



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

AEG
Docket #5297-02
20 December 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, an enlisted member of the Navy, applied to this Board requesting, in essence, that his naval record be corrected by removing all references to the nonjudicial punishment (NJP) imposed on 1 March 2001.

2. The Board, consisting of Messrs. Zsalman, Milner and Agresti, reviewed Petitioner's allegations of error and injustice on 18 December 2002 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the 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 on 7 September 1989. During this enlistment, he served in an excellent to outstanding manner, advancing in rate to boatswains mate third class, (BM3; E-4), and earning a Navy Achievement Medal (NAM). After reenlisting in June 1993, Petitioner was advanced to BM2 (E-5) and earned his surface warfare qualification.

d. Petitioner then began to have problems with alcohol abuse. In 1994, an alcohol-related incident resulted in the imposition of NJP, which included a suspended reduction in rate. At that time, Petitioner completed an outpatient alcohol

treatment program. In January 1995, another such incident
resulted in the vacation of the suspended reduction, and
Petitioner was reduced in rate to BM3.¹ Subsequently,
Petitioner completed an inpatient (level III) program of alcohol
rehabilitation.

e. In November 1995 Petitioner was reassigned to USS AUSTIN (LPD-4), where he performed in an exemplary manner, was readvanced to BM2, received three more awards of the NAM, and earned an air warfare qualification. His service aboard AUSTIN was marred by a positive urinalysis for cocaine in 1999, but no adverse action was taken because of the urinalysis coordinator's conviction on child abuse charges and noncompliance with urinalysis procedures. In December 2000 Petitioner detached from AUSTIN and reported for duty to the Navy Cargo Handling and Port Group (NAVCHAPGRU) at Naval Weapons Station (NWS) Yorktown, Williamsburg, VA.

f. On 1 February 2001, while on temporary additional duty in Jacksonville, FL, Petitioner was permitted to rent a car after being told on several occasions not to drink and drive. Petitioner then drove to a local bar with a female Electronics Technician Seaman (ETSN; E-3) R. They were at this bar from about 1930 until between 2300 and 0000 hours. During this time, Petitioner apparently consumed about three beers and ETSN R had five or six beers and, in the words of one witness, "could hardly stand up." Petitioner then left the bar with ETSN R.

g. Petitioner and ETSN R gave differing versions of events about what happened next. According to ETSN R, Petitioner drove her to another bar, where they stayed for about 30 minutes and Petitioner bought them more drinks. ETSN R said she had two mixed drinks but she "wasn't sure how much (Petitioner) had." She did say that he was carrying a plastic cup upon leaving the bar, and took a drink out of it just before he got into the car. Petitioner agreed that they stopped at the bar, but said he went to the bathroom, had a soft drink, and purchased a 12 pack of beer, and consumed no alcohol.

h. While Petitioner was driving back to his hotel, he was stopped by the local police for going the wrong way on a one-way street. Although they apparently suspected him of driving under the influence of alcohol, the police officers did not perform a field sobriety test, ask him to take a breathalyzer examination, or place him under arrest. Instead, they simply turned him over to the detachment commander. When they did so, at about 0130 hours on 2 February 2001, the leading petty officer noted that Petitioner "smelled of alcohol." According to the detachment

¹ Petitioner's enlisted performance record (page 9) indicates that he also received a second NJP for this misconduct. However, the record does not contain an administrative remarks (page 13) entry or a court memorandum (page 7) that would normally be prepared to reflect the imposition of NJP.

commander, at that time, Petitioner admitted to consuming six or seven beers during the evening.

i. On 28 February 2001 Petitioner was placed on report as follows for violating the Uniform Code of Military Justice (UCMJ):

Charge: Viol. UCMJ, Article 92: Disobeying a lawful order or regulation.

Specification 1: In that (Petitioner), on Active Duty, did, at U.S. Navy Cargo Handling and Port Group, Fleet Industrial Supply Center Yorktown, . . . on or about 2 February 2001, at Jacksonville, FL, operate a vehicle, to wit: a passenger car, after consuming alcohol.

On that same day, Petitioner was advised that NJP action had been initiated for the foregoing offense. On 1 March 2001, after Petitioner elected to waive his right to demand trial by court-martial and accept NJP, Commander (CDR; O-5) R, the commanding officer (CO) of the NAVCHAPGRU, imposed NJP consisting of a suspended reduction in rate, forfeiture of \$827 pay per month for two months and 45 days of extra duties. After being notified that he had the right to appeal the NJP, Petitioner declined to do so.

j. Petitioner then received an adverse performance evaluation for the period 2 November 2000 to 1 March 2001. That report assigned the worst possible mark of 1.0 in the category of "military bearing/character" and noted that Petitioner had been "awarded CO's NJP for violation of UCMJ Article 92 on 01MAR01 (alcohol incident)," and "has failed to meet Alcohol Rehab requirements as set forth in UCMJ."

k. On 16 April 2001 a Navy psychologist reported that Petitioner had been diagnosed with "alcohol dependence in sustained partial remission." The psychologist recommended participation in a relapse prevention workshop, to be followed by a period of continuing care.

l. On 11 May 2001, through counsel, Petitioner submitted a complaint of wrongs under UCMJ Article 138 against CDR R. In that complaint, he made a number of allegations, including a contention that "the command has absolutely no evidence . . . that there was a violation of a general order or regulation . . ." In a separate submission, counsel elaborated on this contention as follows:

(T)here is no notification of any type or (sic) law or regulation in the specification. Also, . . . there is no violation of operating a vehicle to wit: a passenger car, after consuming alcohol. If this were the case, anyone who has had a glass of wine at a dining-in or dining-out, or even at a unit picnic, and then drove to their quarters,

where ever they might be, would be in violation of some general law or regulation.

m. On 14 June 2001 administrative separation action was initiated against Petitioner by reason of alcohol rehabilitation failure. In his closing argument at the ensuing administrative discharge board (ADB), the recorder noted that Chief of Naval Operations Instruction (OPNAVINST) 5350.4C states "personal responsibility means no drinking and driving." After considering all of the evidence, the ADB found that Petitioner was a rehabilitation failure, but recommended his retention in the Navy. CDR W did not concur with the ADB's recommendation, but on 2 August 2001, the Chief of Naval Personnel directed that Petitioner be retained and warned concerning the consequences of further deficiencies in conduct or performance.

n. On 5 February 2002 the general court-martial convening authority (GCMCA), Commander, Naval Surface Force, Atlantic Fleet, acted on Petitioner's complaint of wrongs under UCMJ Article 138. The GCMCA declined to act on Petitioner's specific complaint about the NJP since applicable directives state that such a disciplinary action is not a proper subject of an Article 138 complaint. However, the GCMCA noted that the comments in the adverse performance evaluation pertaining to an "alcohol incident" and "alcohol rehabilitation requirements" constituted an "administrative inaccuracy," and had been removed in a revised evaluation that had been submitted to the Navy Personnel Command (NAVPERSCOM). Petitioner was notified of this action by separate correspondence. The case was forwarded to the Judge Advocate General for final action.

o. On 23 April 2002 Petitioner reenlisted for two years.

p. On 21 June 2002 the Deputy Assistant Secretary of the Navy (DASN) for Personnel Programs took final action on Petitioner's Article 138 complaint as follows:

. . . I have determined that the action of the (GCMCA)
. . . is not correct, and I do not approve it. It is my
determination that your Evaluation Report for the reporting
period 00NOV02 to 01MAR15, as corrected by the (GCMCA),
. . . refers to the results of (NJP) where the charged
offense does not state an offense under the UCMJ.
Accordingly I am directing that the evaluation be removed
from your record. By copy of this letter (NAVPERSCOM) is
directed to ensure this action is carried out.

In a memorandum of 28 October 2002, a representative of the Administrative Law Division (Code 13) in the office of the Judge Advocate General (JAG) explained the foregoing decision as follows:

. . . (Petitioner) was awarded (NJP) for violation of Article 92, (UCMJ), Failure to Obey a Lawful Order or

Regulation. However, the specification did not allege any order that was violated, and only describes that conduct that was allegedly the violation (driving after consuming alcohol). While the UCMJ contains a specific article making driving under the influence of alcohol unlawful (UCMJ Article 111), (Petitioner) was not charged with such a violation.

p. OPNAVINST 5350.4C sets forth binding guidance on the prevention and control of alcohol abuse in the Navy. Paragraph 4 of this directive states that violation of the regulation subjects an individual to disciplinary action under the UCMJ. Paragraph 8n(d)(4) states that Sailors are responsible for understanding individual responsibilities and supporting certain alcohol abuse prevention principles, including "no drinking and driving."

q. UCMJ Article 92(1)² states that it is an offense to violate or fail to obey a lawful general order or regulation. A general order or regulation is lawful if it serves a military purpose³ and is not contrary to the Constitution, Federal law, superior orders, or beyond the authority of the issuing official.⁴ However, not all provisions in general orders or regulations are enforceable under Article 92(1), specifically, those which only supply general guidelines or advice.⁵ In order to be deemed enforceable, the regulation at issue must be intended to regulate the conduct of servicemembers.⁶ Additionally, an order or regulation may be unconstitutional and therefore invalid if it is deemed overbroad.⁷ Finally, a specification alleging a violation of UCMJ Article 92(1) should set forth not only the specific regulation the individual violated, but also the pertinent paragraph or section of the directive.⁸

r. UCMJ Article 111(2)⁹ prohibits driving under the influence of alcohol. The statute defines that offense as operating a vehicle while drunk or when the blood-alcohol content is .10 or higher.

s. Florida law¹⁰ states that no person may "possess an open container of an alcoholic beverage or consume an alcoholic beverage while operating a vehicle in the state . . . "

² 10 U.S.C.A. § 892(1) (West 1998).

³ *Manual for Courts-Martial (MCM)*, Pt. IV, ¶¶ 16c(1)(c), 14c(2)(a).

⁴ MCM, Pt. IV, ¶ 16c(1)(c).

⁵ MCM, Pt. IV, ¶ 16c(1)(e).

⁶ MCM, App. 23, ¶ 16.

⁷ 5 David A. Schleuter, *MILITARY CRIMINAL JUSTICE Practice and Procedure* §2-4a, at 73 (1999).

⁸ MCM, Pt. IV, ¶ 16f(1).

⁹ 10 U.S.C.A. § 911(2) (West 1998).

¹⁰ FLA. STAT. § 316.1936(2)(a).

~~t. On 13 August 2002 a representative of JAG's Criminal Law Division (Code 20) opined, in essence, that Petitioner's NJP was legally unobjectionable. However, further input was requested after Code 13 submitted its memorandum. Accordingly, on 26 November 2002, Code 20 opined, in part, as follows:~~

. . . (I)f analyzed in the same fashion which an appellate criminal court would analyze (OPNAVINST 5350.4C) if it were the subject of a court-martial conviction, the regulation purports to criminalize conduct which is already criminalized by state law. (Florida law) makes it unlawful to consume alcoholic beverages while operating a motor vehicle in the state of Florida. (OPNAVINST 5350.4C), as applied to acts committed in the state of Florida, is on its face a directive to obey the law.

Commanders may not issue an order requiring a member of his command to obey the law and then punish the service member for both the substantive violation of the law and for disobedience of the order.¹¹ (OPNAVINSST 5350.4C) specifically states, "*Personal responsibility means no drinking and driving, no drinking to the extent that it impairs judgment, no public drunkenness, and absolute compliance with local laws for purchase possession and use of alcoholic beverages.*" In addition, paragraph 8n is arguably overbroad in that it may apply to activities not related to a valid military purpose and was not intended to constitute a punitive order. (italics in text)

(T)his section of the instruction can be construed as non-punitive, overbroad, and devoid of proper military purpose by simply extolling service members to obey the law. These potential deficiencies would render this portion of the instruction invalid if it served as the basis for disciplinary action pursuant to UCMJ Article 92.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that the NJP of 1 March 2001 should be removed from Petitioner's record. In this regard, the Board notes that Codes 13 and 20 of JAG now agree that the NJP imposed on Petitioner is legally objectionable. Although each code has a somewhat different reason for its conclusion, the Board sees no need to parse these specific rationales, and elects to simply concur that the NJP should not remain in Petitioner's record.¹²

¹¹ Citing *United States v. Padgett*, 48 M.J. 273 (1998).

¹² Although the performance evaluation for the period 2 November 2000 to 1 March 2001 references the NJP and is on the microfiche record provided by the Bureau of Naval Personnel, the Board took no action on this evaluation since its removal has already been directed by the 21 June 2002 memorandum of the DASN.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all references to the NJP of 1 March 2001. This correction should include, but not necessarily be limited to, the following actions:

1. Removal of all Administrative Remarks (page 13) entries dated 1 March 2001.

2. Removal of the Report and Disposition of Offenses (NAVPERS 1626-7) dated 28 February 2001.

3. Removal from paragraph 1d of the CO, NAVCHAPGRU letter of 23 July 2001, the following words and figures: "NJP-March 1, 2001, found guilty of Article 91 Failure to Obey and (sic) order or regulation."

4. Removal from the summary of Petitioner's testimony at the ADB, the following:

BM2 says he asked for a court martial vice NJP for 111. Before mast Chief Delmotte told (Petitioner) that he would get a waiver for the admin board CMC told (Petitioner) that the last guy this happened to got a waiver. BM2 went to mast believing that he was getting a waiver. The Chief Master at Arms on the direction of the CO changed the charge to Article 92. At CAPT's mast BM2 admitted to drinking and driving. BM2 told the CO he was guilty

5. Removal from the summary of BM1 Mill's testimony at the ADB, the following words and figures: "In CAPT's Mast, CO mentioned waiver. Could have been the standard procedure the CO was talking about."

6. In section 6H of the 16 April 2001 Patient Assessment, delete the word "three" and substitute the word "two."


b. 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.

c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of 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 forgoing is a true and

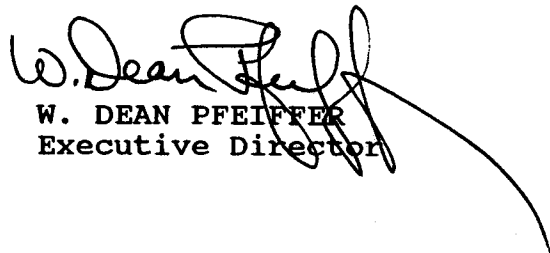
complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 5e of the Procedures for the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6[e]), and having ensured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the provisions of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director