



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

CRS
Docket No: 6322-00
23 July 2001

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Navy, applied to this Board requesting, in effect, that her naval record be corrected by removing the 23 February 2000 nonjudicial punishment (NJP) and promoting her to IT3 (E-4).

2. The Board, consisting of Mr. Lippolis, Mr. Ivins, and Ms. LeBlanc, reviewed Petitioner's allegations of error and injustice on 11 July 2001 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 to the Board was filed in a timely manner.

c. Petitioner enlisted in the Navy on 2 June 1998 at age 19. Upon completion of training, she was assigned to USS GRAPPLE (ARS-53). The records indicate that until the incidents at issue, she served well and had no disciplinary infractions. She was advanced in due course to ITSN (E-3) on 16 March 1999, and subsequently was frocked to IT3. She was to be advanced to that rate on 16 June 2000.

d. Documentation in the record reflects that in October or

November 1999, Petitioner was counseled on her failure to provide a telephone number for the ship's recall bill. On 1 January 2000, after she missed the movement of her ship, she was again counseled on the need to provide recall information. An unsigned counseling entry, dated 25 January 2000, cited an incident on 26 January 2000 in which the command called the recall number provided by Petitioner, but only reached a neighbor who was unhelpful. Petitioner was advised of the need to "have a recall number for your immediate residence while living off base." (There is no explanation in the record for the discrepancy in the dates) This entry also stated that she was directed to have a telephone installed at her recall address by 18 February 2000.

e. On 31 January 2000 a counseling entry (page 13) stated that Petitioner was given "orders" suspending her access to the radion room and to classified material. As part of the "recommendations" section of this page 13 were the words "get a telephone for recall." The entry was signed by Petitioner and witnessed by LTJG (0-2) P.

f. On 18 February 2000 Petitioner was placed on report for the following violation of Article 92 of the Uniform Code of Military Justice:

In that (Petitioner)... having knowledge of a lawful order issued by a page 13 entry dated 31 January 2000 by LTJG P, to wit: Have a telephone recall, an order which it was her duty to obey, did onboard USS GRAPPLE (ARS-53), on or about 18 February 2000, fail to obey the same by failing to have a recall number.

Petitioner was also charged with failure to obey an order to provide sufficient support for her dependents.

g. A memorandum for the record, dated 22 February 2000, by ITC (E-7) K stated that Petitioner had been directed to have a telephone for recall purposes no later than 18 February 2000 and that, as of 22 February 2000, the order had not been carried out. In another memorandum, dated the same day, LTJG P stated that on 23 January 2000 he presented Petitioner with a page 13 that "directed her to provide a valid recall (telephone number) by 18 February 2000...." LTJG P also stated that when he attempted to reach her on 20 February 2000, he found that the recall number that she had given him was not connected. In this regard, there is no page 13 entry dated 23 January 2000 in the record, but only the counseling entries of 1, 25 and 31 January 2000. Petitioner provided a handwritten letter from a representative of the telephone company which stated that installation of her phone should have been completed on 18 February 2000, but was not.

h. Petitioner received NJP on 23 February 2000 for failure to

obey the order in the 31 January 2000 page 13 entry to have a recall number. The punishment consisted of suspended forfeitures and a reduction in rate from ITSN to ITSA (E-2). The commanding officer dismissed the charge of failure to support her dependent.

i. On 29 February 2000 Petitioner appealed the NJP by stating that she did everything required to obtain phone service and have the phone connected before 18 February 2000. She stated that after the 31 January 2000 counseling she tried to obtain a cell phone, but that was found inadequate. She finally ordered the installation of a phone on 14 February 2000, the first opportunity she had to do so since the ship deployed for two weeks on 31 January 2000.

j. On 27 April 2000 Petitioner's appeal was denied by Commander, Combat Logistics Squadron TWO, who found that her reduction in rate was not disproportionate.

k. In her application to the Board, Petitioner essentially reiterates the contentions in her NJP appeal.

l. An advisory opinion from the Deputy Assistant Judge Advocate General (Criminal Law) recommends that relief be denied. The opinion states that the language pertaining to the need for a recall number in the page 13 entry was "arguably not an order" since it was in the "recommendation for corrective action" section of the page 13. However, the opinion goes on to note that prior to 31 January 2000, Petitioner had been repeatedly told, both verbally and in writing, to get a telephone for recall. The opinion then concludes that the NJP should not be removed simply because the specification references the 31 January 2000 page 13 rather than the earlier verbal and written orders of ITC K and LTJG P.

m. In order to be classed as an order a communication must amount to a positive command. United States v. Glaze, 3 USCMA 168, 11 CMR 168 (1953); United States v. Warren, 13 MJ 160 (CMA 1982). Even though an order may be expressed courteously and not peremptorily, it must tell the individual what to do or not to do. United States v. McLaughlin, 14 MJ 908 (NMCMA, 1982).

n. In order to be advanced in rate, an enlisted servicemember must have passed the required advancement examination and, on the date of advancement, be recommended for promotion by the commanding officer.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial relief, specifically, removal of the 23 February 2000 NJP from her record. In this regard, the Board believes that although

imposition of NJP was fundamentally just and equitable, it was improperly imposed and must be removed.

In her NJP appeal and her application to the Board, Petitioner essentially contends that after the counseling of 31 January 2000, she tried to get a telephone installed at her home by the 18 February 2000 deadline, but was unable to do so due, in part, to GRAPPLE's deployment and the inefficiency of the telephone company. This specific contention may well be true. However, Petitioner ignores the fact that since October or November of the previous year, she had been on notice that she needed to provide the command with a recall telephone number. This message was reiterated on several occasions by command representatives, culminating in the 25 January 2000 entry in which she was actually ordered to provide a recall telephone by the deadline date. Accordingly, even if events beyond her control occurred after the 31 January 2000 counseling and precluded timely installation of a phone, she should have attended to this matter well before then. Therefore, the Board is unimpressed with Petitioner's argument and, absent any other considerations, would deny Petitioner's application.

The Board nevertheless concludes that the NJP must be removed from Petitioner's record. This disciplinary action was imposed for failure to obey a lawful order--the page 13 entry of 31 January 2000. However, after carefully examining the facts and the applicable law, the Board is convinced that this entry did not constitute an order. In this regard, the language concerning the need for Petitioner to get a recall telephone is in that portion of the entry entitled "recommendations." It seems clear that a recommendation does not constitute a positive command, and therefore is not an order. That is especially true here since the entry clearly reflects that she was given "orders" to stay away from the radio room and classified material. Along these lines, the Board notes that even the advisory opinion questions whether Petitioner received an order to get a recall telephone on 31 January 2000. The Board is also painfully aware of the prior direction she received on this issue, some of which probably did constitute a positive command to get a recall telephone. However, the Board cannot agree with the advisory opinion that this direction overcomes the foregoing flaw in the NJP. Accordingly, the Board reluctantly concludes that the disciplinary action must be removed from Petitioner's record.

The Board tangentially notes that Petitioner received an unsuspended reduction at the NJP, and believes this was an unduly harsh punishment given her prior good record. However, the Board declines to grant Petitioner's follow-on request--that the record be corrected to show that she was advanced to IT3 in due course. In this regard, the Board is aware that absent the NJP, the record will show that she was not reduced from ITSN to ITSA. Even though she was due to be advanced to IT3 on 16 June 2000,

she would not have been so advanced unless a recommendation for advancement from her commanding officer was in effect at that time. The Board believes that given her culpable failure to get a recall telephone in a timely manner, the commanding officer would have withdrawn his recommendation for advancement even if he had not imposed NJP. In this regard, the Board wishes to emphasize that its recommendation to remove Petitioner's NJP is not based on a belief that she was innocent of any wrongdoing, but only due to a legal insufficiency in the disciplinary action.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all references to the NJP of 23 February 2000. This corrective action should include but not necessarily be limited to removal of any Court Memorandum (NAVPERS 601-7R) documenting that NJP. The record should then reflect that Petitioner was never reduced in rate to ITSA and has served continuously and without interruption in the rate of ITSN since her initial advancement to that rate on 16 March 1999.

b. That no further relief be granted.

c. 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.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of 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.

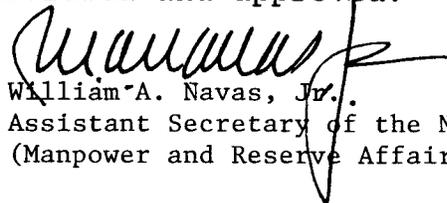
ROBERT D. ZSALMAN
Recorder


ALAN E. GOLDSMITH
Acting Recorder

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


W. DEAN PFEIFFER

Reviewed and approved: AUG 16 2001


William A. Navas, Jr.
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)