



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX
WASHINGTON DC 20370-5100

TRG
Docket No: 8503-00
10 March 2002

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) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an officer in the Naval Reserve, filed an application with this Board requesting that his record be corrected by removing the nonjudicial punishment (NJP) of 26 January 2000 and two related fitness reports.

2. The Board, consisting of Messrs. Lippolis and Geisler and Ms. LeBlanc, reviewed Petitioner's allegations of error and injustice on 26 February 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 was filed in a timely manner.

c. Petitioner served on active duty in an enlisted status from 25 June 1982 until 15 June 1988. After discharge, he completed a master of divinity degree. On 26 May 1992 he was commissioned a LTJG (O-2) in the Chaplains Corps of the Naval Reserve. He then served in an excellent manner for almost eight years, was promoted to LT (O-3), and received a Navy Achievement Medal and a Navy Commendation Medal. At the time of the incident at issue, Petitioner was assigned to the Marine Corps Air Station, Cherry Point, NC.

d. On 4 October 1999 an investigation was conducted, in accordance with Article 32 of the Uniform Code of Military Justice (UCMJ), because charges of assault and conduct unbecoming

an officer and a gentleman had been preferred against Petitioner under UCMJ Articles 128 and 133. The charges alleged that Petitioner improperly kissed Mrs. S, the wife of an HM1 (E-6), at a party; and made an improper remark to PN2 D, a female servicemember. The investigating officer's (IO) analyzed the assault charge as follows:

Charge I lacks probable cause. Specifically the facts suggest that a kiss occurred between the accused and Mrs. (S), but the kiss was consensual. ... Mrs. (S) contends that while at a going away party the accused "put his hands on my shoulders and kissed me."

Mrs. (S's) husband (HM1 S) ... testified that the accused admitted to him that he had kissed Mrs. (S). (Later) the accused apologized for kissing Mrs. (S), but claimed that the kiss was consensual and was initiated by Mrs. (S).

Ms. (E's) testimony supported the alleged admission by the accused. Ms. (E) testified that during the party Mrs. (S) was flirting with the accused, was overly attentive toward the accused, and that the accused was shying away from her advances. At one point during the party, the accused led Mrs. (S) to sit in a chair and told her to "behave" herself. Ms. (E) also saw the accused apparently reprimanding Mrs. (S) because of her behavior towards him. HM1 (S), who did not see the kiss, also testified about the circumstances of the party and his wife's demeanor before and after the alleged kiss. HM1 (S) testified that his wife immediately told him about the incident after it had occurred and that she was visibly upset.

.....
The evidence does not support the charge of assault. In order for the alleged kiss to be an assault, it would have to be a non-consensual act. Although Mrs. (S) states that she did not invite the kiss, other facts suggest that it may have been consensual or even initiated by her. Furthermore, Mrs. (S) may have a motive to misrepresent her encounter with the accused in order to avoid conflict and embarrassment with her husband. Her unwillingness to testify at the hearing further supports that theory of the facts.

However, the IO also concluded that there was probable cause to believe that Petitioner kissed Mrs. S and stated to a PN2 D "what would it take for you to sleep with me", or words to that effect. The IO determined that in both instances, Petitioner was guilty of conduct unbecoming an officer and a gentleman. However, the IO noted that PN2 D's statement was the only evidence concerning

the improper remark, and she was under investigation for misconduct concerning the incident.

e. On 26 January 2000 Petitioner received nonjudicial punishment of a punitive letter of reprimand for the following specification of conduct unbecoming an officer and a gentleman:

In that (Petitioner) a married officer, on or about 22 May 1999 at New Bern, North Carolina, did wrongfully kiss Ms. Kathleen (S), a person who was married to an enlisted service member in (his) command, which conduct was unbecoming of an officer and gentleman.

He was found not guilty of the other charge of conduct unbecoming an officer and a gentleman, apparently based on Petitioner's explanation and the possible disciplinary action against PN2 D. Additionally, the commanding general recommended that Petitioner not be required to "show cause" for further retention on active duty.

e. In his appeal of the NJP, Petitioner stated, in part, as follows:

... Approximately eight months ago, while at a private off-base party, Mrs. Kathleen (S), a woman married to a senior enlisted man, gave me a kiss on the lips. This "peck" is what has led me to this day in my career as a naval officer. For reasons that I can only speculate on, the woman claimed that it was I who initiated this kiss. I never initiated, invited or anticipated any kiss from Mrs. (S) and believe that there is ample supporting evidence to show that it was she who was coming onto me at the party. The officer appointed to investigate these charges at an Article 32 hearing found her statement not to be creditable due to: 1) her refusal to appear at the hearing, 2) her flirtatious behavior at the party as witnessed by others, and 3) my good behavior at the party as witnessed by others When I noticed her behavior at the party, I had a private discussion with her during which I advised her that her actions were inappropriate. After this talk, she began to act in what I would considered an appropriate manner and I thought the issue was settled. Sometime later, I approached her in the kitchen to say hello and to show her that I was in no way upset with her and this is when the kiss occurred that is the subject of this appeal.

... At my NJP, I believe that I was found guilty due to what in hindsight was a poor decision on my part: to

attempt to continue a cordial conversation with someone who was previously acting in an inappropriate manner towards me. I agree that trust is vital to my position as a chaplain and that by putting myself in the position where someone could kiss me in a compromising fashion, that same trust could somehow be shaken. As a chaplain and one faithful in my spiritual walk I should be (the) one setting the moral example for our young sailors and Marines to follow. However, I disagree with the finding that because I did not predict her behavior and put myself in this position that I was somehow at fault.

... My conduct was not criminal in nature. Specifically, my approaching her in the kitchen and not predicting her behavior does not satisfy the definition of conduct unbecoming and officer and gentleman. As defined in Article 133 of the UCMJ, conduct unbecoming is that "action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromising the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." My actions do not fall into either of these categories.

f. In his endorsement to Petitioner's appeal, the commanding general stated, in part, as follows:

... (Petitioner's) position on appeal appears to be that he should not be punished because, according to his version of events, he did not initiate the kiss in question with Mrs. (S). (Petitioner) maintains that although Mrs. (S) was flirting with him earlier in the evening, he merely followed her into the kitchen where she later kissed him. Essentially, he claims that the kiss was involuntary on his part in that his only mistake was in "failing to predict her behavior." In effect, the Chaplain seems to characterize himself as a victim, and not a voluntary participant. Mrs. (S), on the other hand, characterizes the kiss as unexpected, unwelcome, and initiated by (Petitioner).

... Even considering (Petitioner's) version of events, he nevertheless followed a woman (married to an enlisted Sailor in his command and whom he believed was pursuing him) into a room where he was alone with her. Once there, he touched the woman's shoulder, embraced her with one arm, and wound up kissing her on the lips.

Further, in the ensuing moments, Mrs. (S)'s husband
.... observed her to be quite upset.

... As for the voluntariness of the Chaplain's conduct, I note that in (his) interview with Commander (D), the preliminary investigating officer, he explained that Mrs. (S) moved her head forward to kiss him, and that he did the same towards her. At that time, the Chaplain further described the kiss as a "friendly kiss he might give anyone." He also admitted to giving her a "one-armed hug" during the course of events surrounding the kiss. It's also worthy to note that at the NJP hearing, when questioned regarding Commander (D)'s version of their interview, the Chaplain did not contest the accuracy of the investigating officer's summary. Furthermore, soon after the incident occurred, the Chaplain asked his Commanding officer, Captain (B), USN, "if the kiss was consensual would all this be happening." Thus, soon after the event, the Chaplain's position appeared to be that this kiss was a consensual act between two adults. At that time, he did not claim that he was the victim of what would have been, in effect, an assault by Mrs. (S).

... Accordingly, based on all of the facts and circumstances presented during the NJP proceeding, I found that (Petitioner) purposely followed Mrs. (S) into the kitchen, initiated a touch to her shoulder, and then voluntarily kissed her (regardless of who actually initiated the kiss). For any officer, especially a Chaplain, to kiss a subordinate's wife on the lips under such circumstances is, in my opinion, conduct unbecoming an officer and gentleman. Unquestionably, the Chaplain's actions that night with the wife of one of his enlisted Sailor's transcend mere "poor judgment," and tend to seriously compromise his standing as an officer and his character as a gentleman.

On 23 February 2000, the Commanding General, U. S. Marine Corps Bases, Atlantic, denied Petitioner's appeal.

g. In the fitness report for the period 20 February 1999 to 31 January 2000, Petitioner was assigned marks of 4.0 in every category and was recommended for promotion. However, the comments in the report state that he "engaged in unacceptable behavior in May 1999." The next fitness report, for the period ending 29 May 2000, is adverse, with marks of 2.0 in several categories, and the comments mention the nonjudicial punishment of 26 January 2000.

h. Since the NJP, Petitioner has continued to serve in an outstanding manner and has been recommended for early promotion in the fitness reports covering the period 29 May 2000 to 31 January 2002. In addition, although he has failed of selection to LCDR (O-4), he has been extended on active duty until 1 March 2005.

i. Attached to enclosure (1) is an advisory opinion from the Deputy Assistant Judge Advocate General (JAG) for Criminal Law, on the issue as to whether Petitioner's actions constituted the sort of dishonorable or disgraceful behavior required to support a charge of conduct unbecoming an officer and a gentlemen, given the contention and evidence which shows the kiss was consensual. The opinion states, in part, as follows:

.... In order for an officer to be on notice that his or her acts or omissions 'constituted conduct unbecoming an officer' we use a 'reasonable officer' standard. ... It is up to the fact finder to examine all the circumstances, listen to the testimony of the witnesses ... and then determine and apply the appropriate reasonable officer standard. ... (T)he officer conducting NJP determined that the act had taken place and that the act constituted conduct unbecoming an officer in light of all the circumstances.

The opinion concludes that the NJP was supportable in law and fact.

j. Also attached to enclosure (1) is an advisory opinion from the Performance Evaluation Branch in the Navy Personnel Command. This opinion essentially concludes that the two fitness reports at issue, covering the period 20 February 1999 to 29 May 2000, were properly filed in Petitioner's record. The opinion notes that one of the reports has been returned to the commanding officer for correction because a report must not contain both marks of 2.0 and a recommendation of "promotable". However, the report is otherwise properly filed.

k. In his application, Petitioner continues to state that while at a private off-base party, Ms. S gave him a kiss on the lips after she had consumed alcohol and this kiss was nothing other than a "peck". He further states, in part, as follows:

... For reasons that I can only speculate, the woman claimed that it was I who initiated this kiss. I never initiated invited or anticipated any kiss from Mrs. (S)

and believe that there is ample supporting evidence to show that my conduct throughout the party was always appropriate.

Petitioner believes that the IO inferred that Mrs. S's statement may not be credible due to (1) her refusal to appear at the hearing; (2) her flirtatious behavior at the party as witnessed by others; (3) her husband's testimony at the investigation to the effect that on the day after the party his wife said she wanted to leave him and return home because of the incident at the party; and (4) his appropriate behavior at the party as witnessed by others. He further states, in part, as follows:

.... When I noticed (Mrs. S's) behavior at the party, I had a private discussion with her during which I discreetly told her that her actions were inappropriate. This conversation was witnessed by someone at the party. After this talk, she began to act in what I would consider an appropriate manner and I thought the issue was settled. Sometime later, I approached her in an open setting, the kitchen where the food was located and in front of a bay window facing the back yard, to show her that I was in no way upset with her and this is when the charged kiss occurred. I have continually been up-front and honest that not only did the kiss occur but that at the time it was fine with me and the reason I referred to it as consensual. It appeared to be a friendly peck, which is also the reason I followed the kiss with a one-arm hug. I did not consider myself a "victim", as stated by the general in his letter attached to my appeal until she raised the accusation that I forced a kiss on her, when in fact it was she that initiated the kiss However, I disagree with the finding that because I did not predict her behavior and put myself in this position that I was somehow at fault or because a kiss simply occurred that this event constitutes conduct unbecoming an officer and gentleman What the general failed to include was my statement to him that she did not leave the kitchen immediately after she kissed me but in fact we had a cordial conversation. I also stated to the general that it was not until QM1 (D), a friend of her husband and one witnessed by others as being intoxicated, accused us of inappropriate conduct did Mrs. (S) ever leave the house or show any sign of being upset Of note, the investigation revealed that QM1 (D) based his accusation on his interpretation of our facial expressions while in the kitchen.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. The Board believes that the incident with Mrs. S occurred essentially as described by Petitioner and that, in retrospect, to impose NJP for this offense was overkill. In reaching this decision, the Board notes Mrs. S's behavior prior to the incident, and her apparent failure to accuse Petitioner until they were confronted by QM1 D, her refusal to testify during the Article 32 investigation, and Petitioner's excellent record both before and after the NJP. Finally, the Board notes that he was not required to show cause why he should be retained on active duty and has been extended on active duty until 2005. This latter action suggests to the Board that the leadership in the Chaplains Corps do not think that his behavior rose to the level of misconduct.

In coming to the foregoing conclusion, the Board does not specifically take issue with JAG's determination that NJP was legally imposed upon Petitioner. In this regard, the Board has some doubt as to whether his actions were so aggravated as to constitute the disgraceful behavior required under UCMJ Article 133. However, the Board concludes that even if it was, there was sufficient extenuation and mitigation so that imposition of NJP was not warranted.

Therefore, the Board concludes that all documentation concerning the NJP should be removed from Petitioner's record. The documentation to be removed should not only include the report of nonjudicial punishment dated 15 March 2000 and its enclosures, but also the two fitness reports covering the period from 20 February 1999 to 29 May 2000. The Board further concludes that Petitioner should be considered by the next regularly convened selection board as an officer who has not failed of selection for promotion to LCDR (O-4).

RECOMMENDATION:

- a. That Petitioner's naval record be corrected by removing all documentation concerning the NJP of 26 January 2000, including but not limited to all documentation contained on Fiche 5 of enclosure (2).
- b. That the record be further corrected by removing the two fitness reports covering the periods 20 February 1999 to 31 January 2000 and 1 February to 29 May 2000.
- c. That the record be further corrected by inserting a memorandum in place of each of the removed reports containing

appropriate identifying data concerning the report; and stating that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law, may not be made available to selection boards and other reviewing authorities, and that such boards may not conjecture or draw any inference as to the nature of the report.

d. That the record be further corrected so that Petitioner will be considered by the earliest possible selection board convened to consider officers of his category for promotion to lieutenant commander as an officer who has not failed of selection for promotion to that grade.

e. 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.

f. 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



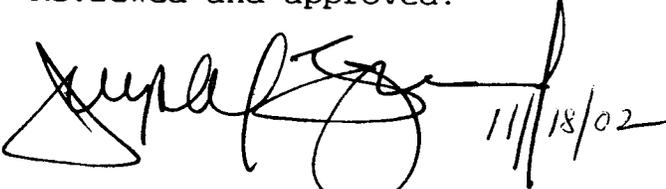
ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.



W. DEAN PFEIFFER

Reviewed and approved:



11/18/02

JOSEPH G. LYNCH
Assistant General Counsel
(Manpower And Reserve Affairs)