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

BJG
Docket No: 4025-98
13 May 1999

AOC AW [redacted] USNFR
[redacted]
M[redacted]

Dear Chie[redacted]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 12 May 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by the Navy Personnel Command dated 4 December 1998 and 28 January 1999, and the advisory opinion from the Office of the Judge Advocate General (OJAG) dated 25 March 1999, copies of which are attached. They also considered your counsel's rebuttal letters dated 20 January and 26 April 1999.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion from OJAG in finding that your contested nonjudicial punishment (NJP) should stand. They found that your NJP was a proper basis for the action to withdraw your recommendation for advancement, which resulted in your removal from the selection list for promotion to pay grade E-8. Finally, they noted that the withdrawal of your recommendation for advancement was not technically punitive, but rather administrative. They observed that such action could not have been a substitute for punitive action, since you were the subject of NJP as well. In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is

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important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to:
Donald J. Farber, Esq.

DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

4025-98

DEC 4 1998

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS (PERS-00ZCB)

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN THE CASE OF CHIEF PETTY OFFICER [redacted], USN [redacted]

Ref: (a) BUPERS memo 5819 Pers-06LR of 13 Jan 94

1. Petitioner claims that he was punished unjustly by his commanding officer at mast and subsequently denied advancement to senior chief petty officer. He now asks BCNR to expunge this mast from his official record and to advance him to that pay grade.

2. The Bureau of Naval Personnel took no action regarding his non-judicial punishment and is not the proper venue for an interpretation as to the sufficiency of that proceeding. The Deputy Judge Advocate General, Criminal Law (Code 20) can render an authoritative opinion concerning the propriety and fairness of petitioner's non-judicial punishment.

3. The Bureau of Naval Personnel did remove petitioner's name from the list of individual's selected for advancement to senior chief petty officer. Reference (a) is a thorough analysis of that action. After a careful review of this case file, I endorse the findings and recommendations contained in reference (a).

4. I will note that petitioner's arguments have been presented previous to this petition in two complaints filed against his commanding officer under Article 138 of the Uniform Code of Military Justice. Both were found to be without merit.

[redacted]
Assistant Legal Counsel

4025-98

DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

5420
NPC-832C
28 Jan 99

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR)

Via: NPC/BCNR Coordinator (NPC-00ZCB)

Subj: AOC [redacted] USN (RET) [redacted]

Encl: (1) BCNR File 04025-98
(2) Petitioner's Microfiche Record

1. The petition and naval records of subject petitioner have been reviewed relative to his request for removal of reprimand and retroactive advancement to E-8.

2. The review indicates that the petitioner was never processed for administrative separation for any reason. The issues of NJP, reprimand, and removal of recommendation for advancement all fall under the authority of a commanding officer and are not subject to further scrutiny or appeal by NPC-832. Therefore, no opinion is issued in this case on the merits.

[redacted]
Technical Advisor
To the Head, Enlisted
Performance Branch

4025-98

DEPARTMENT OF THE NAVY
NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD - BLDG 111
901 M STREET SE
WASHINGTON DC 20374-5047

IN REPLY REFER TO
5800
201/0221

MAR 25 1999

From: Deputy Assistant Judge Advocate General (Criminal Law)
To: Chairman, Board for Correction of Naval Records

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN THE CASE OF AOC [redacted] USN (RET.), [redacted]

Ref: (a) Chairman BCNR ltr BJG Docket No: 4025-98 dtd 8 Feb 99
(b) Manual of the Judge Advocate General
(c) Manual for Courts-Martial

BACKGROUND

You asked for comments and recommendations concerning AOC [redacted] (petitioner) request to remove a 06 January 1992 non-judicial punishment from his military record. Upon careful consideration of the references, including petitioner's detailed petition and the relevant case law, I have concluded that there is an insufficient basis in the record to support petitioner's request. Therefore, I do not recommend that the nonjudicial punishment be expunged from petitioner's service record.

STATEMENT OF FACTS

In early December 1992, the USS INDEPENDENCE (CV 62) was in port at Yokosuka, Japan. Petitioner was an E-7 attached to the ship. On 02 December 1992, petitioner's duty day ended at 2000. At about that time, petitioner left the ship to socialize in Yokusuka for the evening. Petitioner and a first class petty officer, along wit[redacted], who was the civilian wife of an E-8 from the USS INDEPENDENCE, visited two local bars over approximately five hours. Petitioner admits that he consumed several alcoholic drinks during the evening. Petitioner's duty day was to begin at 0700, 03 December 1992.

At about 0300, 03 December 1999, petitioner became involved in an altercation with two non-petty officer enlisted sailors from the USS INDEPENDENCE. The altercation resulted in the two junior enlisted individuals alleging that petitioner assaulted them. Although petitioner admits that he shoved one of them, he

disputes the junior enlisted sailors' version of events and alleges that, in any event, he acted to defend [redacted], who had been subjected to verbal taunting from the two junior sailors.

On 06 January 1992, petitioner's Commanding Officer (CO) took petitioner to nonjudicial punishment (NJP) for his involvement in the 02-03 December 1992 altercation. The charges considered by the CO included assault under UCMJ, Article 128, and drunk and disorderly conduct and incapacitation for duty under UCMJ, Article 134. At the NJP, the CO dismissed the charges relating to assault and incapacitation for duty, but found petitioner guilty of drunk and disorderly conduct.

Petitioner contends that the NJP hearing was unfair and should be expunged from his service record. Petitioner bases this request on the fact that the CO excluded one of petitioner's requested witnesses, [redacted] from participating in the hearing. As a result, petitioner believes his CO denied him the opportunity to present a complete defense and that his due process rights were unlawfully violated.

DISCUSSION

Commanding officers have broad discretion in conducting NJP hearings. The statutes and regulations governing NJP recognize:

> . . . [the] unique responsibility of a ship's captain as the master of a frequently isolated community of sailors; the peculiar vulnerability of this independent society to disorderly practices; and hence the essentiality of affording the captain the authority to swiftly and surely 'discountenance and suppress all dissolute, immoral, and disorderly practices,' and to expeditiously 'correct those who are guilty of the same.' United States v. Penn, 4 M.J. 879, 882 (N.M.C.M.R. 1977).

There are limits, however, to the CO's discretion. Reference (c) specifies procedures for conducting NJP hearings. These procedures provide an accused with two important due process rights: notice and the opportunity to present a defense.

Petitioner avers that he was denied the opportunity to present his defense because the CO declined to allow a witness

to speak on petitioner's behalf.[1] Although this act by the CO was a procedural violation, the standard used to determine whether the CO's action *unlawfully* diminished petitioner's right to present his defense is stated in reference (c): A procedural violation has no effect on an NJP unless it materially prejudices a substantial right of the servicemember. Part V, ¶ 1.h. Therefore, the relevant inquiry here is whether the CO's denial of [redacted] testimony materially prejudiced petitioner's opportunity to present his defense at the hearing.[2]

The Supreme Court explained the material prejudice standard in 1946:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. [redacted] v. United States, 328 U.S. 750, 765 (1946), cited in [redacted], 38 M.J. 41 (1992).

Here, the CO's action did not materially prejudice petitioner for two reasons: First, petitioner appeared at the hearing and presented testimonial evidence, and, second, the CO accepted and considered an alternative to [redacted] testimony -- her sworn statement. Under those circumstances, it is not possible to conclude that the CO's error had a "substantial influence" on the finding of guilt that leaves "grave doubt" that the outcome would have been different had [redacted] testified.

In fact, petitioner's own rendition of events shows that the CO's action in denying [redacted] the opportunity to testify hardly foreclosed petitioner's ability to present his defense. First, although not required to do so, petitioner testified at the hearing. Pet. at 17. This gave petitioner ample opportunity to present a defense. In addition, Ms.

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[1] The record shows, and petitioner does not dispute, that he received adequate notice of the hearing. Therefore, that issue is not discussed.

[2] Petitioner concedes that, even if the CO erred by not allowing [redacted] to speak, "the [NJP] is not automatically reversed." Pet. at 19.

[redacted] husband, MMCS [redacted] USN, testified at the hearing upon petitioner's request. Pet. at. 17 n.14. More importantly, petitioner admits that the CO "obviously" read Ms. [redacted] sworn statement before the hearing. Pet. at 17 n.15.

Therefore, the CO had substantial information available to corroborate petitioner's version of events with [redacted] and contrast that with his accusers' version of events. See Pet. at 17 n.12, 14. Significantly, petitioner makes no claim that [redacted] could have said anything more at the hearing than the recitation of events contained in her sworn statement.

Moreover, the defense cited by petitioner, that he was not criminally responsible for any misdeeds occurring during the altercation because he was defending [redacted] from harm, is only applicable, if at all, to the assault charge dismissed by the CO. "Defense of another" is inapplicable to a charge of drunk and disorderly conduct under UCMJ, Article 134. See Pet. at encl. 36-7, which states that "defense of another" is, by its terms, applicable only to assaults under UCMJ, Article 90, 91, and 128 and to homicide.

Even if the defense does apply to drunk and disorderly conduct, an examination of the punitive reprimand issued by the CO as punishment at the NJP shows that the CO found petitioner guilty at the hearing not because of the alleged assault, but instead because petitioner, a supervisory senior enlisted person, was involved in an altercation with junior enlisted personnel in a public street while under the influence of alcohol.[3]

Even accepting [redacted]s version of events as true, the record shows ample evidence to support the CO's finding that petitioner was drunk and disorderly on 03-04 December 1992. In sum, for the reasons discussed above, petitioner received the required due process protections at the NJP hearing. Clearly,

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[3] Although petitioner alleges that he was not "drunk" because his blood alcohol level was less than .10 and cites the California Vehicle Code (Pet. at 3), it is important to note that reference (c) defines "drunk" as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties." Part IV, ¶ 35c(3) (1984 ed.). Reference (c) does not delineate a specific alcohol level that qualifies an individual as "drunk." In any event, the .096 level cited by petitioner, which was taken at 0657 03 December 1992, actually supports the contention that petitioner was not only drunk but also *above a level of .10* at the time of the altercation, which occurred about three hours before petitioner took the alcohol test.

allowing [redacted] to speak at the hearing would have been the better practice, but her absence did not materially prejudice petitioner in this case.

There are a few additional points worthy of mention:

First, although not articulated in his BCNR petition, petitioner advanced several additional reasons as to why his NJP was unfair in two Article 138 complaints. The appropriate authorities disposed of those arguments in responding to petitioner, and I agree with the reasoning advanced by the reviewing authorities.

Second, petitioner asserts at page 16 of his petition that "military law provides a clear, two part formula" to determine whether expungement of the NJP is required. Petitioner's cite to United States v. [redacted] misleading, however, [redacted] describes the balancing factors required to compel a witness' presence at a court-martial. The [redacted] balancing test is grounded largely in the Sixth Amendment, which guarantees to criminal accused the right to confront the witnesses against them. The Sixth Amendment does not apply at NJP. See United States v. Penn, 4 M.J. 879, 882 (N.M.C.M.R. 1977). Therefore, the test cited by petitioner is not directly applicable to a determination of whether due process was denied at NJP. The [redacted]est, which is cited next by petitioner is subject to the same caveat.

As a final administrative matter, please note that our mailing address has changed. Effective immediately, forward all correspondence to the following address:

NAMARA (Code 20)
Washington Navy Yard
716 Sicard Street SE Suite 1000
Washington, D.C. 20374-5047

21025-98

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN THE CASE OF AOC [redacted], USN (RET.), [redacted]

Please advise if further comment or recommendation is desired.

[redacted]
LtCol, U.S. Marine Corps