DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-099

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FINAL DECISION

This is a proceeding under the provisions of section 1552 of Title 10 and section 425 of Title 14 of the United States Code. The Chair docketed the case on April 21, 2006, upon receipt of the completed application.

This final decision, dated January 31, 2007, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his military records by removing evidence of a November 22, 2005 non-judicial punishment (NJP) (also referred to as captain's mast) under Article 15 of the Uniform Code of Military Justice (UCMJ). He was punished at captain's mast with a reduction in rate to E5/SK2 and restriction to the base for 30 days, suspended for three months, for an unauthorized absence (UA) of approximately two hours.

The applicant alleged that the punishment awarded at the captain's mast was unjust and too severe for the misconduct he committed. He further stated as follows:

> I feel that my punishment was based on the personal opinion and judgment of my personal life, rather than the offense at hand. I also feel that based on the date for which my Article 15 NJP was scheduled, I was not given the adequate tools or resources to file an appeal. The Article 15 NJP was scheduled one day prior to the Thanksgiving holiday and the majority of my division as well as the Administrative Branch were on holiday leave.

The applicant also stated that he felt that he was singled out and targeted based on "personal dislikes, discrimination, and possible prejudice." He stated that his feelings in this regard were based on the fact that 99% of the members of his division were Caucasian males "who seemed to get away with far more situations than they should." He alleged that over a six-month period, sixteen minority members had been taken to NJP, which he opined was a very high number considering [redacted] overall population.

The applicant's UA occurred on the morning of October 13, 2005. Prior to that date, the applicant stated that he was under stress due to family and marital problems. He stated that in April 2005, he and his wife set aside their divorce so that his wife could deal with the death of her sister and make child care arrangements for her nephew. He stated that in May 2005 the stress from his marital situation began to interfere with the performance of his duties and he became somewhat depressed. He informed his immediate supervisors about the problems.

The applicant explained that July 2005 was a very busy period for processing purchase requests because the command was attempting to spend money prior to the end of the fiscal year. In this regard, he stated that division heads were unhappy with him when it was necessary for him to deny their purchase requests to stay within the budget. The applicant stated that in September 2005, the [redacted] was relieved of duty and replaced with LT W who became the applicant's supervisor.

The applicant stated that his divorce was finalized in a hearing on the afternoon of October 12, 2005. He stated that later that evening he was informed of some very depressing information and went to a friend's house in [redacted]. According to his NJP statement, the woman he had been in a relationship with for approximately two years (apparently he and his wife had been separated although not divorced) told him that she had made a mistake by marrying an Army soldier in August 2005. The applicant stated that he became very upset and on the way to his friend's house he bought liquor. While explaining the situation to his friend and feeling sorry for himself he had a few drinks. His friend refused to let him drive home. The applicant stated that he awoke the next morning at approximately 7:00 am and drove back to his [redacted] home and prepared himself for work. He reported to work around 9:50 am. The workday started at 7:30 am. He stated that when he arrived at work he told the [redacted] LT W, that he had his divorce hearing the previous day and that he got together with some friends for drinks but was too embarrassed to explain that his girlfriend of two years had married someone else without his knowledge. He stated that he was then placed on report.

With respect to the applicant's allegation of personal reprisal, prejudice, and discrimination, he explained as follows:

> I feel as though I am the victim of personal reprisal, prejudice, and discrimination. Up until the EO's [engineering officer's] arrival sometime in late June 2005, I was considered an "Above Average" performer and had just been evaluated in May 2005. During the period of time for which I was assigned to Boat Forces & Cutter Operations Center, I witnessed several occasions where BM's and MK's reported late to duty, BM's and MK's reporting late to work, BM's reporting to work with the scent of alcohol and the appearance of being under the influence of alcohol . . . I have noticed various instances of selective punishment, prime example being Chief Warrant Officer [M], a superior officer, who as an officer is expected to set a higher level of example, was arrested for DUI and received next to no punishment for his offense. SNSK [P], who was an E4/SK3, was reduced to E3/SNSK for failure to appear for duty the same weekend, after several other BM's and MK's also missed duty, or arrived late without consequences as severe as being reduced to the next inferior pay grade. All incidents of late arrival by [unit] members . . . are documented in the Officer of the Day (OOD) and Command Duty Officer (CDO) logs, which I have no access to.

The applicant offered the following as examples of the command's retribution against him: having him psychologically evaluated by a flight surgeon, placing him on performance probation when the effort to convene an administrative board failed, placing him on performance probation without a termination date, and accusing him of committing an offense by storing inappropriate material on a flash drive after he had been reassigned to another unit, a charge the applicant vehemently denied.

VIEWS OF THE COAST GUARD

On August 30, 2006, the Board received the advisory opinion from the Judge Advocate General (JAG) of the Coast Guard, recommending that the Board deny the applicant's request for relief. The JAG stated that the applicant failed to prove that the Coast Guard committed any error by punishing him at NJP for violating Article 86 (UA) of the UCMJ.

The JAG argued that the applicant failed to exhaust his administrative remedies by not appealing the NJP and the Board could deny the application on that basis. However, should the Board consider the case on the merits, the JAG stated that the applicant has not presented evidence that government officials failed to carry out their duties correctly, lawfully, and in good faith. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992). The JAG further argued that to establish a claim of error or injustice regarding the imposition of the NJP, the applicant must prove a clear legal or factual error, or a clear abuse of broad discretion by NJP authorities and that such error

resulted in material prejudice to his substantial rights.[1] The JAG stated that the applicant offered no argument or proof that he was not UA and only alleged that the NJP was unfair. The JAG noted that the applicant admitted that he was UA on October 13, 2005 from 0730 to 0950. The JAG argued that based on the applicant's admission, the CO was well within his authority to determine the appropriate level of punishment.

The JAG attached a memorandum from the Commander, Coast Guard Personnel Command (CGPC) and asked the Board to accept it as part of the Coast Guard's advisory opinion. CGPC stated that the applicant was afforded the required due process prior to imposing NJP and that the punishment awarded by the CO was within the limits of that authorized for officer's in pay grade O-6 (captain).

CGPC stated that although the applicant argued that the punishment was too severe for the offense he committed, the evidence of record clearly established that the CO considered the applicant's extenuating and mitigating circumstances and military record before imposing punishment. CGPC noted that since 2001, four negative page 7 entries have been placed in the applicant's record for UA, failure to report to duty, financial irresponsibility, and a NJP for violation of Article 89 (disrespect toward a superior commissioned officer) of the UCMJ. CGPC stated that based upon the applicant's record and the UA, the punishment does not appear to be disproportionate.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On September 1, 2006, the Chair sent a copy of the Coast Guard views to the applicant for his response. The Board did not receive a reply from the applicant.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant asked the Board to remove the NJP from his record on the ground that the punishment imposed (reduction in rate to [redacted] and restriction to the

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[1] *Cf. Cochran v. United States*, 1 Cl. Ct. 759 (Cl. Ct. 1983), *reh. Denied*, 3 Cl. Ct. 3 (1983); *aff'd* 732 F. 2d 168 (Fed. Cir 1984 (reviewing courts may only review NJP for constitutional, statutory, or regulator violations, and absent a strong preliminary showing of bad faith, must defer to the evidentiary determinations and judgment of military authorities.)"

base for 30 days suspended for three months) for a two-hour UA was unjust and too severe for the offense that he committed.

3. Subsection 1.F.1.a. (1) of the Military Justice Manual defines unjust as denoting illegality. The applicant has failed to submit any evidence that the NJP was illegal. In this regard, he has presented nothing showing that the CO did not have the authority to impose punishment or that the punishment imposed exceeded that authorized by the Military Justice Manual. In fact, the punishment imposed by the CO was less than that permitted by Article 1.E.1.a. of the Military Justice Manual. More importantly, the applicant admitted that he committed the UA offense. The NJP was not unjust.

4. The applicant also argued that the punishment was disproportionate to the offense. In this regard, Article 1.F.1.a.(2) states that the term disproportionate "indicates that although the punishment imposed was legal, it was excessive or too severe considering all of the circumstances, as, e.g., the nature of the misconduct involved, the absence of aggravating circumstances, the prior good record of the member, or, any other circumstances that tend to lessen the severity of the misconduct or explain it in a light more favorable to the member."

5. In his statement to the preliminary investigating officer, the applicant explained the circumstances that led to his late arrival to work on October 13, 2005. This information was available to the CO as was the applicant's military record. After deliberating the applicant's case, the CO determined that a reduction in rate to [redacted] and restriction (suspended for three months) was an appropriate punishment. The applicant has not presented any evidence to the Board, except for his own argument, that shows the CO's actions to be an abuse of the discretion afforded to him under Article 15 of the UCMJ, the Military Justice Manual, and/or the Manual for Courts-Martial. While a two-hour UA may appear to be a minor offense to the applicant, the CO, who is responsible for maintaining good order and discipline within the command and for imposing punishment when necessary, considered it a more significant offense. The Board will not substitute its judgment for that of the CO in the absence of evidence that proves the CO abused his authority. The applicant has not shown that the punishment imposed was disproportionate to the misconduct he committed.

6. The applicant made allegations of discrimination, retaliation, and prejudice but did not submit any corroborating evidence that he was the victim of such prohibited practices. He has failed to prove this allegation.

7. Likewise, the applicant alleged that he was not given adequate tools and resources to file an appeal because most of his division and the administrative personnel were on Thanksgiving leave. The applicant did not provide the Board with any evidence on how the absent division and administrative personnel would have

contributed to his appealing the NJP or why the members who were not on leave could not have assisted him with submitting an appeal.

8. Accordingly, the Board finds that the applicant has failed to prove that the Coast Guard committed any error or injustice in his case and it should be denied.

9. The Board notes the Coast Guard's argument that the Board could deny the applicant's request based solely on his alleged failure to exhaust his administrative remedies by appealing the NJP within the five days allotted for him to do so. Section 5213(b) of the CFR states, "no application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to the applicant." This provision is intended to require an applicant to seek relief through other avenues that are available to him prior to filing an application with the Board. The five-day window for appealing the NJP had long ago closed and therefore was not an available remedy at the time the applicant filed his application with the BCMR. The Coast Guard has presented no law or regulation and the Board is aware of none that permits the denial of an application based solely on the ground that an applicant failed to avail himself of a past remedy that no longer exists at the time of filing his or her BCMR application. Section 1552 of title 10 of the United States Codes empowers the Secretary to correct any military Coast Guard record to remove an error or injustice. To emphasize the point, the Board does not deny applications requesting upgrades to discharges based solely on the ground that an applicant did not seek relief from the DRB during the fifteen years that remedy was available to him or her. Likewise, the Board does not deny applications based solely on a member's failure to seek relief from the Personnel Records Review Board within its one-year statute of limitations. Therefore, the Board is not persuaded by the Coast Guard's suggestion that this applicant's case should be denied because he failed to appeal the NJP during the five-day period that was available for doing so. However, the failure to appeal an NJP is one factor that the Board may consider in deciding the merits of an application.

ORDER

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