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

AEG
Docket No. 3943-99
1 September 2000

[redacted]

Dear Mr. [redacted]:

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10, 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 29 August 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary evidence 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. The Board also considered the advisory opinion and legal analysis, dated 14 July 2000, furnished by the Deputy Assistant Judge Advocate General (Administrative Law), copies of which is attached.

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.

The Board found that you first enlisted in the Navy on 13 August 1979. For the next 13 years you served well and were advanced to the rate of chief sonar technician (E-7).

On or about 15 September 1992 you submitted a urine sample that tested positive for methamphetamine. Accordingly, at a special court-martial held on 4 December 1992, you were tried on a single specification of violating Article 112a of the Uniform Code of Military Justice (UCMJ). After you denied using drugs under oath and introduced evidence that showed your good military character, you were acquitted of the charge and specification. On 6 May 1994 you reenlisted for five years.

On 30 November 1994 you once again submitted a urine sample that tested positive for methamphetamine. On 21 December 1994 you received nonjudicial punishment (NJP) for this violation of UCMJ Article 112a. Punishment extended to forfeitures of over $1,000 per month for two months and restriction for 30 days. On 25

December 1994 you submitted a lengthy statement to the commanding officer (CO) in which you admitted to a history of drug use since age 13 consisting of the intermittent use of marijuana, cocaine and methamphetamine. However, you also said that you were no longer were in denial, and had received help from Narcotics Anonymous. Concerning the drug use that led to the earlier court-martial, you stated as follows:

> Two years ago I had my first positive urinalysis for methamphetamine. I chose court-martial, denied it, and was found not guilty. Even at this point, I did not realize I had a problem. The same day I was found not guilty, I celebrated with a line of meth . . .

Administrative separation action was then initiated by reason of misconduct due to drug abuse based on the use of methamphetamine. At an administrative discharge board (ADB), held on 8 March 1995, evidence was introduced concerning your recent NJP. You also testified concerning your career in the Navy, your drug use, and the reasons for it. In this testimony, you also admitted to perjuring yourself at the 1992 SPCM, stating that the allegation of methamphetamine use "was true, and I denied it."

Other individuals also testified on your behalf, including your wife, another member of Narcotics Anonymous, and several other servicemembers. These individuals testified about your drug problem and your efforts to overcome it, and your achievements in the Navy. After considering the evidence, the ADB found that you had committed misconduct due to drug abuse as alleged and recommended discharge under other than honorable conditions (UOTHC). However, the ADB also recommended suspension of the discharge for a probationary period of one year.

In an undated letter forwarding the case to the Chief of Naval Personnel (CNP), the CO concurred with the findings and recommendations of the ADB. However, on 6 June 1995 CNP directed an unsuspended discharge UOTHC and, on 21 June 1995, you were so separated.

Meanwhile, on 16 March 1995 the United States District Court for the Northern District of California decided the case of *Rogers v. Dalton*, No. C-94-3388 EFL (N.D. Ca. 1995). In that case, the court set aside the discharge of a Sailor who had been separated for drug abuse and rationalized that decision as follows:

> The binding policy of the Department of Defense (DOD) concerning drug and alcohol abuse . . . is set forth at 32 C.F.R. § 62.4. DOD policy is to " . . .(5) Treat or counsel alcohol and drug abusers and rehabilitate the maximum feasible number of them; (6) Discipline and/or discharge traffickers and those alcohol or drug abusers who cannot or will not be rehabilitated . . ." Subparagraphs (5) and (6), taken together provide that it is the intent of the DOD to rehabilitate and retain the maximum feasible

number of alcohol and drug abusers, and to discharge only those traffickers and abusers who "cannot or will not be rehabilitated."

Subsequent to the enactment of 32 C.F.R. § 62.4, the Navy promulgated regulations, directives and instructions which conflict with 32 C.F.R. § 62.4. Navy regulations MILPERSMAN (Naval Military Personnel Manual) 3630620 and OPNAVINST (Chief of Naval Operations Instruction) 5350.4B, as modified by NAVADMIN (Naval Administrative Message) 18/92 create a "zero tolerance" drug policy by requiring mandatory processing for separation of all first time drug offenders, and provide no opportunity for rehabilitation and retention to be considered.

The DOD Directive establishes a policy whereby individual services are to implement regulations and procedures which provide for an evaluation of drug abusers' potential for rehabilitation prior to discharging them. The Navy MILPERSMAN regulations governing the (ADB) proceedings do not require the (ADB) to make such a finding, and no such fining was made by the (ADB) in (the plaintiff's case. The Navy's failure to follow DOD policy by discharging (the plaintiff) without considering his potential for rehabilitation denied (him) due process of law.

The cited provisions of 32 C.F.R. § 62.4 were codified in paragraph D1 of DOD Directive (DODDIR) 1010.4 of 25 August 1980. On 18 January 1996 the Director of Correspondence and Directives, Department of Defense, ordered that the directive be modified by deleting the requirement to rehabilitate drug abusers. The change was effective immediately. However, 32 C.F.R. 62.4, as it is set forth in the *Federal Register*, has not been modified. The January 1996 change was embodied in the new DODDIR 1010.4 of 3 September 1997.

Meanwhile, on 31 March 1997 you filed suit in the United States District Court for the Southern District of California, essentially alleging that your discharge failed to pass constitutional muster for the reasons set forth in *Rogers, supra*. On 2 December 1997 you and the Navy settled the case and agreed that the discharge would be set aside and you would be restored to duty, "with the understanding that (you are) subject to administrative reprocessing for drug abuse . . . " Both parties to the litigation also agreed that the settlement "shall not constitute an admission of liability on the part of the United States, . . . and is entered into by both parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation."

Consequently, on or about 18 May 1998, you were reinstated in the Navy. On 13 July 1998 administrative separation action was initiated by reason of misconduct due to drug abuse as evidenced by your 1994 violation of UCMJ Article 112a, as provided for in

MILPERSMAN Article 1910-146; and by reason of misconduct due to commission of a serious offense as evidenced by your perjury at the December 1992 court-martial, in violation of UCMJ Article 131, as provided for in MILPERSMAN Article 1910-142.

You once again elected to present your case to an ADB, which met on 5 August 1998. Among the exhibits introduced by the recorder to the ADB was a copy of MILPERSMAN Article 1910-212. That article states that in making the decision to whether to separate or retain an individual, the ADB and separation authority should consider the seriousness of the offense and likelihood of a recurrence, and the individual's potential for further service and military record. No other information, such as the original or modified versions of DODDIR 1010.4 or 32 C.F.R. § 62.4, was presented to the ADB concerning the policy on rehabilitation and retention of drug abusers. During the ADB, you presented evidence of past achievements during your Navy career. Testimony and statements were also received from a number of individuals who opined that you had potential for further service. Several of these individuals had experience or training in advising and counseling drug abusers.

After considering the documentary evidence and testimony, the ADB found that you had committed misconduct due to drug abuse and commission of a serious offense as alleged. The ADB recommended separation because "member has no potential for further service," and further recommended a characterization of UOTHC. In his letter of 19 August 1998 concurring with the ADB's findings and recommendations, the CO noted that " . . . of utmost importance, the (ADB) found that (you lack) rehabilitative potential . . ."

On 9 November 1998 CNP, acting in his capacity as Deputy Chief of Naval Operations for Personnel, directed your discharge UOTHC by reason of misconduct. CNP also stated that MILPERSMAN Article 1910-146, which provides for separation by reason of misconduct due to drug abuse, constituted the separation authority. Additionally, CNP directed a separation code of "GKK," which means that the individual was discharged due to drug abuse. Accordingly, on 18 December 1998, you were discharged UOTHC after about 19 years and 4 months of active service.

The Board rejected your contentions that separation processing based on your perjury violated the settlement agreement of 2 December 1997, and that such processing was a nullity because the perjury occurred during a prior enlistment. In this regard, the Board substantially concurred with paragraph 3b of the advisory opinion and paragraphs 4e and 5b of the legal analysis.

The Board also concluded your discharge would be proper and appropriate even if even if the perjury should not have been used as a basis for separation. MILPERSMAN Article 1910-170 essentially states that when an individual is processed for discharge for more than one reason, the separation authority must choose the most appropriate reason for separation when he directs

discharge. CNP did so 9 November 1998 when he directed separation by reason of misconduct due to drug abuse. Accordingly, it is immaterial whether processing by reason of commission of a serious offense was proper since you were not actually separated for that reason. Additionally, in accordance with MILPERSMAN Article 1910-214, even if the perjury had not been used as a basis for separation, that misconduct could have been considered by the ADB on the issue of whether you should be separated or retained. That article allows adverse matter from a prior enlistment to be considered if it would have a direct value in determining whether separation is appropriate. Although the use of such material is normally be limited to situations involving patterns of misconduct, your drug abuse constituted such a pattern, and you perjured yourself to cover up part of that pattern of abuse.

The Board also found no merit in your contentions that regulations in effect in 1998 failed to contain any procedures by which the ADB could consider your potential for rehabilitation, and directing separation UOTHC was improper given the evidence of rehabilitation in the record. Along these lines, the Board concurred with paragraph 3a of the advisory opinion and paragraphs 4a-d and 5a of the legal analysis. The Board also noted that MILPERSMAN Article 1910-212 was considered by the second ADB and states that in deciding whether an individual is to be separated, the ADB should consider the likelihood that the offense will recur, the individual's potential for further service, and his entire military record. In short, an ADB is required to consider an individual's rehabilitative potential, and that is what the ADB did in your case. Additionally, DODDIR 1010.4 called for rehabilitation of "the maximum feasible number" of drug abusers. Discharge was authorized for those abusers "who could not or would not" be rehabilitated." The mandate for rehabilitation clearly refers to rehabilitation for the purpose of retention in the service, and not simply to weaning an abuser from his drug use. The Board believed it is not feasible to rehabilitate and retain an individual such as yourself who used drugs while in a position of leadership as a chief petty officer. It is a fundamental tenet of leadership that someone in such a position must set a good example for subordinates, and such an individual is rightly held to a higher standard of conduct. Accordingly, the ADB and CNP could reasonably conclude that it was not feasible to rehabilitate you for the purpose of retention in the Navy.

Accordingly, 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 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 a probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure

Copy to: Mr. [redacted]

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO

1400
Ser 13/1MA11171.00
14 Jul 00

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

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN THE CASE OF EX-STGC [redacted], USN, [redacted]

Ref: (a) Your memo Docket No 3943-99 of 28 Jan 00

Encl: (1) Legal Analysis

1. This responds to your reference (a) request for our comments and recommendation on subject case.

2. Issues

a. Whether Department of Defense (DOD) Directive 1010.4 of 3 September 1997 applied to subject member's case despite the continued publication of an earlier, superseded, version of DOD Directive 1010.4 in the Code of Federal Regulations.

b. Whether Navy violated its settlement agreement with subject member (Petitioner) by administratively processing him for separation by reason of misconduct due to commission of a serious offense (perjury) and by reason of misconduct due to drug abuse.

3. Short Answers

a. Though Petitioner's BCNR case file does not establish Petitioner's actual notice of the current version of DOD Directive 1010.4, the fact Petitioner's rehabilitative potential was affirmatively considered and assessed prior to his discharge makes resolution of this issue unnecessary.

b. No. Though the Government's settlement agreement with Petitioner stated he was "subject to administrative reprocessing for drug abuse", it did not prohibit Navy from processing him for administrative discharge on other applicable grounds.

4. Discussion. Enclosure (1) provides a detailed legal analysis.

5. Point of contact: LCDR Barry Goehler, at (703) 604-8212.

P. M. DELANEY

JUL 19 2000

Legal Analysis

1. Issues

a. Whether Department of Defense (DOD) Directive 1010.4 of 3 September 1997 applied to subject member's case despite the continued publication of an earlier, superseded, version of DOD Directive 1010.4 in the Code of Federal Regulations.

b. Whether Navy violated its settlement agreement with subject member (Petitioner) by administratively processing him for separation by reason of misconduct due to commission of a serious offense (perjury) as well as by reason of misconduct due to drug abuse.

2. Short Answers

a. Though Petitioner's BCNR case file does not establish Petitioner's actual notice of the current version of DOD Directive 1010.4, the fact Petitioner's rehabilitative potential was affirmatively considered and assessed prior to his discharge makes resolution of this issue unnecessary.

b. No. Though the Government's settlement agreement with Petitioner stated he was "subject to administrative reprocessing for drug abuse", it did not prohibit Navy from processing him for administrative discharge on other applicable grounds.

3. Background

a. First administrative discharge. In 1992, Petitioner tested positive for methamphetamine use, but was acquitted by a special court-martial after denying drug use under oath.[1] In 1994, he tested positive a second time for methamphetamine use and received nonjudicial punishment (NJP). He was then processed for administrative separation by reason of misconduct due to drug abuse. In a notarized statement he submitted to his commanding officer prior to his NJP hearing, and again at his administrative discharge board hearing, Petitioner admitted he lied under oath when he denied drug use at his 1992 court-martial.[2] He was discharged in June 1995.

b. Suit for reinstatement on active duty. In March 1997, Petitioner sued the Department of the Navy (DON) for reinstatement on active duty. He alleged that existing DOD regulations, published in the Code of Federal Regulations, required Navy to

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[1] *See* Navy-Marine Corps Trial Judiciary Case Report Form, Case No. WS930074 in BCNR case file. The "remarks" section at the bottom of the form states, "4.0 CHIEF WHO DENIED UNDER OATH WITH SOLID GOOD CHARACTER."

[2] *See* Pirante, Frankie J. ltr of 25 December 1994, in BCNR case file, and CO Fleet ASW Training Center ltr 1910 Ser 01D ICO STGC Frankie J. Pirante, Enclosure (1), "Transcript of Board Proceedings," at 12, in BCNR case file.

evaluate his rehabilitative potential prior to discharging him for drug abuse. Petitioner further alleged that if he could be rehabilitated, Navy was required by published regulations to retain him on active duty. Petitioner negotiated a settlement with the DON whereby he was reinstated on active duty 1 June 1998[3] with no break in service and "as if (Petitioner) had never been discharged and his service interrupted . . . ."[4] That agreement also stated an "understanding" Petitioner would be "subject to administrative reprocessing for drug abuse" following his reinstatement on active duty.[5]

c. Second administrative discharge. Petitioner was returned to active duty and subsequently reprocessed for administrative discharge, this time on two grounds: misconduct due to the commission of a serious offense (perjury at his court-martial) and misconduct due to drug abuse (as evidenced by his 1994 urinalysis and NJP). He was discharged in December 1998.[6]

d. Regulations amended. At the time of Petitioner's first administrative discharge board in 1995, DOD Directive 1010.4,[7] SECNAVINST 5300.28B,[8] and OPNAVINST 5350.4B[9] all contained language requiring Navy to rehabilitate the maximum feasible number of drug abusers and discipline or discharge those not rehabilitated. That provision continues to the present in the version of the DOD Directive published in the Code of Federal Regulations.[10] The DOD

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[3] Declaration of Timothy Suich of 3 June 1998 ICO Pirante v. Dalton, Civil No. 97cv0561-IEG(RBB) (S.D. Cal. 1998)

[4] *See* Stipulation For Compromise Settlement and Dismissal ICO Pirante v. Dalton, Civil No. 97cv0561-IEG(RBB) (S.D. Cal. 1997) at ¶ 1.

[5] *Id.*

[6] Petitioner's discharge certificate (DD-214) lists only "MILPERSMAN 1910-146" (Separation by Reason of Misconduct - Drug Abuse) under block 25, "Separation Authority."

[7] DOD Directive 1010.4 of 25 August 1980, at ¶¶ D1e and D1f. Paragraph D1e stated it was DOD policy to "[t]reat or counsel alcohol and drug abusers and rehabilitate the maximum feasible number of them." Paragraph D1f further stated a policy to "[d]iscipline and/or discharge drug traffickers and those alcohol and drug abusers who cannot or will not be rehabilitated, in accordance with appropriate laws, regulations, and instructions." These requirements were deleted from the Directive on 18 January 1996. A new DOD Directive 1010.4 was issued in its entirety on 3 September 1997.

[8] Paragraph 5e of SECNAVINST 5300.28B of 11 July 1990, which is not mentioned in Petitioner's complaint, echoed the language from DOD Directive 1010.4 and mandated the rehabilitation of "as many members as is feasible" who have "exceptional potential for future useful service and a high probability of successful treatment." This statement, however, was modified by NAVADMIN 018/92 of 12 February 1992, which announced a policy to process for separation all first-time drug users. A 1999 revision to the instruction deleted the rehabilitation language (SECNAVINST 5300.28C of 24 March 1999).

[9] OPNAVINST 5350.4B of 13 September 1990 was superseded by OPNAVINST 5350.4C of 29 June 1999. The revised instruction, like the DOD Directive, deleted any requirement to return rehabilitated drug users to duty. Petitioner cites the earlier version, which stated that the goal of Navy alcohol and drug programs was "to prevent alcohol and other drug abuse and to return eligible former alcohol and drug abusers to full duty status as soon as possible." This requirement of the old instruction, however, was at least partially superceded by NAVADMIN 018/92 and its requirement to administratively process all drug abusers.

[10] 32 C.F.R. § 62.4. The C.F.R. provision remains unchanged despite the 1996 changes to,

Directive,[11] SECNAVINST, and OPNAVINST, however, have been amended. The amended versions delete the language requiring consideration of rehabilitative potential. When Petitioner was reinstated to active duty in mid-1998, DOD Directive 1010.4 had been revised to exclude the rehabilitation policy and was no longer inconsistent with NAVADMIN 018/92, which required discharge processing of all first-time drug abusers.

4. Discussion

a. Actual notice. We have previously opined that DOD Directive 1010.4 of 3 September 1997, may be applied against persons who had actual notice of its new provisions, even though the new provisions had not yet been published in the Code of Federal Regulations.[12] Under that analysis, statutes governing the Federal Register require publication of documents and rules having general applicability.[13] DOD Directive 1010.4 was an internal personnel policy not required to be published by statute or regulation.[14] However, because DOD Directive 1010.4 was published in the Federal Register, it acquired the "force of law" and is binding on the Secretary until changed and re-published in the Federal Register.[15] The statutes requiring publication, taken together, create a requirement to provide constructive notice when persons who may be adversely affected have not received actual notice.[16] Therefore, when a petitioner has received actual notice, the changes to DOD Directive 1010.4 are applicable even if not published in the Federal Register.[17]

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and 1997 revision of, DOD Directive 1010.4.

[11] DOD Directive 1010.4 of 3 September 1997 now states at ¶ 4.6 that it is DOD policy to "[c]ounsel, discipline, and/or process drug abusers for separation . . .." This policy is distinguished from that found in ¶ 4.5 to "[c]ounsel military personnel who abuse alcohol and provide treatment and/or rehabilitation . . .."

[12] DAJAG (Administrative Law) ltr 1400 Ser 13/1MA11657 of 19 May 98.

[13] *Id.* at ¶ 4a. The requirements for publication in the Federal Register are set in title 44, U.S. Code, which requires the publication of certain classes of documents, all of which must have "general applicability and legal effect." 44 U.S.C. § 1505. The Administrative Procedure/Freedom of Information Act requires publication of "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability." 5 U.S.C. § 552(a)(1)(D).

[14] *See* DAJAG (Administrative Law) ltr of 19 May 98, *supra* note 12, at ¶ 4a. Authority for this conclusion may be found in National Association of Concerned Veterans v. Secretary, 487 F.Supp. 192, (D.D.C. 1979) (*quoting* Lewis v. Weinberger, 415 F.Supp. 652, 659 (D.N.M. 1976)), which interprets the language of 5 U.S.C. § 552(a)(1)(D) ("general policy" and "general applicability") as having "a direct and significant impact upon the substantive rights of the general public or a segment thereof." *Id.* at 200. Similarly, the Administrative Procedure/Freedom of Information Act has an exception for "internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2).

[15] *See* DAJAG (Administrative Law) ltr of 19 May 98, *supra* note 12, at ¶ 4c.

[16] *Id.* at ¶ 4d, *citing* 44 U.S.C. § 1507, which states that "[a] document required . . . to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until" it has been published.

[17] *See* DAJAG (Administrative Law) ltr of 19 May 98, *supra* note 12, at ¶ 4e. The BCNR request in this case refers to Nolan v. United States, 44 Fed. Cl. 49 (1999), which reaches a different conclusion. In this regard, reliance should not be placed on *Nolan*

b. Application to Petitioner's case. The BCNR record in this case does not establish that Petitioner received actual notice of the current provisions of DOD Directive 1010.4. Additional factual inquiry would be required to determine whether such notice was provided to Petitioner in the course of litigation or during subsequent administrative discharge processing. If there were evidence that Petitioner was aware of the regulatory changes prior to his discharge, then the conclusion of reference (b) would apply to this case.

c. Compliance with DOD Directive 1010.4. The 25 August 1980 version of DOD Directive 1010.4 stated that DOD will "rehabilitate the maximum feasible number" of drug abusers and "discipline and/or discharge . . . drug abusers who cannot or will not be rehabilitated."[18] Implicit in these requirements was a duty to assess the rehabilitative potential of service members who abuse drugs. The Directive did not require the attempted rehabilitation of all service members, only the "maximum feasible number" of them. It permitted the services to render a judgment that a member "cannot" be rehabilitated, which is essentially an assessment of rehabilitative potential.[19] In Petitioner's case, it may have been possible, and reasonable, for the board and subsequent reviewers to determine Petitioner lacked rehabilitative potential based on his history of drug use and evidence of record. Petitioner's suspected drug use was evidenced by a urinalysis in 1992 that tested positive for methamphetamine and Petitioner's subsequent admissions to further drug use following a second positive urinalysis in 1994.[20] Petitioner's history of drug use and prior rehabilitative efforts provided his 1998 administrative discharge board and higher authority with substantial evidence to support a determination that no additional attempts at Petitioner's rehabilitation were required by the DOD Directive. The board's findings expressly state that "[m]ember has no potential for further service."[21] Additionally, Petitioner's commanding officer, in transmitting the board proceedings to the Bureau of Naval Personnel, interpreted the

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because of analytic errors. The court in *Nolan* reasons that because publication of a regulation creates a presumption of effectiveness under 44 U.S.C. § 1510(e), such regulation is the exclusive authority until subsequent regulation is republished. The court fails to address 44 U.S.C. § 1507 and the line of cases holding that an unpublished regulation is effective against those who have actual notice of its provisions. Accordingly, our opinion, discussed above, represents a more complete analysis of the issue.

[18] DOD Directive 1010.4 of 25 August 1980 (emphases added).

[19] This is the only reasonable interpretation of the Directive's language. If the phrase "cannot or will not" were read to require the actual, attempted rehabilitation of each service member, then even one attempt at rehabilitation might not be sufficient. At some point, a judgment is required as to whether the drug abuser can ever be reliably drug-free and fit for full duty.

[20] See ¶ 3a above and *supra* note 2. *See also* Addendum to DD 149 Submitted By Frankie J. Pirante, # 568-29-9546, of 26 July 1999, at 3, in BCNR case file (citing earlier admissions of drug use).

[21] CDR Edmond C. Caviness II ltr of 5 August 1998, "REPORT OF AN ADMINISTRATIVE BOARD IN CASE OF STGC FRANKIE J. PIRANTE," at 1.

board's findings as a determination that Petitioner "lacks rehabilitative potential."[22]

d. Compliance with *Rogers*. Assuming the application of *Rogers v. Dalton* to Petitioner's case,[23] his 1998 administrative discharge complied with *Rogers*' requirements.[24] The *Rogers* ruling characterized "Navy's failure to follow DoD policy by discharging [Rogers] without considering his potential for rehabilitation and without making findings regarding his potential for rehabilitation" as a denial of due process.[25] In this case, Petitioner was aware of his right to present evidence on his rehabilitative potential and exercised that right. The administrative discharge board record is replete with testimony addressing Petitioner's rehabilitative potential.[26] At one point, the board itself examined a witness for the Petitioner on the witness's own rehabilitation as an alcoholic through Navy programs.[27] As noted above, the board and Petitioner's commanding officer made findings on his rehabilitative potential, explicitly or implicitly through their recommendations, after consideration of the information presented. Accordingly, the record clearly establishes rehabilitative "consideration" under the *Rogers* standard and the finding that Petitioner had no potential for future service is not arbitrary or capricious.

e. Separation processing based on perjury

(1) Under the terms of the December 1997 settlement agreement, Petitioner's reinstatement on active duty was to be "as if [he] had never been discharged and his naval service uninterrupted, including restoring his eligibility to apply for TERA retirement."[28] Once reinstated, he was eligible for all

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[22] TPU San Diego ltr 1910 Ser 30/0691 of 19 August 1998 at 2.

[23] Rogers v. Dalton, 1995 WL 125427 (N.D. Cal). As we have noted in each of our opinions in connection with cases relying on the ruling in *Rogers v. Dalton*, we believe that *Rogers* was decided incorrectly, is not binding on the BCNR, and should not be considered persuasive regarding any other case. As has been our practice, we assume for purposes of this opinion that the BCNR nonetheless intends to apply the findings of *Rogers* in cases of similarly situated petitioners.

[24] We assume here that the only aspect of Petitioner's history of disciplinary and administrative action that is subject to this BCNR application is his 1998 administrative discharge. This assumption is based on the government's 1997 compromise settlement with Petitioner of his lawsuit regarding the propriety of his 1995 administrative discharge. Under the terms of that settlement, Petitioner was reinstated on active duty with no break in service reflected in his service record and agreed to the dismissal with prejudice of all claims arising out of his complaint. Dismissal and Release and Order Thereon ICO Pirante v. Dalton, Civil No. 97cv0561-IEG(RBB) (S.D. Cal. 1998) at ¶ 1-2.

[25] Rogers v. Dalton at 1.

[26] *See e.g.* testimony of STGCM Spivey, STG1 Sprague, STG1 Boon, and STG1 Sloan, set forth in CDR Caviness ltr, *supra* note 21.

[27] *Id.* at 10.

[28] *See* Stipulation for Compromise Settlement and Dismissal, *supra* note 4. The settlement also included the caveat that TERA availability "depends on congressional authority and appropriations for FY98." *Id.* Navy implementation of TERA, NAVADMIN 126/97, lists E-8 as the only TERA-eligible paygrade within the STG rating in FY98. Accordingly,

benefits available to active-duty personnel and subject to all applicable regulations. The Military Personnel Manual (MILPERSMAN) regulates the administrative separation process, and is the definitive source for determining whether a particular basis for processing is appropriate. MILPERSMAN 1910-142 permits separation processing for misconduct due to the commission of a serious offense when the offense can be substantiated by a preponderance of evidence. Regarding Petitioner's alleged perjury, evidence was available in the form of his own notarized statement provided to his commanding officer following his 21 December 1994 NJP.[29] In that letter, Petitioner admits to methamphetamine use prior to his 1992 positive urinalysis and immediately after his court-martial acquittal.[30] Even more compelling is his testimony at his 1995 administrative board hearing: "I am not proud of the fact that I went to a court-martial and denied methamphetamine use because it was true and I denied it."[31] This evidence clearly rises to the preponderance standard required for processing under MILPERSMAN 1910-142.

(2) MILPERSMAN 1910-215 provides that adverse matter from a prior enlistment "should be used as a basis for separation if the adverse matter was unknown to competent authority" at the time of reenlistment. In this case, Petitioner last re-enlisted on 6 May 1994, prior to making the above-quoted statements. Accordingly, the evidence of Petitioner's perjury was unknown to Navy at the time of his re-enlistment and could be used as a basis for administrative processing during a subsequent enlistment. Per MILPERSMAN 1910-210, processing is required for all known reasons. Once Navy had credible evidence Petitioner had committed perjury, it was required by its regulations to include the perjury as a basis for administrative processing. The settlement agreement with Petitioner states he "is subject to administrative reprocessing for drug abuse,"[32] but does not restrict Navy from processing on other bases applicable under its regulations.

Petitioner, as an E-7, was ineligible. NAVADMIN 126/97 further states in ¶ 5.B that the "applicant must be eligible and recommended for retention/reenlistment, and not have adverse disciplinary or administrative actions pending." As Petitioner was ineligible for TERA, it is not necessary to decide whether an understanding existed between the Navy and Petitioner at the time of the settlement that he would not be processed until given the opportunity to apply for TERA. In fact, the following language from the government's settlement offer, enclosure (3), establishes otherwise: [E]ligibility for the TERA Retirement Program is not a guarantee Mr. Pirante would be approved for TERA retirement were he to request it. Any such application would be considered on its merits, *in accordance with applicable regulations* [emphasis added].

[29] Pirante, Frankie J., ltr of 25 December 1994, in BCNR case file.

[30] *Id.* at 4-5. Excerpts supporting this conclusion include: (from page 4) "I was seriously thinking about divorce for the last 2 years. Every time I got angered I would use meth."; (from page 5) "Two years ago I had my first positive urinalysis for methamphetamine. I chose Court Marshall [sic], denied it, and was found not guilty. Even at this point, I did not realize I had a problem. The same day I was found guilty, I celebrated with a line of meth. However, back in my mind I knew I had a problem and needed help. I quit using meth probably for approximately 6-7 months."

[31] CO Fleet ASW Training Center ltr, *supra* note 2, encl. (1), at 12.

[32] Stipulation for Compromise Settlement and Dismissal, *supra* note 4, at ¶ 1.

5. Conclusions

a. The record does not establish that Petitioner had actual notice of the changes to DOD policy contained in DOD Directive 1010.4 of 3 September 1997. However, even if Petitioner did not have notice, Navy complied with the requirement to consider Petitioner's rehabilitative potential, as enunciated in *Rogers v. Dalton*, prior to discharging Petitioner in 1998.

b. Once reinstated on active duty, Petitioner was subject to Navy rules and regulations that required his processing for misconduct based on evidence he committed perjury. The settlement agreement with Petitioner expressly permits Navy to reprocess Petitioner for administrative discharge for drug use, and there is no language in that agreement restricting Navy from processing Petitioner for administrative discharge on other applicable grounds. Therefore, Navy did not violate the settlement agreement with Petitioner by adhering to its regulation on administrative discharge processing.

c. No relief is warranted in Petitioner's case.