

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 42-96

FINAL DECISION

████████ Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on December 11, 1995, upon the BCMR's receipt of the applicant's request for correction of his military record.

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

Applicant's Request for Relief

The applicant asked the Board to set aside the non-judicial punishment (NJP) awarded him on February 7, 1995 and to restore the "Rank, Pay, and Privileges" he lost as a result of that NJP.

The applicant alleged that "[his] accusers conspired to ruin [his] career with lies and innuendo." According to him, the Coast Guard gave him the untenable choice "between pleading guilty to something [he] **had not done** or [being] discharged from the Coast Guard based on false accusations" (emphasis in original). The applicant also alleged that he was denied the right of competent legal consultation and the right to plead "**not guilty of the charges.**"

SUMMARY OF PROCEEDINGS AND SUBMISSIONS

A special investigation was conducted, from December 19, 1994 to January 10, 1995, into allegations of sexual harassment by the applicant. The investigating officer made specific findings, opinions, and recommendations, including a

recommendation that the applicant "be administratively separated" under COMDTINST 5350.3 (Sexual Harassment Prevention System).

On February 7, 1995, the applicant was brought before commanding officer's (CO) mast where he admitted seven charges "involving indecent or inappropriate language and actions" toward female petty officers (POs). He was charged with having violated the following articles of the Uniform Code of Military Justice (UCMJ): Article 134, (kissing a female PO forcefully in an elevator); Article 134 (propositioning a female PO); Article 92 (wrongfully requesting sex from a female PO); Article 117 (wrongfully using provoking words to a female PO); Article 92 (requesting sex from a female PO); Article 117 (suggested that he buy a female PO "sexy lingerie" so she could model it for him); Article 134 (told female PO about sexual dreams he had had about her); and Article 134 (reference to a female who needed "servicing"). The applicant admitted at the mast that he had sent electronic mail of a sexual nature to three POs, one of whom was subordinate to him in the supervisory structure. He also admitted that he had violated three articles of the UCMJ by requesting sex from two female POs, by the use of provoking speech, and by the use of indecent language on three occasions toward two female POs.

The CO punished the applicant by reducing him in rate from paygrade E-6 to paygrade E-5 and by reprimanding him in writing.

The applicant appealed the NJP, despite his pleas of guilty on the ground that he did not commit the offenses to which he had pleaded guilty. He said that he had no alternative but to plead guilty to them because he had an "inadequate legal counsel." According to the applicant he had been "given no choice but to accept the NJP and plead guilty to offenses that [he] still contend[s] [he] did not commit." He said that things might have been different if he "[h]ad . . . been afforded competent legal counsel." "Without adequate legal advice and facing the threat of the full weight of the command's ire, I chose to acquiesce even though maintaining my innocence."

The applicant appealed the NJP as unjust and disproportionate and alleged that it was in error because he was (1) not afforded the right to present evidence in "extenuation and mitigation" prior to the announcement of punishment; (2) denied competent legal consultation; and (3) denied the right to plead not guilty due to command coercion.

On March 22, 1995, the applicant's appeal was denied by the Commander, Maintenance and Logistics Command Atlantic. The Commander found there was no lack of evidence establishing the existence of the applicant's reported

misconduct, and he found that the procedures followed were not inappropriate and the punishment was not excessive.

The Commander specifically rejected the applicant's claim that he was "coerced into agreeing to admit the offenses" at mast. The Commander concluded that the "preliminary inquiry officer's report . . . contains information and statements sufficient to establish that there was a factual basis for [the applicant's] admissions.

The Commander also found that the applicant was "aggressively represented" by [his military lawyer]. The Commander noted that the applicant "did not call any witnesses in mitigation," even though he had the opportunity to do so and was advised of this right. As the Commander stated: "You were capably represented by your [military lawyer] during the proceedings, you knew of your right to present witnesses, and you failed to call them."

The Commander also found that the punishment was not disproportionate because "acts of sexual harassment [are] particularly serious. As an organization, the Coast Guard is committed to maintaining a work environment free from such conduct. . . . I expect any senior petty officer to comply with this standard of conduct at all times."

Views of the Coast Guard

On July 9, 1996, the BCMR received the views of the Coast Guard with respect to this application. The Coast Guard recommended that the application be denied on the grounds that the applicant failed to submit substantial evidence to show error or injustice on the part of the Coast Guard. The Service set forth the following:

The Coast Guard stated that the Board should not find error in the NJP "unless it finds an abuse of discretion." It contended that the decision of the CO should only be changed by the Board if findings of fact "are clearly erroneous" or legal conclusions "are contrary to law." The Coast Guard reviewed the asserted errors and injustices in the NJP proceeding and concluded that they were without merit.¹

The applicant also contended that he did not have an adequate opportunity to

¹ The allegations are summarized and evaluated in the Findings and Conclusions section of this decision.

discuss with a lawyer his right to refuse NJP in favor of court martial proceedings . The Coast Guard said that the applicant did not assert that he had been denied that right. During the NJP proceeding, the applicant acknowledged consulting with a lawyer. On October 8, 1995, the applicant's civilian attorney claimed that the applicant "should have been advised to demand trial by court-martial."

The Coast Guard concluded that the applicant's assertion that the applicant was "coerced" into accepting NJP was without merit. He did not submit proof that he admitted the sexual harassment charges in order to avoid a sexual assault charge, that might have resulted in separation from the Coast Guard rather than a reduction in grade.

Response of the Applicant to the Views of the Coast Guard

On August 20, 1996, the BCMR received a submission from the applicant in response to the views of the Coast Guard. He stated that the evidence submitted by him rebutted the presumption that the NJP was conducted in accordance with regulation. The applicant also stated that it was absurd to conclude that he had suffered no prejudicial effects "even if due process, equal protection, and fundamental fairness were violated."

The applicant also said that he had requested to be represented by counsel during the interrogation, but that his request was summarily denied. He also criticized the Commander who adjudicated the appeal. He said that this officer "was simply rubberstamping and attempting to legitimize" what was done by the CO at mast.

The applicant also alleged again that he was coerced into accepting the NJP and into pleading guilty to the charges of sexual harassments. He alleged that there is a document that "clearly demonstrates the command's position that either I accepted the NJP or they would . . . have me thrown out of the Coast Guard," but he did not submit such a document.

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code.

2. The applicant asked the Board to set aside the NJP awarded to him on February 7, 1995 for offenses involving sexual harassment.

3 At the February 1995 mast, according to the mast recorder, the applicant "pleaded no contest to all of the charges." He admitted all the charges, except for one of sexual assault.

4. The applicant's civilian attorney stated, on October 8, 1995, that the applicant had admitted to the sexual harassment charges on February 7, 1995 only because of coercive pressure by the command. The civilian attorney said that the applicant admitted to the charges only "after the command threatened to pursue separation from the service if he did not acquiesce to their demands based on threats."

5. The applicant's military attorney may have secured an agreement from the Coast Guard attorneys which the applicant admitted guilt as to lesser offenses in return for a Coast Guard promise not to seek to have the applicant separated from the Service. The existence of such an agreement did not show that the military attorney was "incompetent" or that the legal services provided the applicant by the military attorney was the equivalent of "no legal assistance whatsoever." The fact that the applicant's civilian attorney may have advised the applicant to plead guilty to these charges did not mean that the military attorney was incompetent, ineffective, or negligent because he allegedly advised the a applicant to "[t]ake the NJP and don't fight it or you risk a conviction or separation."

6. The applicant claimed that the Coast Guard had committed other errors and injustices with respect to the NJP procedure. He claimed, inter alia, that the CO was predisposed to award punishment; denied the applicant the opportunity to present witnesses in mitigation; and denied the applicant the opportunity to submit a written statement before a written reprimand was issued. The statement that showed the CO's decision to demote the applicant was made after the applicant had admitted that he had committed the offenses which is appropriate since "[t]he very purpose of a mast proceeding after the accused admits to committing the offenses is to determine an appropriate punishment, if any." The applicant had the opportunity to present witnesses in mitigation, but he chose not to do so. The Commander who adjudicated the appeal recognized that denying the applicant the right to submit a statement before the reprimand was issued was an error, and he directed that it be corrected; a revised written reprimand was issued.

7. The applicant has not established any of his asserted violations of equal protection, due process and compulsory process for obtaining witnesses.

Nonjudicial punishment is specifically authorized by law, under Article 15 of the UCMJ, and is "nonjudicial." NJP is a disciplinary rather than a criminal proceeding, and the standard to be applied in evaluating claims of denial of fundamental rights is fundamental fairness.

8. The applicant has not presented, by a preponderance of the evidence, that his mast proceeding was unfair or that the punishment imposed on him was disproportionate. The applicant has also not shown that the Coast Guard has committed any error or injustice.

9. Accordingly, the application for relief should be denied.

ORDER

The application to correct the military record of
JSCG, is denied.

