



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

AEG
Docket #6979-00
10 September 2001

Mr. [REDACTED]

Dear Mr. [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 5 September 2001. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. The Board also considered the advisory opinion furnished by the Deputy Assistant Judge Advocate General for Criminal Law, dated 15 May 2001, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that you first enlisted in the Navy in September 1978. During the next 18 years, you served in a generally excellent to outstanding manner. Although you received nonjudicial punishment (NJP) in 1979 and 1983, these were your only disciplinary actions of record. Between 1987 and 1995, you received no mark below 4.0. You qualified as an enlisted surface warfare specialist in 1992 and were advanced to chief data systems technician (DSC; E-7) in 1993. You reenlisted for the last time, for six years, on 15 July 1994. In 1995 you were awarded the Navy Marine Corps Achievement Medal for outstanding performance of duty. Shortly thereafter, you reported to USS SAIPAN (LHA-2), where you continued to perform in an excellent manner.

On 7 June and 25 July 1996 a Navy drug laboratory reported that a urine sample you submitted on or about 17 May 1996 had tested positive for the presence of cocaine. On 5 August 1996, following a retest of the sample produced an identical result, on

5 August 1996 NJP action was initiated for wrongful use of cocaine, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ). On 17 September 1996 the commanding officer (CO) of SAIPAN dismissed the charge after you claimed irregularities in the urine sample collection procedures. However, you received a letter of caution due to your failure to bring those discrepancies to the attention of the command in a timely manner.

Sometime in early 1997, SAIPAN underwent an internal reorganization resulting in the abolition of the CSD division, of which you were a member. Its members were then reassigned to two other existing divisions, CSE and CSF. It appears that as a result of the reorganization CSE had between 20 and 28 members and CSF, your new division, increased to 16-20 members.

On 17 March 1997 you submitted a urine sample as part of a urinalysis conducted aboard SAIPAN. The Specimen Custody Document-Urine Testing (DD Form 2624) reflects that the test basis was "IU", a unit sweep. On 14 April 1997 the servicing Navy drug laboratory reported that your sample had tested positive for cocaine. Accordingly, on 28 April 1997 the CO referred a charge of wrongful use of cocaine to a summary court martial (SCM). At that time, the summary court officer aboard SAIPAN was a Lieutenant (LT; O-3) T. However, you refused trial by SCM, whereupon the CO referred the charge to a special court-martial (SPCM). Subsequently, the CO also referred the specification of cocaine use he initially dismissed in September 1996.

During early June 1997 a Naval Reserve judge advocate, Captain (CAPT; O-6) S, was assisting your military defense counsel, LT H. In preparation for trial, CAPT C interviewed Senior Chief Electronics Technician (ETCS; E-8) St.C and Master-at-Arms First Class (MA1; E-6) V concerning your case. In a sworn declaration of 12 June 1997 CAPT C related, in part, as follows an interview with MA1 V:

He has been assigned to the USS SAIPAN for about one year, where he is the leading petty officer in the MAA (master-at-arms) shop.

He serves as the Urinalysis Coordinator aboard SAIPAN. His duties as coordinator include operation of a Navy computer program known as "NDSP," which stands for Navy Drug Screening Program. Using this program, he can randomly select either individuals from throughout the ship's company for urinalysis screening, or he can randomly select divisions for all their personnel to give urine samples.

. . . .

Drug screening on SAIPAN is usually done on Mondays and Fridays. Most of the drug screening is done by divisions. A division is randomly selected by the computer program, and all personnel from that division who are present that day must give a urine sample. However, some drug screening is done by drawing samples from throughout the ship's company. MA1 (V) believes this feature of the NDSP program selects personnel based upon whether a particular randomly selected digit appears in their social security number. MA1 (V) estimates that at least over 55% of drug screening on SAIPAN is done by randomly selected divisions, rather than by randomly selected individuals.

MACM (Master-at-Arms Master Chief; E-9) (D) is the head MAA on SAIPAN. MACM (D) informs MA1 (V) as coordinator of how many divisions are to be screened on a particular day, and MA1 (V) operates the NDSP to select the divisions. MA1 (V) does not know how MACM (D) determines how many divisions are to be screened on a given day. However, that number has always been between one and three as long as MA1 (V) has been aboard SAIPAN.

. . .

MA1 (V) recalls a urinalysis screening on March 17, 1997. He specifically recalls that the "CSD" division was selected by the NDSP computer program, which he operated.

He recalls this particular screening because ETCS (St.C) of CSE division came to the MAA office and complained that the CSD division did not exist anymore, so it should not have been selected for urinalysis. He recalls ETCS (St.C) directed his complaint to MAC (M), who moved the discussion with ETCS (St.C) into the passageway. After that discussion, he recalls MAC (Chief Master-at-Arms; E-7) (M) returning to the office and informing him that only CSF division members, and not CSE division members, would have to provide samples. He believes MAC (M's) exact words were "Let's do CSF because it's smaller."

CAPT S's declaration pertaining to what ETCS St.C told him reads, in part, as follows:

ETCS (St.C) is currently assigned to the CSE division aboard USS SAIPAN. Previously, he was part of the CSD division.

. . .

ETCS (St.C) recalls an event on March 17, 1997 aboard USS SAIPAN in which his division officer, LT (G) upon returning from morning officers' call, informed him that the CSD division had been selected for urinalysis screening. Because the CSD division no longer existed, LT (G) said

every member of both the CSE and CSF divisions, which absorbed all of the CSD personnel, would have to give a urine sample. ETCS (St.C) recalls he told LT (G) "this is bullshit," or words to that effect.

ETCS (St.C) thought it unnecessary that the ship's MAA office would select a division that no longer existed, and then inconvenience all the personnel of the two divisions which absorbed the members of the old division having to give urine samples. If this procedure were followed, it would result in approximately three times as many urine samples as the previous CSD would have produced.

ETCS (St.C) stated that he expressed his objections to LT (G) about both CSE and CSF having to give samples. LT (G) told him to "do it that way just one more time" or words to that effect.

ETCS (St.C) acknowledged that he next "went around" LT (G), by taking his complaint to MAC (M). He located MAC (M) in the MAA office spaces and told him that CSD no longer existed, and it was a waste of time collecting urinalysis samples from both CSE and CSF. MAC (M) replied that urine samples from either CSE or CSF would be acceptable, and whichever division was smaller should provide the samples. ETCS (St.C) believes this conversation could have occurred in the passageway outside the MAA offices, because other MAA force personnel were working in the office spaces.

After concluding his discussion with MAC (M), he departed the MAA office, whereupon he immediately ran into (DSC G; you). He informed DSC (G) that "the MAA wants your division."

Based on the foregoing, LT H filed a motion on 18 June 1997 in which she argued as follows for suppression of all evidence obtained as a result of your 17 March 1997 urine sample:

Pursuant to M.R.E. (Military Rule of Evidence) 313(b), an inspection is "an examination of the whole or part of a unit, conducted as incident of command, the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit." One of the purposes of an inspection is to ensure that personnel are fit and ready for duty as well as to locate and eliminate contraband. It is under this guise that inspections include random sample and unit sweep urinalysis testing.

The courts have long held that to be admissible as the result of an inspection, urinalysis testing must be ordered for a legitimate purpose and conducted in a lawful manner. (citations omitted) As M.R.E. 313(b) explains, a

urinalysis conducted "for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule." Furthermore, if the purpose of an inspection is to locate contraband, specific individuals may not be selected for testing . . . If a specific individual is selected for examination, the burden then rests on the government to establish by clear and convincing evidence that the exam was actually an inspection within the meaning of M.R.E. 313. (citation omitted) M.R.E. 313 is reinforced by OPNAVINST (Chief of Naval Operations Instruction) 5350.4B, which delineates the Navy's drug testing policy and the admissibility of test results in disciplinary proceedings. The Instruction notes that the only type of drug urinalysis results which are admissible for disciplinary proceedings are those obtained by (1) search and seizure, (2) inspection, (3) medical treatment, (4) accession training, and (5) brig and overseas screenings.

In this case, the government contends that the urinalysis test that DSC (G) submitted to on 17 March 1997 was a valid random sample inspection. This test, however, does not meet the necessary criteria. The command selects divisions to provide the samples via the NDSP computer program. This program, however, did not produce a random sample on 17 March 1997. Instead, the Command incorrectly included a non-existent division, CSD, in the pool of samples. In actuality, CSD had been dissolved and absorbed by CSE and CSF divisions. Therefore, personnel of the former CSD had twice the probability of their shipmates of being selected for screening because both their previous division and their new division were in the pool of possible computer selections.

When the NDSP computer program selected the non-existent CSD division for sampling, that selection simply should have been disregarded. CSD should have been removed from the pool and another random sample taken under the revised program. Instead, MAC (M), at the urging of ETCS (St.C), decided to let the invalid selection stand but to modify it to apply only to DSC (G's) new division. ETCS (St.C) has absolutely no command authority to influence the nature of a urinalysis test, and, in fact, is the senior enlisted member in CSE, the other portion of the selected CSD division. This decision was made with the knowledge that DSC (G) had tested positive in a previous urinalysis and that the earlier result had been dismissed at NJP. ETCS (St.C) then confirmed these events by discussing the situation with DSCS (Data Systems Senior Chief; E-8) (S), DSC (W), and DSC (G), where he nodded in acknowledgment of DSC (G's) accusation that CSF had only been selected because he was a member of that division.

Under these circumstances, DSC (G's) urine sample was obtained under circumstances amounting to command direction rather than random selection. In the absence of probable cause for such command direction, the results of the urinalysis must be suppressed.

LT H's motion was never litigated because one day after it was filed, the CO, SAIPAN, dismissed the charges against you. However, on 24 June 1997 the CO initiated administrative separation action by reason of misconduct due to drug abuse, as evidenced by the positive urinalysis results of May 1996 and March 1997. At that time, you were advised that if separation was approved, characterization could be under other than honorable conditions (UOTHC). After you elected to have the case heard by an administrative discharge board (ADB), the CO appointed a three-member ADB which included LT T, SAIPAN's summary court-officer.

Your ADB convened on 7 July 1997. After questioning the ADB members, neither the recorder nor LT H challenged any member for cause. The recorder then introduced evidence pertaining to your positive urinalyses; and LT H introduced evidence documenting your naval career, the declarations of CAPT S, and her motion to suppress.

LT H then presented testimony from the weapons officer and one of your subordinates, both of whom attested to your fine performance of duty. DSCS D, in charge of weapons aboard SAIPAN, then essentially echoed this testimony and, when asked about the urinalysis of 17 March 1997, he stated as follows:

I specifically remember (DSC G) making the statement that the decision was made to test CSF because he was in the division, but I don't remember the exact words. I do not remember what (ETCS St.C) said. My memory was focused on (DSC G). I do not know that (ETCS St.C) had any grudge against (DSC G). I feel my division was picked because it had fewer people in it and it presented less of an administrative burden for the MAA . . . Due to the entire circumstances of the first urinalysis, I think there was a little bad blood left over. I am afraid that the second situation came about because of the first urinalysis, something seemed fishy. I have absolutely no solid proof of this, but I do feel (DSC G) was targeted.

Your wife then testified that both of you lived with three sons, her mother and her three brothers; and she also said that her brothers all sold drugs in the neighborhood. However, she said they did not do so in their house, and that you neither used drugs nor liked your kids to be around drugs.

You then testified under oath and speculated that one of your wife's brothers might have put drugs in your food. Concerning the urinalysis of 17 March 1997, you testified as follows:

I had been TAD (temporary additional duty) for almost a month. They pulled me in and said that CSD had to provide. At that time, CSD had been dissolved as a division. ETCS (St.C) said that he would go talk to the MAA and see what they wanted to do. He said that CSF would provide. I heard through (ETCS St.C) that they wanted the division that had the DS's. When I heard that, I said he wants whatever division I am in. I looked at (ETCS St.C) and he just nodded his head. However, he denies that he did it . . . I have no idea why I popped positive . . .

Testifying in rebuttal for the government, ETCS St.C testified, in part, as follows:

I did not tell (DSC G) that CSF was picked because he was in the division. My department head told me that CSD had (been selected) for urinalysis. I went to the MAA's and told them CSD no longer existed, but there was CSE and CSF. CMAA asked me which one absorbed most of the people from CSD and I told him CSF. At that time CSF was selected. There are some serious errors with the motion presented at trial. The primary problems were that CSF was not selected because (DSC G) was in it; I did not nod to affirm that this allegation was true; and I did not give any indication at all to the MAA's what division (DSC G) was in, but I simply informed them that CSD did not exist.

MA1 V then testified for the government and characterized the urinalysis of 17 March 1997 as a "sub unit sweep." He then stated as follows concerning the method used to select units for testing:

There are several ways to select the units. I use the computer program to test randomly and under (sic) unit sweeps. On this particular day, the units were picked out of a box by the XO (executive officer) at officers' call. I was in the office when ETCS (St.C) came down and said CSD had been resolved; from there he began to talk with the CMAA, (after) which the CMAA came to me and told me we were going to do CSF.

MACM D then testified for the government as follows:

. . . On the morning we drew units for testing, I had a box with each one cut up into single sheets, shook it up, held it above my head and the XO made the selections. It was about one hour later following a meeting that the CMAA informed me of the problem. I immediately went to the XO and informed him of the situation. I explained to him that the bulk of personnel from CSD went into CSF. At that time, the XO made the decision to test CSF. I then returned to the MAA Office and told the CMAA we would be doing CSF . . .

After the recorder and LT H made final arguments, the ADB closed for deliberations. Upon reopening, the senior member announced findings that you had not committed misconduct due to drug abuse in 1996, but had committed such misconduct in 1997. Accordingly, the ADB recommended discharge UOTHC.

On 9 July 1997 the CO forwarded the case to the Chief of Naval Personnel (CNP), concurring in the finding of misconduct and the recommendation for discharge UOTHC. In his letter of that date, the CO noted that LT H had not yet filed a letter of deficiency or asked for an extension of time to do so.

On 11 July 1997 LT H submitted her letter of deficiency to CNP. After reciting the basic facts of the case, she attempted to clarify as follows the procedure used aboard SAIPAN to select units and individuals for urinalysis:

. . . Initially, the USS SAIPAN conducted urinalysis inspections by randomly selecting a number between 1 and 9 and then calling all individuals with that digit in a particular position in their social security number. Sometime prior to March 1997, this system was altered to instead randomly select a number of divisions and then have everyone within that division provide a sample. Both systems were designed to be random sample inspections, one simply used social security numbers and the other divisions. Under either system, a random drawing was made from a hat to select either the social security digit or the division. This information was then fed into a computer system that pulled up all of the individuals with the appropriate social security number or within the applicable division. If the method of selection involved a random drawing of several divisions, the computer program automatically labeled that test as a unit sweep, despite the fact that the test was actually a random sample.

. . . On 17 March 1997 DSC (G) supplied a urine sample to USS SAIPAN pursuant to what was purported to be a random "divisor" sample drug screening. On this date, the (XO) drew 2 divisions from a hat. One of those divisions was CSD. Several months earlier CSD had been dissolved and all of its personnel were reassigned to either CSE or CSF . . .

LT H then asserted that after ETCS St.C was unable to persuade LT G that not everyone in CSE and CSF should provide a urine sample, the senior chief did an "end around" and convinced MAC M that only CSF members should provide samples. LT H also stated that both ETCS St.C and MAC M knew that you were a member of CSF and had a prior positive urinalysis, and questioned the urinalysis procedures aboard SAIPAN.

LT H then argued as follows:

. . . Given the method by which this test was conducted, DSC (G) asserts that this urinalysis failed to meet the criteria necessary to utilize the results to characterize service as (UOTHC). Per OPNAVINST 5350.4B, the only tests which can be used to characterize service as (UOTHC) are (1) search and seizure tests, (2) inspections, (3) medical tests, (4) rehabilitation tests, and (5) accession tests. The results of any other type of test may not be used to characterize service.

In this case, the command alleges that this test was an inspection. All interviewed witnesses, including those conducting the urinalysis program claimed that the test was designed to be a random division sample. MA1 (V) noted in his testimony that the computer automatically assigns the notation "IU" for Unit Sweep, any time the sampling covers an entire division. MA1 (V) agreed that this designation would occur even if, in fact, the test was intended as a random sample, drawn by division rather than social security number. In essence, the Command is now attempting to re-classify what everyone understood to be a random inspection as a unit sweep, so as to justify a lack of randomness in the test selection. Such actions are clearly unjust.

Additionally, this test was far from random. Those members in CSD actually had twice the probability of everyone else on the ship of being selected for urinalysis.

Furthermore, the error of drawing a non-existent division was easily rectified. The (XO) could simply have redrawn a second division to provide samples. After all, even CSE and CSF could have been selected as they were both still remaining in the hat. When questioned about this possibility, MACM (D) responded that the XO would not have wanted to redraw because he had already announced which divisions were going to provide samples, and he likes for everyone to see and understand the urinalysis system so that they know it is fair. Unfortunately, the events which occurred in the absence of simply redrawing is probably exactly the appearance of impropriety the (XO) sought to avoid.

Finally, the Department Head, LT (G) specifically instructed ETCS (St.C) that everyone in both CSE and CSF would provide samples. ETCS (St.C), however, chose to ignore his superior and instead approached MAC (M) about the situation. MAC (M) and ETCS (St.C) then determined which division needed to provide a sample that day. ETCS (St.C) had absolutely no authority to be involved in these decisions. What worse appearance of bias could exist than for an outsider to the urinalysis program to approach the Urinalysis Coordinator to adjust the results of who needed to provide a sample?

The CO endorsed LT H's letter on 24 July 1997 and stated that her contentions of error were raised at the ADB and were taken into account by the ADB in arriving at its findings and recommendations. The CO then stated as follows:

Omitted from (LT H's) letter is MACM (D's) testimony that the urinalysis used as the basis for separation was ultimately a unit sweep ordered by the (XO). As such, there was sufficient evidence to find that, contrary to the position taken by (LT H) at the (ADB), the actual test premise was a unit sweep within the meaning of OPNAVINST 5350.4B.

It appears that CNP accepted the CO's assertion, rejected LT H's contentions and directed your discharge UOTHC. The record reflects that you were so discharged on 14 October 1997, after about 19 years and one month of active service.

The Board considered your contention that it was improper, or at the very least unfair, for LT T to sit on your ADB because he had been previously detailed as a SCM to try you on the charge of using cocaine in 1997. In support of this contention, you and your counsel allege that in this capacity, LT T would have acted as a prosecutor; he had reviewed an investigation and other documentation pertaining to that charge before you refused trial by SCM; and he spoke with the legal officer concerning the allegation against you. The qualifications for membership on an ADB were set forth in Article 3640350.4a of the Naval Military Personnel Manual (MILPERSMAN), which stated that officers appointed to an ADB should be "well qualified by reason of grade, leadership experience and judicious temperament." MILPERSMAN Article 3640350.5d(6) stated that an ADB member could be "challenged for cause only." The Board concluded that LT T's status as summary court officer did not disqualify him from sitting on your ADB or render him subject to a challenge for cause.

Rule for Courts-Martial (RCM) 1301(b) states that the function of the SCM, the summary court-officer, is to "adjudicate minor offenses under a simple procedure . . . thoroughly and impartially inquire into both sides of the matter and . . . ensure that the interests of both the government and the accused are safeguarded and that justice is done." Accordingly, this officer serves as a defense counsel as much as he does a prosecutor, but primarily serves as a fact-finder. Just because he would have acted as a fact-finder had you elected trial by SCM did not disqualify him from serving in that role at your ADB. Additionally, RCM 1304(a) requires the SCM, before trial, to "carefully examine" relevant paperwork, to include reports of investigation, witness statements and other correspondence. Accordingly, it would have been appropriate for LT T to review certain documentation concerning your case, and you do not indicate how his review of such material might have been

prejudicial. You also provide no substantiation for your contention that LT T spoke with the legal officer. Finally, and arguably most important, your military counsel, LT H, questioned LT T during the preliminary phase of the ADB and declined to challenge him for cause.

The Board also rejected the contention that the ADB improperly found that you had used cocaine. Clearly, there was ample evidence to support the ADB's finding of drug use. You tested positive for cocaine use on the March 1997 urinalysis, and have submitted no evidence to show that the command failed to follow the urine sample collection procedures set forth in Appendix B of Enclosure (4) to OPNAVINST 5350.4, or that the drug laboratory improperly tested your urine sample. The Board also noted that in accordance with MILPERSMAN Article 3640350.5f(2), the standard of proof at an ADB was not beyond a reasonable doubt but only a preponderance of the evidence.

In support of your contention that the ADB's finding was improper, you allege that although the March 1997 collection of urine samples was deemed to be either a random or unit sweep urinalysis, it was neither, essentially for the reasons set forth in LT H's 11 July 1997 letter of deficiency. However, whether or not the urine samples were collected as a random urinalysis or unit sweep is irrelevant on the issue of whether the ADB properly found that you committed misconduct due to drug abuse. In this regard, MILPERSMAN Article 3640350.5c stated that any relevant and competent evidence could be admitted at an ADB. Even if the 1997 urinalysis did not qualify as random or a unit sweep, the positive result certainly was relevant and could be introduced in evidence to show that you had used cocaine.

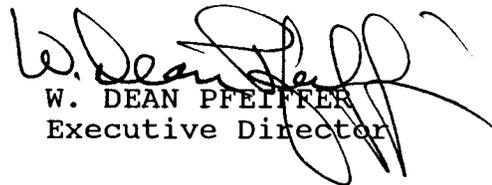
Whether the 1997 evolution met the requirements for a random or unit sweep urinalysis is relevant on the characterization of your service as UOTHC. Enclosure (4) to OPNAVINST 5350.4B stated that random and unit sweep urinalyses are considered "inspections" under MRE 313 and could be utilized for the purpose of characterizing service. Certain other urinalyses may not be used for such a purpose. Accordingly, if the 1997 urinalysis was neither random nor a unit sweep, a case can be made that it could not be used to characterize your service. However, the Board agreed with the advisory opinion that the 1997 urinalysis constituted an inspection and, therefore, it could be used to characterize your service. In this regard, the Board noted your contention that CSF division was selected only because you were a member of that division. However, every individual who testified at the ADB on this issue, except you, denied this was the case except for DSCS D. Even he admitted he had no proof that the division was selected for this reason, but only said that he had "a feeling" that you had been targeted. The Board therefore agreed that CSF was not selected as a pretext to gather evidence against you by requiring you to submit a urine sample. Additionally, although there was a degree of non-compliance with the selection procedure set forth in paragraph 3d of USS SAIPAN

Instruction 5355.1F for determining which divisions would participate in the urinalysis, the Board determined this was a minor deviation from the stated policy and not a serious violation. Consequently, since the 1997 urinalysis was accomplished as an incident of command and was not undertaken in order to obtain evidence against you, this urinalysis constituted an inspection and the results could be used to characterize your service.

Based on the foregoing, the Board could find no justification to remove any derogatory material from your record, reinstate you in the Navy, upgrade your discharge, or change the reenlistment code. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,


W. DEAN PFEIFFER
Executive Director

Enclosure