DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-206

[redacted]

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on September 26, 2014, and prepared the draft decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 22, 2015, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant commander (LCDR) on active duty, asked the Board to remove from his record a CG-3307 ("Page 7"), dated January 6, 2011, which is signed by the applicant and his commanding officer (CO) and states the following:

> In accordance with [Coast Guard firearms policy], you are advised that as the subject of a restraining order issued on 04 JAN 2011, you are prohibited from accessing or possessing firearms or ammunition as explained in the Coast Guard Policy on the Possession of Firearms and/or Ammunition by Coast Guard Military Personnel, COMDTINST, COMDTINST 10100.1 (series), for the duration of the order. You are advised that this prohibition is a violation of federal law and applies to personally owned firearms and ammunition as well as government owned firearms and ammunition. Possession of any firearm or ammunition, including those previously or privately owned, for the duration of the order, is a violation of the law as contained in 18 U.S.C. Section 922 and if you are found to be in the possession of a firearm, you may be prosecuted by the civilian authorities or punished under the Uniform Code of Military Justice.

The applicant argued that the Page 7 was issued in error because the order he received does not meet the Coast Guard's definition of a "restraining order" in COMDTINST 10100.1:

> For the purposes of this instruction, the term 'restraining order' applies to military protective orders or a civil court order which was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and includes a finding that such person represents a credible threat to the physical custody of such intimate partner or child.

The applicant alleged that the order documented on the Page 7 was a temporary order and that he received no notice or opportunity to participate before the order was issued on January 4, 2011. The applicant stated that the hearing on January 24, 2011, was the first of which he received notice and was able to participate, and as a result of the hearing, the order was dismissed "freely without intimidation."

The applicant submitted a copy of a "Temporary Order—Protection from Abuse," which a state family court issued on January 4, 2011, upon the applicant's wife's complaint, and which restrained the applicant from contacting his wife and required him to vacate their household. The order states that it was issued "upon consideration of plaintiff's complaint (and having found that immediate and irreparable injury, loss or damage will result to the plaintiff before a notice can be served and a hearing had thereon." The order schedules a hearing for January 24, 2011, "[i]f the defendant wishes to be heard." The applicant also submitted a copy of the summons he received to appear at the hearing on January 24, 2011, and a copy of an order dismissing the temporary restraining order. The order of dismissal shows that the temporary restraining order was dismissed as a "Free & Voluntary Act – No Intimidation," rather than due to failure to appear, burden of proof not met, or duplicative action.

In addition, the applicant alleged, his CO told him that the Page 7 would not be entered in his record if the temporary order was dismissed at the hearing on January 24, 2011, and it was in fact dismissed. The applicant stated that the Page 7 was not in his record when he reviewed it as a candidate for promotion to LCDR in 2011, but was somehow entered thereafter, and on September 5, 2014, he discovered it had been erroneously entered in his record, where it might damage his future eligibility for promotion. In support of these allegations, the applicant submitted a copy of his August 2011 record, which does not include the Page 7, and letter from the CO to the BCMR, dated September 10 2014. The CO corroborated the applicant's statements concerning the circumstances surrounding the disputed Page 7, including the fact that the Page 7 was issued as a precaution and was not supposed to be entered in the applicant's record since the temporary restraining order was dismissed at the hearing.

VIEWS OF THE COAST GUARD

On February 27, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case.

The JAG adopted the findings and analysis in a memorandum on the case submitted by the Personnel Service Center (PSC). PSC stated that the entry of the disputed Page 7 dated January 6, 2011, in the applicant's record "was an error" because the temporary order issued on January 4, 2011, did not meet the definition of "restraining order" in COMDTINST M10100.1 and because the applicant's CO did not intend for the Page 7 to go in the applicant's record if the temporary order was dismissed.

APPLICANT'S RESPONSES TO THE VIEWS OF THE COAST GUARD

On February 27, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. The Board did not receive a response.

APPLICABLE POLICY

COMDTINST 10100.1 contains the "Coast Guard Policy on the Possession of Firearms and/or Ammunition by Coast Guard Military Personnel" issued on April 14, 2009. Paragraph 5.B.(5) defines "restraining order" as stated at the top of page 2 herein. Paragraph 7 contains policies prohibiting the issuance of firearms and mandating the retrieval of firearms of members subject to restraining orders. Paragraph 7.g. requires the command to counsel members about the policy and states that a Page 7 "will be used to counsel a member any time a military protective order or civilian restraining order is issued."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's discovery of the alleged error.[1]

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[2]

3. The applicant alleged that the Page 7 dated January 6, 2011, in his record is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[3] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[4]

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[1] 10 U.S.C. § 1552(b).
[2] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[3] 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R.§ 52.24(b)).
[4] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. The applicant has proven by a preponderance of the evidence that the disputed Page 7 was entered in his record in error and should be removed. The preponderance of the evidence shows that the order issued on January 4, 2011, was a temporary order issued without notice to the applicant or an opportunity for him to be heard and so does not meet the definition of a "restraining order" under COMDTINST 10100.1. Because the court dismissed the order once the applicant had a hearing and the CO did not intend the Page 7 to be entered in the applicant's record if the order was dismissed, the Board finds that its entry in his record is erroneous and unjust.

5. Accordingly, the applicant's request should be granted.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of [redacted], USCG, for correction of his military record is granted. The Coast Guard shall remove from his military records all copies of the CG-3307 dated January 6, 2011, documenting his receipt of a restraining order issued on January 4, 2011.

May 22, 2015

[redacted]