

(Filed: May 11, 1998)

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CLIFFORD De LOUIS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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\* Military pay; court review of a  
\* nonjudicial punishment (NJP)  
\* issued under 10 U.S.C. § 815;  
\* court review of an administra-  
\* tive discharge under "Other  
\* Than Honorable" circum-  
\* stances; Defense Directive  
\* 1332.14; the same offense can  
\* form the basis for an NJP and  
\* an administrative discharge  
\* under "Other Than Honorable"  
\* circumstances.

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Clifford De Louis, Silver Spring, Maryland, pro se.

Paul S. Padda, with whom were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, and James M. Kinsella, Assistant Director, Washington, D.C., for defendant.

OPINION

ANDEWELT, Judge.

I.

In this military pay action, plaintiff, Clifford De Louis, seeks back pay, forfeited pay, and related injunctive relief from the United States Navy. Plaintiff alleges that both his December 2, 1993, nonjudicial punishment (NJP) and his March 25, 1994, discharge from the Navy under "Other Than Honorable" conditions violated Navy regulations and plaintiff's constitutional and contractual rights. Plaintiff's NJP and subsequent discharge were based on plaintiff's allegedly having signed the name of his supervisor, Lieutenant Commander Gordon Ferber, on a written evaluation of plaintiff's work which plaintiff used in seeking a transfer to Hawaii. In a January 25, 1996, order, the court addressed certain issues presented in the complaint. The court subsequently reserved the remaining issues for trial. This action is before the court after trial. For the reasons set forth below, the court concludes that plaintiff's

NJP did not result in any material prejudice to a substantial right and that the Navy officials involved in plaintiff's discharge acted within their discretion.

## II.

As a prelude to the court discussing its findings of fact and conclusions of law, the court will briefly address one crucial issue that permeated this litigation--the credibility of plaintiff as a witness. Plaintiff testified on a variety of issues in a manner that was inconsistent with the testimony of other witnesses. On one such issue, the government presented as an exhibit a document that bore what appeared to be plaintiff's signature and purported to waive plaintiff's right to have an administrative board determine whether plaintiff should be administratively discharged. The government also presented a witness who testified that she observed plaintiff signing that waiver. Plaintiff, however, testified that he had never signed the document, that the signature on the document is a forgery, and that he was out of town on the date the document was signed. Regrettably, this court concludes that not only was plaintiff's testimony as to this alleged forgery not credible, but also plaintiff intentionally testified in a manner that was false and inconsistent with the oath that this court administered in which plaintiff swore or affirmed to tell the truth. <sup>(1)</sup> Because the court concludes that plaintiff demonstrated a willingness to testify falsely, the court has determined to resolve virtually all issues in which plaintiff's credibility is material in a manner adverse to plaintiff.

## III.

Before addressing plaintiff's arguments attacking the NJP and his "Other Than Honorable" discharge, it is necessary to place the NJP in the larger context of the choices available to the military for addressing offenses by servicemembers. In the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-935, Congress establishes four pertinent methods for addressing offenses by servicemembers: general courts-martial (Section 818), special courts-martial (Section 819), summary courts-martial (Section 820), and nonjudicial punishment (Section 815). The general and special courts-martial are somewhat analogous to the concept of felony and misdemeanor courts, respectively. General courts-martial may try servicemembers for any punishable offense under the UCMJ and are authorized to order any lawful sentence, including the penalty of death. Special courts-martial may try servicemembers for any noncapital offense punishable under the UCMJ but their sentencing power is more limited. Special courts-martial may not order "death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months." 10 U.S.C. § 819. Lawyer judges preside over general and special courts-martial and the servicemember is entitled to the full panoply of rights such as the rights to appointed defense counsel and a jury trial and the rights to confront witnesses and remain silent. Servicemembers may not refuse either general or special courts-martial.

Summary courts-martial differ in numerous ways from general and special courts-martial. Only enlisted members are potentially subject to summary courts-martial and those members have the right to refuse summary courts-martial and demand instead a trial by general or special courts-martial. Summary courts-martial employ a single officer who acts as the judge, jury, prosecutor, and defense counsel. Like special courts-martial, summary courts-martial may try servicemembers for any noncapital offense punishable under the UCMJ but their sentencing power is even more limited. Summary courts-martial may not order "death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one-month's pay." 10 U.S.C. § 820. In a summary court-martial, the servicemember is entitled to the protections provided by the military rules of evidence such as the rights to remain silent, call witnesses on his or her behalf, and question all witnesses.

The servicemember's commanding officer conducts an NJP and his or her authority is limited by the regulations prescribed by the President and the Secretary of Defense. Except where the servicemember is "attached to or embarked on a vessel," the servicemember may refuse an NJP and demand instead a trial by court-martial. See 10 U.S.C. § 815(a). As to the commanding officer's sentencing power in an NJP, 10 U.S.C. § 815(b) provides:

Subject to subsection (a) of this section, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or

more of the following disciplinary punishments for minor offenses without the intervention of a court-martial.

The maximum punishments thereafter listed generally are further limited than those available for summary courts-martial.

Part V of the Manual for Courts-Martial (1984) (hereinafter MCM) sets forth the regulations governing an NJP. The MCM describes the purpose of the NJP procedure as follows: "Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction." MCM

V-1.c. A commander must base a determination to employ an NJP on the exercise of personal discretion. See id. at V-1.d(2). Unlike the three types of courts-martial discussed above, the military rules of evidence do not apply in an NJP. The MCM, however, provides certain rights for the servicemembers. For example, when a servicemember requests a personal appearance before the NJP authority, the MCM provides that the servicemember is entitled to be informed of the information against him or her and the offenses alleged, to examine documents reviewed by the commander, and to present a defense. See id. at V-4.c(1). In rendering a decision, the commanding officer may consider any relevant evidence and may base his or her decision on a preponderance of the evidence rather than evidence establishing guilt beyond a reasonable doubt. The MCM establishes an appeal procedure for servicemembers who consider the punishment imposed under the NJP to be unjust.

#### IV.

#### A.

Plaintiff's December 2, 1993, NJP resulted in an \$800.00 forfeiture of plaintiff's pay and a reduction in rank of one pay grade. Plaintiff did not appeal the NJP. This court has jurisdiction to review forfeitures of pay imposed under NJP procedures. See Cochran v. United States, 1 Cl. Ct. 759, 765-66 (1983), aff'd without op., 732 F.2d 168 (Fed. Cir.), cert. denied, 469 U.S. 853 (1984); Cappella v. United States, 224 Ct. Cl. 162,

169-70, 624 F.2d 976, 980 (1980). In conducting such a review, however, "it is not this court's function to review the merits of findings of guilt . . . , but only the disregard or violation of the Constitution, statute or regulations in the conduct of the proceedings." Cochran, 1 Cl. Ct. at 770. Not all such violations warrant reversing an NJP. The MCM provides that "[f]ailure to comply with . . . [NJP procedures] shall not invalidate a punishment imposed [thereunder], unless the error materially prejudiced a substantial right of the servicemember on whom the punishment was imposed." MCM V-1.h; see also Matias v. United States, 923 F.2d 821, 826 (Fed. Cir. 1990) (the Court of Federal Claims' jurisdiction to hear collateral attacks of courts-martial reaches only "those issues that address the

fundamental fairness in military proceedings and the constitutional guarantees of due process").

## B.

Plaintiff contends that the Navy improperly deprived him of his right to demand a trial by court-martial instead of accepting the NJP. (2) Plaintiff originally had requested a court-martial but later voluntarily withdrew that request and orally expressed his willingness to proceed with the NJP. (3) Plaintiff contends, however, that this voluntary withdrawal of his request for a court-martial was not controlling because it was not in writing. But plaintiff has not pointed to any regulatory requirement demanding that such withdrawal be in writing and due process does not so require. Indeed, a servicemember's pertinent due process rights are protected by the requirement that waivers of the right to a trial by court-martial "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Fairchild v. Lehman, 814 F.2d 1555, 1559 (Fed. Cir. 1987) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

Plaintiff contends that he was not sufficiently aware of the relevant circumstances and likely consequences of choosing an NJP because Lieutenant Commander Ferber and Navy counsel Lieutenant Vern Brown relayed to plaintiff that if plaintiff consented to the NJP, he could not be separated from the Navy for the alleged forgery. Plaintiff testified, in effect, that he had negotiated what amounted to a plea bargain under which the NJP would serve as the only punishment for plaintiff's alleged actions. Plaintiff's testimony on this issue, however, is inconsistent with the testimony of Ferber and Brown. Ferber testified that he never told plaintiff that plaintiff could not be separated from the Navy for the conduct involved. Ferber also testified that at the NJP proceeding, he read verbatim to plaintiff a form used by the Navy that tracks the relevant portions of the MCM and advised plaintiff in detail of his rights. Ferber further testified that in response, plaintiff acknowledged that he understood his rights. (4) Brown testified that although he did not remember the exact details of his conversations with plaintiff, he would not have advised plaintiff that plaintiff could not be separated from the Navy after the NJP because Brown knew that the state of the law was to the contrary.

This direct conflict between plaintiff's testimony and the testimony of the other witnesses presents an issue of credibility. Because, as noted above, the court has concluded that plaintiff demonstrated a willingness to testify falsely, the court will rely upon the testimony of Ferber and Brown and conclude that plaintiff consulted counsel and was informed of his rights, that plaintiff did not receive incorrect advice, and that plaintiff's waiver of a court-martial satisfied the requirement in Fairchild. (5)

## C.

Next, plaintiff argues that the court should set aside the NJP because Lieutenant Commander Ferber conducted the NJP in a manner inconsistent with Navy requirements. As noted above, under MCM V-1.h, failure to comply with Navy requirements "shall not invalidate a punishment imposed under [an NJP], unless the error materially prejudiced a substantial right of the servicemember on whom the punishment was imposed." Although plaintiff lists a series of errors in the NJP process, ultimately plaintiff has not demonstrated any "error [that] materially prejudiced a substantial right of [plaintiff]."

First, plaintiff alleges that the Navy failed to conduct any investigation prior to the NJP. The evidence submitted at trial, however, indicates that the Navy did conduct such an investigation. Next, plaintiff argues that Ferber failed to provide plaintiff with the statements of witnesses and an opportunity to have a signature expert present to address the issue of whether plaintiff had forged Ferber's signature. But nothing in the record suggests that plaintiff ever requested to examine documents or present witnesses and the court finds that plaintiff, having been informed of these rights, did not make such a request.

Plaintiff also alleges that Ferber's discussing plaintiff's situation with superiors prior to conducting the NJP violated MCM V-1.d(2), which requires the commander to "exercise personal discretion in evaluating each case." But defendant demonstrated at trial that Ferber's discussions with his superiors were directed toward securing relevant background information and that Ferber did in fact exercise personal discretion in evaluating plaintiff's case.

Next, plaintiff argues that Ferber unfairly changed the charge against plaintiff from forgery to false official statement so as to prevent plaintiff from presenting a defense. These two offenses, however, are similar and the respective defenses available substantially overlap. (6) Plaintiff has failed to identify any defense precluded to him by this change or point to any substantial right that was prejudiced by the unavailability of this unidentified defense. Plaintiff also faults Ferber for not allowing plaintiff to examine the original copy of the allegedly forged evaluation and for relying upon an illegible copy at trial. But plaintiff has not demonstrated that Ferber withheld the original from plaintiff during the NJP and, in any event, the copy used at trial was legible.

Plaintiff contends that Ferber was obliged to proceed using a court-martial rather than an NJP because pursuant to 10 U.S.C. § 815(b), an NJP can be employed only for "minor offenses" and the conduct with which plaintiff was charged is not properly characterized as a "minor offense." The controlling definition of a minor offense is provided in MCM V-1.e, as follows:

*Minor offenses.* Nonjudicial punishment may be imposed for acts or omissions that are minor offenses . . . . Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record, and experience; and the maximum sentence imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial. The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment, but nonjudicial punishment for an offense other than a minor offense (even though thought by the commander to be minor) is not a bar to trial by court-martial for the same offense. However, the accused may show at trial that nonjudicial punishment was imposed, and if the accused does so, this fact must be considered in determining an appropriate sentence.

(Citations omitted.)

For allegations of forgery and false official statements, the MCM allows confinement of up to five years. The MCM merely states that a minor offense "ordinarily" would not involve a potential punishment of more than one year. Hence, the MCM does not unequivocally bar a commander from employing an NJP for an offense with a potential punishment of five years. The MCM ultimately leaves it to the discretion of the commander as to when to impose an NJP and obliges the commander to consider not only the maximum sentence imposable but also age, rank, duty assignment, record, and experience. Consistent with the regulations, Ferber evaluated factors other than potential punishment and determined to proceed, with plaintiff's acquiescence, with an NJP. The court concludes that this decision was properly within the broad discretion allowed Ferber under the controlling regulations.

Plaintiff makes certain additional allegations as to the procedures employed during the NJP. The court has considered each of those allegations and concludes that plaintiff has failed to make the requisite showing under the standards articulated above that the NJP process resulted in any material prejudice to a substantial right.

A.

Before addressing plaintiff's arguments attacking his "Other Than Honorable" discharge, it is necessary to review the controlling regulations and background facts. Pursuant to 10 U.S.C. § 1169, regular enlisted servicemembers such as plaintiff may be discharged "as prescribed by the Secretary." The Secretary of Defense has issued implementing regulations entitled "Enlisted Administrative Separations." Department of Defense Directive 1332.14, published at 32 C.F.R. pt. 41. The Secretary of the Navy has further implemented these regulations in the Naval Military Personnel Manual (NMPM). Pursuant to NMPM §§ 3630600.1c and d, servicemembers may be discharged for the "commission of a serious offense." As to when an offense is punishable by such a discharge, NMPM § 3630600.1c allows an administrative discharge "when a punitive discharge would be authorized by the Manual for Courts-Martial for the same or a closely related offense." The misconduct for which plaintiff was processed for separation, a violation of Article 107 of the UCMJ involving the signing of an official document with the intent to deceive, would have been punishable by a punitive discharge and hence would qualify as a "serious offense." (7)

B.

The NMPM details the procedures for initiating and conducting administrative discharge proceedings. NMPM §§ 3610200.1a, 3630600.5, 3640200.1a(2), and 3640350.2. Servicemembers separated for cause must be processed for all applicable bases of separation. NMPM §§ 3610260.3, 3620200.5, 3630600.5d, and 3640200.1b. Servicemembers who are processed for the commission of a serious offense are entitled to have an administrative discharge board review their status because any resulting discharge potentially may be characterized as being under "Other Than Honorable" conditions. NMPM §§ 3610300, 3630600.3 and 5. The commanding officer initiates the administrative separation process by notifying the servicemember in writing of the basis for the administrative separation, including statements of certain rights to which the servicemember is entitled and a statement of awareness and acknowledgment of those rights. NMPM § 3640200. The servicemember's rights include the right to consult with counsel prior to electing or waiving any rights, the right to a hearing before an administrative separation board, the right to obtain copies of all documents to be forwarded to the board and the separation authority, the right to representation by qualified counsel before the board, and the right to present to the board oral and written statements on his or her behalf. NMPM § 3640200.

If a servicemember exercises his or her right to a hearing before an administrative separation board, the commanding officer appoints a board of at least three commissioned officers and/or senior enlisted members. NMPM § 3640350.1b. Board members must be impartial and may be challenged and replaced if they are determined to have preconceived opinions regarding the findings and recommendations to be made. NMPM §§ 3640350.1b(1)(h), 3640350.2b, 3640350.3b, and 3640350.7(1)(b). The board must consider the evidence and determine whether the servicemember committed the misconduct with which he or she was charged. NMPM § 3640350.5. (8) The board "shall rely upon its own judgment and experience in determining the weight and credibility to be given material received in evidence." NMPM § 3640350.2a. If the board finds that the servicemember committed the alleged misconduct, the board must recommend whether to retain or separate the servicemember. If the board recommends separation, it must also recommend the characterization of the separation as either honorable, general (under honorable conditions), or other than honorable. NMPM § 3640350.5. (9)

A servicemember can waive his or her right to a hearing before an administrative discharge board. NMPM §§ 3630600.5g, 3640200.2a(10), 3640200.8, and 3640200.11. In the event of such a waiver, the servicemember is evaluated for discharge by the "separation authority." The separation authority

considers the relevant materials, including the commanding officer's recommendation, and determines whether to approve the separation and if so, whether or not the separation will be honorable. NMPM §§ 3610220.1j and 3610260.8. (10) In reaching its decision, the separation authority must determine whether the basis for processing the separation is substantiated by a preponderance of the evidence and whether the process was flawed in such a way as to cause prejudice to a substantial right of the servicemember. NMPM §§ 3610220.1j and 3640370.

C.

Shortly after conducting plaintiff's NJP, Lieutenant Commander Ferber further discussed plaintiff's false evaluation with officers at the Naval Reserve Readiness Command Region 22, which is in charge of a number of reserve centers, including the center in Tacoma, Washington, where plaintiff reported for duty. The Readiness Command had been advising Ferber on policies, including those applicable to plaintiff's case. During these conversations after the NJP, the Chief of Staff of the Readiness Command suggested that plaintiff's offense was more serious than Ferber had thought and recommended, but did not order, Ferber to proceed with administrative discharge. After considering this advice, Ferber decided to recommend administrative discharge.

On December 16, 1993, plaintiff received a letter of notification from Ferber informing plaintiff that the Navy had initiated administrative separation proceedings against him based upon "Misconduct Due to Commission of Serious Offense." The letter explained that the process could result in plaintiff being discharged on an "Other Than Honorable" basis and listed the rights to which plaintiff was entitled, including the right to obtain copies of all documents supporting his separation and the right to a hearing before an administrative board at which plaintiff could be represented by qualified counsel. The letter specifically informed plaintiff that "nonjudicial punishments . . . occurring before . . . this Notice may be considered by the separation authority and Administrative Board (if convened) in determining retention or separation . . . and the characterization of any discharge to be recommended."

Plaintiff in turn signed a "Statement of Awareness and Request for or Waiver of Privileges" in which plaintiff stated that he had been afforded an opportunity to, and did, consult with counsel, that he understood that he was being considered for an administrative discharge for the "Commission of a Serious Military Offense," and that this consideration could result in plaintiff being discharged on an "Other Than Honorable" basis. Plaintiff further stated that he objected to the separation and requested an administrative board and qualified counsel to represent him before the board.

Thereafter, in a February 21, 1994, letter to the Chief of Naval Personnel, plaintiff addressed the merits of the misconduct charge against him. Plaintiff denied that he had committed any misconduct and alleged that rather than being based on any misconduct, the effort to discharge him was in retaliation for plaintiff's alleged anonymous letter and telephone call to the Readiness Commander in which plaintiff complained about the conditions at the Tacoma reserve center. Plaintiff contended that in an effort to retaliate, the Readiness Commander directed Ferber to process plaintiff for separation. In the letter, plaintiff retracted his previous objection to being separated and apparently suggested that he was withdrawing his request to have his fate determined by an administrative board. Plaintiff stated:

The Readiness Commander insists on convening the Administrative Board at his level if one is to convene; thereby keeping my Commanding Officer out of the process. It is my belief that every member detailed to such a Board would have some preconceived opinions regarding the findings and recommendations to be made relative to my case which would undoubtedly result into legal prejudice of my rights. Therefore, I am taking this route instead. I am not objecting to being separated. However, based on all the above facts, and in the name of fairness, I do believe that I should be processed at the

Convenience of the Government instead of misconduct and transferred to a reserve component.

Based on this letter and conversations with plaintiff, Ferber concluded that plaintiff intended to waive his right to a hearing before an administrative board and thus forwarded his recommendation regarding plaintiff and the related papers to the appropriate offices within the Navy. In response, Ferber was told that in order to properly waive the right to an administrative board hearing, plaintiff had to sign a specific written request to that effect. As a result, plaintiff was contacted and asked to sign such a waiver. Plaintiff signed the waiver on March 10, 1994, in front of an eye witness. This is the previously discussed waiver that plaintiff untruthfully denied having signed. On March 25, 1994, plaintiff was discharged under "Other Than Honorable" conditions.

D.

In Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983), the Court of Appeals for the Federal Circuit described generally the standard to be used by courts in reviewing military determinations as to servicemembers' fitness to continue service in the military, as follows:

It is equally settled that responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province; and that courts cannot substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence. Thus, although judicial review of military service determinations with monetary consequences is available, the review jurisdiction has been summarized:

[R]eview of the administrative decision is limited to determining whether the . . . action was arbitrary, capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which [the complainant] has been seriously prejudiced. [Citations omitted.]

Clayton v. United States, 255 Ct. Cl. 593, 595 (1980).

Heisig, 719 F.2d at 1156 (footnotes omitted).

Plaintiff did not demonstrate at trial that the decision to discharge him on an "Other Than Honorable" basis was arbitrary, capricious, in bad faith, or unsupported by substantial evidence. As described above, plaintiff was processed for an administrative discharge for a violation of Article 107 of the UCMJ, an offense for which the Manual for Courts-Martial authorizes a punitive discharge and, hence, an offense for which administrative separation is available pursuant to NMPM § 3630600.1c. The administrative record contains substantial evidence to support the conclusion that plaintiff committed the alleged violation and the evidence presented at trial confirmed that conclusion.

Next, despite allegations to the contrary, plaintiff failed to establish that his discharge was the product of bad faith actions by Navy employees. At the time of plaintiff's NJP, Ferber did not intend later to process plaintiff for separation. Ferber did not decide to recommend discharge until after the NJP when, based on conversations with his superiors at the Readiness Command, Ferber rethought his position. Contrary to plaintiff's contention, the court finds that no tricks or subterfuge were involved and that the Navy did not aim to dupe plaintiff into accepting an NJP and then administratively discharge plaintiff based upon that NJP. Ferber impressed the court as an honest and supportive commander who made all pertinent decisions based on a careful exercise of his view of the merits. Ferber was influenced by the recommendations of his superiors but recognized that the responsibility for making the pertinent decisions and recommendations was on his shoulders and that he was to exercise personal discretion.

Plaintiff failed to establish that Ferber or any person involved in plaintiff's discharge took any actions against plaintiff in bad faith.

Plaintiff also failed to establish that his "Other Than Honorable" discharge was "contrary to law, regulation, or mandatory published procedure of a substantive nature." *Id.* (quoting Clayton v. United States, 255 Ct. Cl. 593, 595 (1980)). In processing plaintiff's discharge, the Navy followed the applicable controlling statutes and internal procedures and based the final discharge in part on plaintiff's NJP. As described above, plaintiff voluntarily chose an NJP rather than a court-martial after consulting with counsel and then voluntarily chose not to appeal the imposed punishment. Further, plaintiff was informed in the discharge process that a prior NJP could be used against him, that any resulting discharge could be on "Other Than Honorable" grounds, and that he had the right to a hearing before an administrative board instead of the separation authority. Although choosing a hearing before an administrative board would have afforded plaintiff certain rights and opportunities not available at the separation authority in contesting the allegations that had led to his NJP, plaintiff voluntarily and knowingly chose not to avail himself of that option.

Next, plaintiff argues that it was not appropriate for the Navy to have relied upon the same offense to support both an NJP and an administrative discharge because an NJP can be employed only for "minor offenses" and an administrative discharge under NMPM § 3630600.1c is available only for "serious offenses." Plaintiff claims that a single offense cannot reasonably be characterized as both "minor" and "serious." Although plaintiff's argument has some initial intuitive appeal, ultimately it cannot survive close analytic scrutiny. The terms "minor" and "serious" are terms of art that are defined specifically in the respective regulations governing an NJP and an administrative discharge. Upon review of those definitions, there is no inconsistency with Ferber first characterizing the offense as "minor" for NJP purposes and later, in a separate consideration, as "serious" for administrative discharge purposes.

As quoted above from Part V of the MCM, a determination as to whether an offense is minor "is a matter of discretion for the commander imposing nonjudicial punishment" and is based upon numerous factors in addition to the nature of the offense. These factors include age, rank, duty assignment, record, experience, and the circumstances surrounding the commission of the offense. Hence, an offense that necessarily cannot be deemed "minor" when only the nature of the offense is considered could possibly, in the discretion of the commanding officer, be considered minor once the other factors are added to the analytic mix. In contrast, a determination as to whether an offense is "serious" focuses exclusively on the nature of the offense. Pursuant to NMPM § 3630600.1c, an offense, in effect, can properly be classified as serious "when a punitive discharge would be authorized by the Manual for Courts-Martial for the same or a closely related offense." Because of the differences in the factors to be considered in the two distinct inquiries, it potentially is consistent with the specific regulation definitions for a commanding officer initially to classify an offense as "minor" for NJP purposes and later to characterize that same offense as "serious" for administrative discharge purposes. Based on the administrative record, Ferber acted within the scope of his discretion when he made each of the two distinct determinations. First, relevant factors not related to the nature of the offense supported Ferber's classification of the offense as "minor" for NJP purposes. Second, the nature of the offense, when viewed in isolation, is sufficient to warrant a classification of "serious" for administrative discharge purposes because pursuant to NMPM § 3630600.1c, "a punitive discharge would be authorized by the Manual for Courts-Martial for the same or a closely related offense."

Plaintiff also alleges that his discharge violated his due process rights, but plaintiff has not demonstrated any such violation. Initially, plaintiff voluntarily and knowingly waived his right to a court-martial on the charge of violating Article 107 of the UCMJ and later plaintiff voluntarily and knowingly waived his right to a hearing before an administrative discharge board. The Navy followed its regulations and procedures and plaintiff has not pointed to any actions by Navy officials that impinged upon his due

process rights or that otherwise prejudiced any other substantial right.

The court is not without some sympathy for plaintiff's personal plight. Plaintiff apparently worked hard and served successfully in the Navy for a number of years. He had expected to be transferred to Hawaii but instead he was discharged from service. Moreover, plaintiff mistakenly believed that the discharge to which he ultimately acquiesced would be on an honorable basis. Nevertheless, plaintiff apparently committed an act--submitting a false evaluation--which the Navy reasonably could not leave unsanctioned. As to the sanctions imposed, plaintiff was warned prior to waiving his right to a hearing before an administrative board that the prior NJP could be considered in the discharge determination and that the determination potentially could be a discharge on "Other Than Honorable" grounds. Turning to the instant litigation, a perceived prior wrong by coworkers can never justify the giving of false testimony. False testimony threatens the very foundations of the judicial process because false testimony dramatically increases the risk that the court will not reach the correct legal result and hence that justice will not be served. In any event, the central issue raised in the complaint is the correctness of the Navy's actions, not plaintiff's. Accordingly, for the reasons set forth above, the Navy officers involved in plaintiff's case acted within the discretion allowed them both with respect to the NJP and the administrative discharge. Hence, the court will not disturb the Navy's actions.

#### Conclusion

For the reasons set forth above, the Clerk of the Court shall dismiss plaintiff's complaint. Costs shall be awarded to plaintiff.

IT IS SO ORDERED.

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ROGER B. ANDEWELT

Judge

1. Based on conflicting evidence presented before trial, the court was concerned about the truthfulness of plaintiff's testimony. Hence, prior to administering the oath to plaintiff, the court stressed the importance of telling the truth and the possible sanctions for failing to tell the truth, as follows:

I am going to put you under oath. The oath is the basis of our justice system. If people do not tell the truth, the system breaks down. As a result of that, when people do not tell the truth there are very serious sanctions, including criminal sanctions. That is what the oath is about. When you say you will tell the truth, you subject yourself to these kinds of sanctions.

2. "[P]unishment may not be imposed under [an NJP] upon any [servicemember] who has, before imposition of [the NJP], demanded trial by court-martial in lieu of [the NJP]." MCM V-3.

3. "[I]n no event may [an NJP] be imposed . . . unless the demand [for court-martial] is voluntarily withdrawn." MCM V-4.b(1) (emphasis added).

4. Plaintiff faults Ferber for not using the correct procedures during an NJP conducted on November 30, 1993. But that NJP was halted and reconvened on December 2, 1993, after plaintiff had an opportunity to consult with counsel. During the December 2, 1993, NJP, Ferber read to plaintiff from the correct form which advised plaintiff of his rights.

5. Plaintiff contends that the Navy requires a signed statement from the servicemember acknowledging that he or she was fully advised of and understands his or her legal rights and that the administrative record herein does not contain any such signed form. But plaintiff has not cited any provision in the MCM that indicates that a written acknowledgment is a prerequisite to a binding NJP, much less that the Navy was obliged to maintain such a document if signed. Such a signed statement certainly would be useful evidence that plaintiff waived his right to a court-martial with full knowledge of the consequences, but the absence of such a statement in the record does not necessarily demand a conclusion that plaintiff did not voluntarily and knowingly waive his right to a court-martial.

6. 10 U.S.C. § 907, entitled "False official statements," provides:

Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

10 U.S.C. § 923, entitled "Forgery," provides:

Any person subject to this chapter who, with intent to defraud--

(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

is guilty of forgery and shall be punished as a court-martial may direct.

7. NMPM §§ 3630600.1c and d distinguish those instances when a servicemember "must be processed" for administrative separation and those instances when the commanding officer is authorized, but not required, to process the servicemember for separation.

8. The board members must find by a preponderance of the evidence that the basis for processing the separation is established. Court-martial rules of evidence are not controlling at the administrative separation board proceedings. NMPM §§ 3640350.2a, 3640350.4, and 3640350.5.

9. The board is not authorized to recommend a bad conduct discharge or a dishonorable discharge, both of which are punitive discharges that may be imposed only by a court-martial. NMPM § 3610300.1.

10. The separation authority is the Chief of Naval Personnel in any case in which an other than honorable discharge is possible or when the servicemember objects to separation. The separation authority gives the final approval or disapproval of all discharges. NMPM §§ 3610220.1b, 3610220.1c (5), 3610220.1i(2), and 3630600.5f.