect to the applicant's NJP: (1) According to the OIC, the unit files contain no record of the NJP; (2) no EER was prepared for the applicant, as required by Article

10.B.5.b.3.a. of the Personnel Manual for an enlisted member punished at mast; and (3) the punitive reprimand that appears in the database was apparently not within the OIC's authority to impose at mast, under Chapter 1.E.1.c. of the MJM,² and thus also not within the XPO's authority.

7. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that any Court Memorandum or other record of NJP dated May 10, 2006, in his record is erroneous and should be removed from his record as null and void. In addition, because the applicant's eligibility for a Good Conduct Medal was apparently terminated on May 10, 2006, because of the NJP, pursuant to Article 5.A.1. of the Medals and Awards Manual, such termination should be removed.

8. Accordingly, the applicant's request should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

² *But see* footnote 1, above.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted. Any Court Memorandum of a mast dated May 10, 2006, and all other records of and references to nonjudicial punishment on that date shall be removed from his record as null and void. In addition, his record shall not show that his eligibility for a Good Conduct Medal terminated on that date.

No copy of this decision shall be placed in his Personal Data Record.

George J. Jordan

Patrick B. Kernan

Vicki J. Ray