

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2003-026

FINAL DECISION

██████████ Chair:

This is a proceeding under section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on December 23, 2002, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated September 25, 2003, is signed by three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to correct his record by removing all evidence of his November 29, xxxx, non-judicial punishment (NJP or captain's mast) for missing ship's movement through neglect.

The applicant alleged that the NJP proceeding was biased against him because his executive officer (XO) served as both the person placing the applicant on report and the preliminary investigating officer. He submitted with his application the Report of Offense and Disposition Form (Offense Form), which shows in the first section that the XO placed the applicant on report. Under the second section on the Offense Form entitled "Initial Action of the [XO]," the XO appointed himself as the preliminary investigation officer (PIO). As PIO, the XO recommended in the fourth section of the Offense Form, that the applicant be punished at captain's mast (NJP) on the basis of the following results of his investigation:

[The applicant] had knowledge of the Commanding Officer's requirement for all active duty personnel assigned to [the cutter] during a Bravo-2 status to respond to crew recall. [The applicant] had knowledge of [the cutter's] Bravo-2 status. On the morning of 25 November xxxx a group page was ordered by the Commanding Officer and executed by [an] MK3 . . . The group page ordered the immediate return to the ship of all personnel subject to recall. [The applicant] did not respond to the page and therefore missed ship's movement. [The applicant] was later contacted through another page and he then stated that he was an hour from the ship. [The applicant] also stated that he did not receive the first page. When [the applicant] was informed by the XO that the ship was

returning to port and needed him to handle lines, he displayed a lack of concern and stated that he did not want to leave his family and travel an hour to meet the ship. Through his inability to respond to the page, his distance from the unit, and his lack of concern displayed negligence on his part.

In the fifth section of the Offense Form entitled "Action of the [XO]," the XO recommended that the applicant go before a captain's mast,

On November 29, xxxx, the CO punished the applicant at captain's mast for missing ship's movement. The punishment consisted of restriction to the ship for seven days and extra duties for 7 days. The Report of Offense and Disposition Form indicates that the applicant was advised of his right to appeal the NJP on November 29, xxxx. The record contains no evidence that the applicant appealed the NJP.

As a result of the NJP, the applicant had an adverse administrative remarks (page 7), dated November 29, xxxx, entered into his military record. It stated that the applicant was given an unsatisfactory conduct mark, which terminated his good conduct award eligibility period. He also was given a mark of "not recommended" for advancement.

Views of the Coast Guard

On June 24, 2003, the Board received an advisory opinion from the office of the Chief Counsel, recommending that the Board deny the applicant's request.

With respect to the applicant's allegation that the NJP proceeding was biased against him because the executive officer (XO) served as the person placing the applicant on report and the PIO, the Chief Counsel stated that neither the Coast Guard Military Justice Manual nor the Manual for Courts-Martial indicate that this practice constitutes procedural error.

The Chief Counsel stated that Article 15 (NJP) of the Uniform Code of Military Justice (UCMJ) is a congressionally established administrative means for military commanders to deal with minor violations, as an essential part of their responsibility to preserve discipline and maintain an effective armed force. He stated that NJP is intended to provide military commanders with a prompt means of maintaining good order and discipline and promoting behavioral changes in members without the stigma of a court-martial conviction. See, Part V, para. 1c., Manual for Courts-Martial (1995 ed.)

The Chief Counsel stated that the CO and designated appeal authorities are charged with the responsibility of determining if an offense has occurred and the appropriate punishment in cases where such a determination has been made. He stated that absent strong evidence to the contrary, government officials are presumed to have

carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (D.C. Cir. 1992).

The Chief Counsel stated that even if the applicant could show that an administrative or procedural error had occurred in his case, he must go the extra step of showing that such error materially prejudiced one of his substantial rights. He stated that an applicant seeking relief from NJP must prove (1) that the CO's determination regarding commission of an offense was clearly erroneous; (2) that the accused suffered material prejudice due to a clear procedural error; or (3) that the punishment imposed was a clear abuse of the broad professional discretion accorded military commanders to take corrective action so as to maintain good order and discipline within the service.

"[The] applicant was awarded 7 days restriction and 7 days of extra duty for missing ship's movement. The basis for the imposition of punishment at NJP was applicant's violation of Article 87, UCMJ. Specifically, the applicant chose not to return to his ship when called to do so on 25 November 1999 and purposely stayed away. Based on the aforementioned conduct, his commanding officer would have sufficient cause to adjudge applicant in violation of his obligation to report to the ship for movement. The applicant has provided absolutely no evidence, beyond his unsupported allegation, to overcome the presumption that his [CO] and [XO] carried out their official duties correctly, lawfully, and in good faith."

Applicant's Response to the Views of the Coast Guard

On June 30, 2003, the Board mailed a copy of the Coast Guard views to the applicant for reply. He did not submit a response.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 U.S. Code. The application was timely.

2. The applicant has not proved that the punishment he received on November 29, xxxx was in error. He did not deny that he missed ship's movement through neglect, but rather he alleged that the NJP proceeding was biased against him because the XO served as the person placing him on report and as the investigating officer. While having the XO serve in the these two roles, while also making a disposition recommendation to the CO in his capacity as XO, may appear unfair, it is not prohibited by either the Manual for Courts-Martial or the Military Justice Manual, which contain regulations for the imposition of NJP.

3. While not error, having the XO perform the functions of the accuser, the PIO, and the XO could amount to an injustice. In this regard, the Board notes that the Military Justice Manual encourages that the PIO be someone other than the XO. Article 1.C.3.a. of the Military Justice Manual states that the XO is to review the reported offense for probable cause, and if such exists, the XO should inform the accused of the alleged offense and that a PIO has been assigned to investigate the case. In addition, Article 1.C.5.a. states after the return of the PIO's report, the XO should again review the Offense Form and dismiss the matter, if the CO has given the authority to do so, or refer the matter to the CO recommending either dismissal or disposition at captain's mast.

4. However, the Board is not persuaded that the applicant has shown by a preponderance of the evidence that he has suffered an injustice under the circumstances of this case. He has not presented any evidence, except for his own statement, that the NJP proceeding was biased against him. Nor has he explained which, if any, of the rights afforded to him under Manual for Courts-Martial or the Military Justice Manual were prejudiced by having the XO serve in all pre-mast capacities. And as stated above, he did not deny that he missed ship's movement through neglect.

5. In addition, the CO was free to decide the applicant's punishment and was not bound by the input from the XO. Article 1.d. (2) of Part V. of the Manual for Courts-Martial states that "[a] commander who is considering a case for disposition under Article 15 will exercise personal discretion in evaluating each case, both as to whether nonjudicial punishment is appropriate, and, if so, as to the nature and amount of punishment appropriate." The applicant has presented nothing to indicate that the CO failed to carry out his responsibility as required by the Manual for Courts-Martial. The applicant also failed to appeal the NJP, an avenue available to him, if he believed he had suffered an injustice. A mere allegation is an insufficient basis on which to grant relief. In the absence of proof of prejudice or a violation of a regulation, the Board will not second-guess the punishment imposed by the CO.

6. The applicant has failed to prove by a preponderance of the evidence that the NJP he received on November 29, xxxx, was in error or unjust. Accordingly, his request should be denied.

ORDER

The application of xxxxxxxxxxxxxxxxx, USCG, for the correction of his military record is denied.

