



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

TRG  
Docket No: 260-00  
6 February 2001

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

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

Encl: (1) DD Form 149 w/attachments  
(2) Case Summary  
(3) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy filed enclosure (1) with this Board requesting, in effect, reinstatement to RM2 (E-5) and compensation for the illegal and improper actions taken against him.

2. The Board, consisting of Mr. Dunn, Ms. McCormick and Ms. Davies, reviewed Petitioner's allegations of error and injustice on 23 January 2001 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. Enclosure (1) was filed in a timely manner.

c. Petitioner reenlisted in the Navy on 4 July 1993 for four years in the rate of RM2 (E-5). In August 1995 Petitioner and another RM2 were placed on report and charged with disobeying a regulation in that they failed to properly safeguard classified material, resulting in the loss of two person integrity (TPI). Petitioner appeared before the chief petty officer disciplinary review board and admitted that he had made a mistake. The disciplinary board recommended nonjudicial punishment (NJP) which included a reduction in rate to RM3 (E-4).

d. On 24 April 1997 Petitioner and the other individual, RM2 C received NJP for the foregoing offense, which was charged

as dereliction of duty instead of a failure to comply with the applicable regulation. They both received 14 days extra duty and a reduction in rate to RM3. Since both petty officers would soon reach length of service limitations for E-4s, the officer in charge (OIC) informed them she would consider mitigating the punishment at a later date if they became more involved in command functions. Subsequently, Petitioner's appeal of the NJP was denied.

e. On 18 August 1997 Petitioner requested that the punishment be mitigated. He stated that he had requalified as a classified material user, performed the rest of his duties in an excellent manner, completed college courses, and given to charity. However, in a memorandum dated 21 August 1997 the division officer recommended as follows against mitigating Petitioner's punishment:

.. Immediately following (NJP), (Petitioner) openly questioned and criticized his chain of command regarding the fairness of his situation. ...

.. I was informed by two Chief Petty Officers that their conversations with (Petitioner) indicated he did not accept responsibility for his actions and didn't consider mishandling (classified material) a serious matter.

.. You recommended at (NJP) that (Petitioner) and RM3 (C) make every effort to move ahead and overcome their poor judgment. I recall specifically you told them command involvement would be favorably considered. While RM3 (C) went forth and worked hard on his primary job, he also worked diligently on command collateral jobs ... (Petitioner) on the other hand requested no additional responsibilities or duties.

f. On 28 August 1997 Petitioner submitted an equal opportunity (EO) complaint alleging that he was not reinstated because he is a Muslim. An investigation was conducted by a CDR (O-5) C, JAGC. The investigating officer found, in part, as follows:

.. Complaints of racial and religious discrimination at (the command) have been ongoing for about 3 years. They have been investigated several times, the last being in May 1997. The complaints were determined to be unfounded. However, a *perception* (emphasis in original) of discrimination continues to exist. The (previous investigator) has found no specific incident

of discrimination and he believes the OIC would not hesitate to stop it if she was aware of a discriminatory activity. .... Efforts have been made to sensitize people to the issues, and RMC A, a Muslim lay-leader ... has visited several times to discuss and educate people on Islam. ....

Concerning Petitioner's contention that his mitigation request was treated differently than RM3 C the IO found, in part, as follows:

.. On 13 August 1997, ETC (E-7) G personally assigned (RM3 C) to submit a request for mitigation. He did not have the request routed through the (leading petty officer) or the (assistant leading petty officer). He endorsed it and hand carried it to .... the Division Officer who also favorably endorsed it. This procedure was not afforded (Petitioner), in fact no assistance was given by ETC (G) to (Petitioner). ETC (G) cautioned (RM3 C) not to talk to anyone about the handling of his request. ....

.. The manner of handling (RM3 C's) request to (Petitioner's) has led to gossip, tension, and loss of respect to ETC G among *some* (emphasis in the original) of the department. ETC (G) has created a perception that it is not what you know but who you know that helps you, and that whether or not "you are liked" is more important than work performance. A potential of divisiveness exists as a result of perceived unfairness. ....

.... Overall the chain of command had a more positive assessment of (RM3 C) in regard to rehabilitation and rehabilitative potential.

.. The decision to mitigate NJP punishment is discretionary with the officer imposing punishment. Demonstrated rehabilitation and rehabilitative potential are legitimate criteria for mitigating punishment. The exhortations to both PO's to work hard and contribute clearly fall within the realm of accepted demonstrations of rehabilitation/future potential. A commander may not however use criteria such as race, gender, or religion as a discriminator.

.. I am satisfied that bottom line (Petitioner) failed to exercise sufficient personnel initiative post-NJP to do more than his job. In addition his memorandum in

support of his complaint tends to indicate that he does not understand the severity of his offense. His defense to the severity of the offense is that his side of the safe was locked and it was (RM3 C's) fault that (C) left his side open. This ignores his responsibility as the watch supervisor to ensure the safe was locked when (C) left and his responsibility as a shipmate. The responsibility to maintain TPI is a *joint* (emphasis in the original) responsibility, that either or both maintained TPI and electrical safety or that both broke TPI. By definition you can't have a situation of one breaking TPI and the other not.

g. In response to Petitioner's request ETC(SS) (S), the Fleet Equal Opportunity Assistant conducted another investigation. The chief found, in part, as follows:

... During my interview with ETC (G), he stated that (Petitioner) didn't have to drink or serve alcohol at these events, but they were events that he had expected (him) to be involved with. ETC (G) did not express these expectations to (Petitioner). (Petitioner) did not indicate to ETC (G) that he could not participate because of his religious beliefs. Chief (G) stated that community involvement outside the command was a personal issue, not commitment to the Navy. He also stated that helping the detachment, division or a shipmate is commitment.

.... (Petitioner) tried to avoid these types of events because of the presence of alcohol.

.. RMC (A) (the Muslim lay-leader) reflected to me that (Petitioner) tries to comply strictly with his religion. RMC (A) explained to me that (Petitioner's) avoidance of alcohol and events that promote the use of alcohol is an acceptable course of action to adhere to the practices of his religion. RMC (A) stated that prior to the denial of (Petitioner's) request for reinstatement he had discussed options and actions that (Petitioner) could follow to help his reinstatement efforts. (Petitioner) did not follow these recommendations. ....

.. Commander (C's) original investigation findings indicated that ETC (G) provided preferential treatment to Petty Officer (C) in the submission of his request for mitigation, but not to (Petitioner). The investigating officer's findings also contained

statements from ETC (G), (Petitioner), and RM1 (M) pointing out that RMC (G) provided this assistance but attempted to keep it quiet. In my interview with ETC (G), he denied keeping it quiet. He said that contrary to the investigating officers findings, he did not approach Petty Officer (C), but rather Petty Officer (C) approached him. In my interview with the .... division officer ..., he said that he had talked to the chief about prompting both individuals to submit their requests. In my interviews with (Petitioner), RM2 (C) and RM1 (M) they held to their original statements.

....

.. In the denial of (Petitioner's) request the OIC used inputs from the ... division officer and LCPO. The division officer reported that his negative endorsement was based on the inputs he received from the LCPO. Inputs from the LPO (Two positive recommendations) were not used in her decision. ....

.. My conclusions are:

- a. (Petitioner's) religion was an unintentional factor in the denial of his request for mitigation of his mast case.
- b. He was the recipient of unequal treatment in the handling of his request.
- c. Junior personnel perceive that participation in designated events indicates command involvement. Non-participation negatively impacts performance evaluations.
- d. ETC (G's) input was used as the sole input for making a decision on (Petitioner's) request. This input was based partly on (Petitioner's) lack of command involvement in command events.
- e. ETC (G) was not present long enough to make an accurate assessment of (Petitioner's) suitability for reinstatement.

.. Based on my findings, I recommend that (Petitioner's) mast be mitigated and that he be reinstated to Petty Officer Second Class.

h. In his endorsement, the Fleet Chaplain stated, in part, as follows:

.. The command functions initiated by the Commanding Officer were designed to enhance esprit de corps and neither were intended to include alcohol nor promoted its use. The command involvement promulgated by (the)

Detachment in no way conflicts with the religious beliefs or practices of the Islamic Faith.

.. It was incumbent on (Petitioner) to make his religious adherence known to his chain of command which he did not nor did he suggest any other way he could be involved in building command morale.

.. I find no religious discrimination based on the investigation carried out by ETC (S).

.. It should be noted that strict observance of Islamic law within the military services is very difficult as it would require a Muslim to refrain from using any establishment that sold or carried alcoholic beverages (e.g. most restaurants or the .... package store...). If (Petitioner's) religious practice is in conflict with his duties and expectations, his command should seek an administrative separation in accordance with Navy Regulations.

i. In his endorsement, the Fleet Staff Judge Advocate stated, in part, as follows:

.. I have reviewed Commander (C's) initial investigation the report of ETC(SS) (S's) review into this allegation of religious discrimination against (Petitioner) by his chain of command ... I concur with Commander (C) and (the Fleet Chaplain's) determinations that the command's decision not to mitigate (Petitioner's) nonjudicial punishment was not based on any impermissible basis. Thus, I do not find any instance of religious discrimination on the part of (Petitioner's) command.

.. To establish unlawful religious discrimination, there must be clear and convincing evidence that the governmental entity .... knowingly and intentionally unfairly treated the complainant (Petitioner) solely on the basis of his religious affiliation. More to the point, to prove religious discrimination, the complainant must prove that there was no reasonable distinction for the unfair treatment except for the fact of his religious affiliation. There is absolutely no evidence to support (Petitioner's) contentions.

.. It is clear from the investigation and report of the review, that the Officer in Charge based her decision ..... on the fact that she perceived that RM3 (C) had gone out of his way to support the command by getting

actively involved with command functions. (Petitioner) asserts that he did not participate in these command functions for religious reasons. Therefore, under his rationale, by the OIC considering command participation in her equation as to whether or not to mitigate his NJP punishment she discriminated against him because of his religion. The problem with this rationale is that the chain of command *did not know (Petitioner's) reason for not participating in these command functions. (emphasis in the original)* (Petitioner) had a duty to bring this matter to his chain of command's attention. He failed to do this. Therefore, he did not give his chain of command the chance to accommodate his religious beliefs with the command functions. As an example, if (Petitioner) declined to participate in a command function because alcohol was served, he could have participated in the function by being the command designated driver. ....

.. I would agree that (Petitioner) did not receive the same assistance from his LCPO as RM2 (C) received from the LCPO. This might signal a leadership deficiency on the part of ETC (G) and should be examined by his chain of command.

.. I find no evidence of religious discrimination in this case, and therefore do not concur with ETC S's conclusion ... that "(Petitioner's) religion was an unintentional factor in the denial of his request for mitigation of his mast case." Since the command did not know why (Petitioner) declined to participate in command functions, this was never a factor, either intentional or unintentional, by the command, in deciding his request for NJP mitigation.

.. Finally, paragraph 6b of Part V, Manual for Courts-Martial, United States (1995 ed.) gives the commanding officer or officer in charge the discretion to mitigate NJP punishment. Thus, (Petitioner) does not have a right to have his NJP punishment mitigated. Therefore, his OIC may in her discretion, now knowing all the circumstances involved in his case, decide whether or not she wishes to grant any mitigation in his case. This should be solely her determination, and I disagree with (ETC S's) recommendation that COMFAIRMED either order the OIC to mitigate his NJP punishment or mitigate his NJP on its own accord.

j. On 30 January 1998 the Commander, Fleet Air

Mediterranean found that the denial of Petitioner's mitigation request by the OIC was proper and was not based on religious discrimination or any other impermissible basis. The investigation was returned to the OIC for her complete review and for any further action she might deem appropriate with respect to Petitioner's mitigation request.

k. Petitioner was denied reenlistment because he had reached high year tenure (HYT) for a petty officer third class. He was honorably discharged on 29 March 1998 with separation pay in the amount of \$17,704.40. On discharge he was assigned an RE-6 reenlistment code. This code is assigned when an individual is otherwise recommended for reenlistment but is denied further service because of HYT.

l. On 10 April 2000 the Director, Professional Relationships Division, Navy Personnel Command provided an advisory opinion to the Board concluding that the conclusion of the Fleet commander was appropriate and religious discrimination was not a factor in this case.

m. In his rebuttal to the advisory opinion, Petitioner continues to contend that the punishment was not mitigated because of requirements that conflicted with his religious beliefs and improper actions taken by a chief petty officer. He states that he had been stationed at the command for over two years at the time of the NJP, previous superiors and the entire work station knew of his religious beliefs and, in effect, that he did not realize that the chain of command was unaware of his beliefs.

n. Subsequently, Petitioner's allegations were reviewed by the Navy Inspector General (NIG). The NIG concluded that religious discrimination was not a factor in this case. However, the NIG stated as follows in a letter to a Congressman.

Notwithstanding the foregoing, however, the facts of the case also allude to a widely held perception that (Petitioner's) treatment, if not technically discriminatory, may have been disparate, particularly with respect to the command's apparent support of another Sailor who had received NJP for the same offense. Given this perceived disparity, we recommend that (Petitioner) petition the Board for the Correction of Naval Records (BCNR) for relief. He should include all the documentation available to him and ask BCNR to request and consider the Navy's report of investigation.

o. The Board is aware that when a reduction in rate is set

aside or a punishment which imposed a reduction in rate is mitigated, regulations require the restoration of the original effective date and time in rate.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. The Board initially finds that the NJP was proper and the punishment was not too severe. Concerning the subsequent actions, the Board believes that religious discrimination was not a factor in the denial of his request for mitigation. In this regard, if Petitioner was being asked to do things which were contrary to his religious beliefs, he should have made the command aware of the problem in no uncertain terms. In addition, the Board notes that alcohol use is legal and it is impossible to avoid all contact with alcohol. Although Petitioner was not required to participate in events where alcohol is served, some degree of flexibility in this area is required. The suggestion of the Fleet SJA that he could have served as the duty driver following an event is an example of such flexibility. Finally, the Board notes that other factors, such as his refusal to take responsibility for his actions which resulted in the NJP, his failure to volunteer for collateral duties, and his failure to comply with the suggestions of the Muslim lay-leader, could properly be used to differentiate Petitioner's case from RM3 C, who was readvanced. Therefore, the Board concludes that the OIC did not abuse her discretion in this matter.

However, the Board notes the conclusion in the investigations that there was disparate treatment in the processing of the restoration in rate requests, and agrees that even though there was no religious discrimination there may well have been some disparate treatment. In this regard, Petitioner apparently did not receive the same degree of assistance in preparing his mitigation request as did RM3 C. Further, it does appear that he did make some efforts to do more than was absolutely required in the normal performance of his duties, and the OIC may not have been aware of Petitioner's actions. Weighing the equities of the situation, the Board concludes that Petitioner's reduction in rate should be set aside on 1 February 1998, the day following completion of the review by COMFAIRMED on 30 January 1998. Accordingly, the record will show that he was not reduced in rate on 24 April 1997.

Finally, the Board notes that since the record will show that he was never reduced to RM3, he should not have been assigned an RE-6 reenlistment code for failure to meet HYT requirements. Therefore, the Board further concludes that the record should be corrected to show that he was assigned an RE-1 reenlistment code on 29 March 1998 vice the RE-6 reenlistment code now of record.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that the reduction in rate imposed on 24 April 1997 was set aside on 1 February 1998.

b. That Petitioner's naval record be further corrected to show that on 29 March 1998 he was assigned an RE-1 reenlistment code vice the RE-6 reenlistment code now of record.

c. That no further relief be granted.

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.

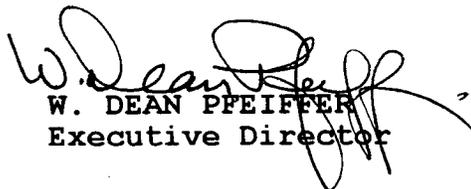
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder



ALAN E. GOLDSMITH  
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER  
Executive Director