



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

CRS  
Docket No: 4427-01  
23 May 2002

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

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

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected by removing the nonjudicial punishment (NJP) of 13 June 2000, setting aside his discharge and transferring him to the Fleet Reserve on the first date he became eligible to do so.

2. The Board, consisting of Ms. Humberd, Ms. LeBlanc, and Ms. Suiter, reviewed Petitioner's allegations of error and injustice on 20 March 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 to the Board was filed in a timely manner.

c. Petitioner first enlisted in the Navy in June 1978 and served until May 1982. He then reenlisted in February 1985 and served continuously on active duty until 27 March 1997. During these periods of service, he performed well, attained the rate of engineman chief (ENC; E-7) qualified in surface warfare, was not the subject of any disciplinary actions, and received two awards of the Navy Achievement Medal (NAM).

d. Petitioner reenlisted for three years on 28 March 1997

after more than 15 years of prior active service. Subsequently, he extended his enlistment for 25 months. During this period of service, he continued to perform well, receiving a third NAM and two awards of the Navy-Marine Corps Commendation Medal.

e. Petitioner served without disciplinary incident in his last enlistment until 13 June 2000, when he received NJP for use of cocaine. The punishment imposed consisted of forfeitures of \$1283 per month for two months and a suspended period of restriction. The disciplinary action was based on a urine sample Petitioner submitted on 22 May 2000, as part of a random urinalysis. In a statement he submitted on the date of the NJP, Petitioner denied any use of illegal drugs.

f. On 23 June 2000 Petitioner appealed the NJP on the grounds that he was denied access to the "litigation package" prepared by the Navy drug laboratory, and thus could not present a meaningful "innocent ingestion" defense or question the chain of custody at the drug laboratory.

g. In his forwarding endorsement of 29 June 2000, the commanding officer explained that Petitioner had initially argued that the medications he was taking caused the positive urinalysis, but the drug laboratory advised the command that none of the medications would result in a positive urinalysis for cocaine. The commanding officer further stated that Petitioner did not request the litigation package and verification of the chain of custody until after his NJP, and also noted he did not rely on the litigation package at the NJP, but only the report from the drug laboratory.

h. On 10 July 2000 Petitioner's NJP appeal was denied by Commander, Naval Surface Group, Pacific Northwest.

i. While Petitioner's NJP appeal was being decided, he submitted a hair sample to a civilian drug testing laboratory. On 14 July 2000, the laboratory reported that the hair sample had tested negative for cocaine.

j. On 23 July 2000 an administrative discharge board (ADB) recommended that Petitioner be separated with an other than honorable discharge by reason of misconduct due to drug abuse, based on the positive urinalysis and the NJP. At the ADB, Petitioner introduced the favorable report from the civilian drug laboratory. He also testified that three days before submitting the urine sample, he had left his drink on a bar when he went to the restroom, thus implying that someone could have placed cocaine in his drink at that time. He also pointed out that the hair sample taken from him had tested negative for cocaine. Additional evidence presented to the ADB included a statement from a chemist employed by the Navy drug laboratory, who stated that the positive urinalysis results "are low enough so as not to

be inconsistent with innocent ingestion". Additionally, several contemporaries and superiors testified that Petitioner was an excellent chief petty officer and was not the type of person who would use drugs.

k. Petitioner's counsel submitted a letter of deficiency concerning the ADB proceedings. He argued that insufficient evidence had been introduced to show knowing use of cocaine citing the favorable hair analysis, the statement from the chemist at the drug laboratory, and Petitioner's many years of unblemished service. He also contended that testimony had been improperly received at the ADB from an individual who stated that Petitioner had used drugs prior to entering the Navy. Counsel also pointed out that in the letter notifying Petitioner of the administrative separation action, he was advised that the worst characterization of service he could receive would be a general discharge.

l. On 10 August 2000 the separation authority directed separation with a general discharge by reason of misconduct. One day later, Petitioner was so discharged with 19 years, 5 months and 19 days of active service.

m. In his application, Petitioner's counsel essentially reiterates the contentions he made in the letter of deficiency, stating that there was insufficient evidence in the record to demonstrate knowing use of cocaine instead of innocent ingestion. Included with the application are affidavits from individuals attesting to Petitioner's good character and stating that he would not use drugs.

n. In an advisory opinion of 27 June 2001, the Navy Drug Testing Program Manager, Navy Environmental Health Center (NEHC), states that a negative hair analysis "does not cast doubt on or negate the positive urinalysis for cocaine." The opinion goes on to state that the positive urinalysis is indicative of cocaine ingestion within three days, and a negative hair test "may be indicative of someone who does not use cocaine often." A second opinion of 27 July 2001 was obtained from the Deputy Program Manager, Forensic Toxicology, Army Medical Command. He also states that a negative hair test "does not in any way cast doubts on or negates (sic) the positive urinalysis for cocaine." Further, he points out that use of cocaine less than once a month could explain the positive urinalysis and the negative hair result.

#### CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. In this regard, the Board simply does not believe that he knowingly used cocaine.

In reaching this conclusion, the Board does not rely on the favorable hair analysis from the civilian drug laboratory, and agrees with the conclusion of the two advisory opinions that the positive urinalysis and the negative hair analysis are not inconsistent, and the latter result neither contradicts nor casts doubt on the former. The Board therefore concedes that Petitioner's urine contained a sufficient amount of the metabolite of cocaine to result in a valid positive urinalysis. However, the Board is also aware that at the ADB a representative of the Navy drug laboratory stated that this result could have been caused by innocent ingestion.

The Board cannot say with any degree of certainty how cocaine found its way into Petitioner's body. It may be that the scenario he suggested at the ADB--someone spiked his drink--is correct. However, the Board does not believe that an individual such as Petitioner would knowingly use a controlled substance. At the time of the positive urinalysis result, Petitioner had never been the subject of a disciplinary action during more than 19 years of service. Although he may have used drugs prior to his enlistment, he had no prior incidents of drug abuse during his service, even though he had been subject to the Navy's urinalysis program since his 1985 reenlistment. The Board believes that had Petitioner been even a casual abuser of drugs, he would have been caught long before the 19-year point.

Petitioner had not just stayed out of trouble during his many years of service. He had received fine evaluations over the years, and had been decorated for outstanding performance on several occasions. The Board agrees with those individuals who testified at the ADB and who submitted affidavits with Petitioner's application that he is not the sort of individual who would use drugs. Additionally, the Board does not believe that even if he was in any way inclined to do so, he would take the risk of using a controlled substance when he was only a year away from attaining retirement eligibility.

Based on the foregoing, the Board concludes that all evidence pertaining to or resulting from the allegation of drug abuse, to include the NJP and administrative separation documentation, should be removed from the record, and further corrections should be made by setting aside the discharge of 11 August 2000 and showing that Petitioner served on active duty until eligible to transfer to the Fleet Reserve.

**RECOMMENDATION:**

a. That Petitioner's naval record be corrected by removing all references to the NJP of 13 June 2000, including but not necessarily limited to the Court Memorandum (P601-7R) dated 17 July 2000.

b. That the record be further corrected by removing all documentation pertaining to the administrative separation action taken against Petitioner, to include the proceedings of the ADB and all exhibits and endorsements thereto.

c. That the record be further corrected to show that Petitioner was not discharged on 11 August 2000 but continued to serve without interruption until the date he was first eligible to transfer to the Fleet Reserve and, on that date, was so transferred.

d. 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.

e. 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 action of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Reviewed and approved:



DEPARTMENT OF THE NAVY  
OFFICE OF THE GENERAL COUNSEL  
WASHINGTON, D.C. 20350-1000

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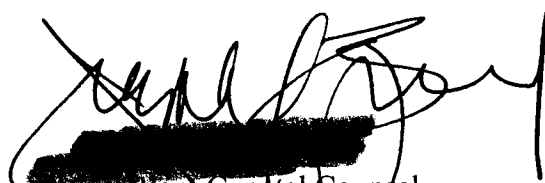
MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

I have considered the recommendation of the Board for Correction of Naval Records (BCNR) that petitioner's record be corrected to remove his Non-Judicial Punishment (NJP) for wrongful use of cocaine, set aside his administrative discharge based on this NJP and transfer him to the Fleet Reserve. For the reasons stated below, the Board's recommendation as to the appropriate relief is approved, but for reasons other than those stated by the BCNR.

The BCNR based its recommendation in favor of relief on its belief that petitioner did not wrongfully use cocaine. This determination was in turn premised on the BCNR's view that a service member with 19 years of otherwise unblemished service and within months of qualifying for a 20-year retirement would not use cocaine. I specifically reject this reasoning as unsupported by the facts of this case and contrary to the actual events that have occurred in numerous other cases in the military.

I am not satisfied, however, that the evidence in this case is sufficient to demonstrate that the NJP and administrative discharge proceedings against the petitioner were free of legal error. Pursuant to United States v. Campbell, 52 M.J. 386 (2000), and its progeny, where scientific evidence provides the sole basis to prove the wrongful use of a controlled substance, expert testimony or some other form of evidence is required to provide a rational basis for concluding the accused wrongfully used the illegal drug. The record in this case is devoid of any such proof. Moreover, the stipulated testimony of a Navy chemist offered support for the petitioner's claimed defense of unknowing ingestion. While I do not necessarily accept this claim, justice requires that every element of a charged offense must be proven in order to sustain a punitive action based on that charge. Accordingly, for the reasons stated above only, I find an error warranting relief.

  
[REDACTED]  
Assistant General Counsel  
(Manpower and Reserve Affairs)