


**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction
of Coast Guard Record of:

BCMR Docket No. 2000-093

FINAL DECISION



 Chairman:

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 proceeding was docketed on March 16, 2000, upon the Board's receipt of a complete application for correction of the applicant's military record.

This final decision, dated January 25, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a Port Security Specialist second class (PS2; pay grade E-5) in the Coast Guard Reserve, alleged that the non-judicial punishment (NJP) awarded him and the administrative actions taken with respect to him were too severe for a minor offense.

The applicant asked the Board to reinstate his original NJP appeal; asked the Board to have his  qualifications reinstated; and asked that all documents saying he cannot perform his duties as a  be removed from his record.

SUMMARY OF FACTS

On March 15, 1997, the applicant disobeyed an order from a civilian contract security guard at a Coast Guard base. The guards told him to park and enter the base on foot since his parking "decal" had expired, and he had no proof of insurance. Thereupon, the applicant disobeyed the guard and drove onto the base. As a consequence, he was brought to mast and awarded NJP for disobeying the order of a security guard and for using profanity.

The punishment in total imposed on the applicant was as follows: (1) a fine of \$400; (2) suspension of driving and parking privileges on Coast Guard Island for six months; (3) letter from his Command rescinding his [REDACTED] qualification; (4) page 7 entry stating that he can no longer perform his job at the Marine Safety Office (MSO) without his designation as [REDACTED] (5) letter from the command ordering him to be put into the inactive ready reserve (IRR) for reason of misconduct and inability to perform his duties.

The applicant appealed the NJP to the Commander of the 11th Coast Guard District. Subsequently, the applicant agreed to withdraw the appeal if the amount of the fine was reduced from \$400 to \$50. Later he asked the Board to reinstate the appeal and to review the appeal according to his appellate rights. He also requested reversal of the administrative actions summarized as subparagraph (3), (4), and (5), above.

VIEWS OF THE COAST GUARD

Coast Guard Personnel Command (CGPC)

On September 14, 2000, the Commander of the CGPC recommended to the Commandant (LMJ) that relief not be granted to the applicant.

CGPC concluded that the applicant was given due process in his NJP proceedings. According to CGPC, he had no right to reinstatement of his NJP appeal subsequent to his decision to rescind it.

CGPC concluded that the "only punishment received at the applicant's NJP was a \$400 fine, subsequently adjusted. All other 'punishments' alleged by the member were administrative actions taken by the command."

Chief Counsel of the Coast Guard

On October 23, 2000, the Chief Counsel of the Coast Guard recommended that relief be denied the applicant "for lack of merit and lack of proof." He said that his comments and CGPC's comments should be considered as the advisory opinion of the Coast Guard.

The Chief Counsel concluded that the applicant has not proved by a preponderance of the evidence that the record of "nonjudicial punishment and the other administrative actions" was either erroneous or unjust. "His commanding officer [CO] had proper legal authority and a reasonable basis for awarding applicant NJP and for taking the other actions delineated."

The Chief Counsel said that on May 20, 1997, the applicant was awarded NJP for "Failure to obey a lawful order" and "Indecent Language." The Chief Counsel said that on the same date, the applicant took "separate action" to rescind the applicant's [REDACTED] qualification, which made him, unable to carry out his assigned duties. The applicant was informed of this action on May 21, 1997. On May 23, 1997, the applicant submitted an NJP appeal. On May 27, 1997, the command endorsed the appeal recommending that it be denied. According to the Chief Counsel, that endorsement explained the command's basis for suspending his base driving privileges and the rescission of his [REDACTED] qualification. On June 25, 1997, the applicant rescinded his appeal in consideration of a reduced fine (\$50 rather than \$400).

The Chief Counsel said that the "sole" issue in this case is whether the applicant has met the burden of proving that the NJP and other administrative actions shock the sense of justice, so as to constitute an injustice within the meaning of the BCMR statute (10 U.S.C. § 1552).

Article 15 of the Uniform Code of Military Justice (UCMJ; 10 U.S.C. § 15) is a congressionally established administrative means for military commanders to deal with minor violations as part of their responsibility to preserve discipline and maintain an effective armed force. NJP gives military commanders a prompt means of maintaining discipline and good order. In Cochran v. United States, 1 Cl. Ct. 759 (1983), reh. denied, 3 Cl. Ct. 3 (1983), aff'd 732 F.2d 168 (Fed. Cir. 1984), cert. denied, 469 U.S. 853 (1984), the court held that the reviewing court must defer to the evidentiary determinations of military authorities.

The Chief Counsel said that the CO is the official responsible for conducting the proceedings and determining an appropriate punishment. The CO has the opportunity to view the evidence, including the demeanor of the applicant. "Absent proof that the [CO's] determinations were clearly erroneous, or that a substantial right of Applicant was materially prejudiced by clear procedural error, the [CO's] decision should be upheld. The decision of the NJP appeal authority affirming the punishment is similarly entitled to deference."

The Chief Counsel said that in considering the amount and type of NJP awarded by a CO, the reviewing authority should be particularly deferential to the broad discretion accorded military authorities who are charged by law with accomplishing unit missions, maintaining unit readiness, and maintaining good order and discipline in their units; and who are presumably familiar with the individuals involved. UCMJ, 10 U.S.C. § 15, MCM Part V and Appendix 24.

There is a presumption, the Chief Counsel said, that military officials involved performed their duties "correctly, lawfully, and in good faith". Arens

v. United States, 969 F.2d 1034, 1037 (Fed. Cir. (1992)). To prove an error or injustice, the applicant must overcome that presumption.

The Chief Counsel said the applicant must prove that the CO's determinations regarding the commission of an offense were clearly erroneous; that the accused suffered material prejudice due to clear procedural error; or that the punishment was a clear abuse of the discretion granted military commanders under Article 15. No such showing was made in this case. Accordingly, the Chief Counsel found that the applicant failed to prove by a preponderance of the evidence that the punishment awarded him by his CO constituted error or injustice.

The applicant did argue that the punishment imposed on him, under Article 15, was disproportionate to his misconduct. The Chief Counsel stated that the applicant "has provided no evidence, beyond his unsupported allegation, to overcome the presumption [that he acted] correctly, lawfully, and in good faith."

The Chief Counsel recommended that the applicant's request for the reinstatement of his NJP appeal be denied, in the absence of clear and convincing evidence of fraud or duress. Absent such evidence, the Chief Counsel said the BCMR "should deem that any matter raised in applicant's NJP has been affirmatively waived." The applicant, according to the Chief Counsel, does not present the clear, cogent, and convincing evidence necessary to show that the decision to rescind was obtained by duress or fraud.

The Chief Counsel said that the applicant's CO took administrative action in response to the applicant's wrongful acts of March 15, 1997, in addition to the punishment awarded at NJP. In general, a CO "has the authority to exercise administrative control over a subordinate member of his command." The administrative acts included revoking the applicant's on-base driving privileges, rescinding his [REDACTED] qualification, and transferring him to the Individual Ready Reserve (IRR). According to the Chief Counsel, there was a presumption that the CO carried out his official duties correctly, lawfully, and in good faith, and that presumption could only be overcome by clear and cogent evidence to the contrary. The applicant, according to the Chief Counsel, did not produce such evidence.

RESPONSE OF THE APPLICANT TO COAST GUARD'S VIEWS

On October 27, 2000, a copy of the views of the Coast Guard was sent to the applicant. The applicant was notified that he could submit a response to these views within 15 days of the date of notification.

No response was received from the applicant.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code. The application was timely.

2. On March 15, 1997, the applicant disobeyed a lawful order from a security guard at a Coast Guard base. The applicant drove onto the base after receiving a direct order not to do so.

3. On May 20, 1997, the applicant was awarded NJP for failure to obey a lawful order and for using indecent language. He was punished by receiving a \$400 fine. The applicant appealed his NJP and subsequently agreed to withdraw the appeal if the fine were reduced to \$50. In addition to imposing NJP, the applicant's CO took the following administrative actions: suspension of driving and parking privileges, a letter from his command rescinding his [REDACTED] qualification, a page 7 entry stating that he can no longer perform his job at the MSO without that designation, and transfer to the IRR by reason of misconduct. The Chief Counsel said that "[o]ther than the forfeiture of pay, none of the other administrative actions taken by the applicant's commanding officer . . . would have been imposed by virtue of Article 15, UCMJ."

4. The applicant alleged that the administrative punishments were too severe for a minor offense. The Coast Guard responded that it was not too severe inasmuch as the applicant did not prove that the punishment shocks the sense of justice.

5. Article 15 of the UCMJ provides that the CO's findings and determinations as to punishment should be upheld unless the CO's determinations are clearly erroneous or a substantial right of the applicant was prejudiced by clear procedural error. The purpose of Article 15 is to allow CO's to deal with minor violations as part of their responsibility to maintain discipline and good order. The reviewing authority "must defer . . . to the determinations of military authorities."

6. There is a presumption that the duties of COs and other military officials are performed "correctly, lawfully, and in good faith." Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir, 1992). That presumption can be overcome

but only by a preponderance of the evidence. The applicant made no such showing.

7. The applicant alleged that the punishment imposed on him was disproportionate to his misconduct. However, he provided no evidence, aside from his unsupported allegation, to overcome the presumption that the CO acted correctly, lawfully, and in good faith.

8. The Coast Guard committed neither error or injustice in denying the applicant's request for reinstatement of his NJP appeal. A withdrawn appeal can be reinstated only if the applicant can prove by clear and convincing evidence that fraud or duress compelled him to withdraw his appeal. Absent such evidence of fraud or duress, any matter raised in applicant's NJP appeal has been affirmatively waived.

9. By virtue of his decision to rescind his appeal in consideration of reduction of the punishment imposed, the applicant affirmatively waived any matter that could have been raised in the Article 15 appeals process. Moreover, he did not present any clear, cogent, and convincing evidence necessary to show that his decision to rescind his Article 15 appeal was obtained by duress or fraud. Therefore, no relief should be granted as to his request to reinstate his NJP appeal.

10. The "punishment" other than the forfeiture of pay that the applicant alleges to have received at mast actually consisted of separate administrative actions taken by his CO based on his conduct. The applicant failed to prove, by a preponderance of the evidence, that his command's decision to take administrative action based on his March 15, 1997 misconduct constituted error or injustice.

11. The applicant's CO added administrative actions to the punishment he was awarded at NJP, in response to the March 15, 1997 actions. Each of these administrative actions (e.g. revoking on-base driving privileges, rescinding [REDACTED] qualification) was authorized under a CO's authority to exercise administrative control over a subordinate. The CO's action in recommending the applicant for transfer to the IRR from the Standby Reserve was authorized under Article 6.B.3. of the Reserve Policy Manual.

12. The applicant has not established any error or injustice on the part of the Coast Guard.

13. Accordingly, the application to correct the applicant's record should be denied.

ORDER

The application to correct the military record of [REDACTED]
[REDACTED] hereby denied.

