

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-124

FINAL DECISION

ANDREWS, Attorney-Advisor:

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on June 4, 1999, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated March 30, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a xxxxxxxx,¹ asked the Board to correct his military record by removing two negative "page 7" administrative entries (Form CG-3307) dated June 11, 199x, and June 25, 199x.

The page 7 entry dated June 11, 199x, and signed by the commanding officer (CO) of USCG xxxxxx, states that according to a female member of the Coast Guard and witnesses, the applicant "used inappropriate language and made denigrating comments" to the female member in a bar in xxxx on the night of June 7, 199x. The page 7 further indicates that when she asked him to be quiet and leave, he told her that his behavior "in the civilian community had nothing to do with the workplace." Later that night, he tried to apologize, but she felt the effort was insincere. The page 7 indicates that the applicant was counseled for making comments that "constituted verbal sexual harassment," and that he apologized to the female member in front of three officers at the station. It also

¹ The applicant was a xxx at the time he applied to the Board. However, he was recently appointed as a xxxxxxxx.

indicates that the female member told the commanding officer that she was satisfied with the command's handling of the incident, and it warns the applicant that a further incident will result in disciplinary action.

The page 7 dated June 25, 199x, signed by the same CO, documents a sexual harassment complaint based on incidents that occurred in the fall of 199x but that only came to light after news of the June 7, 199x, incident and its aftermath spread. The complainant [xx] and witnesses stated that the applicant, who was then her supervisor, harassed her during her pregnancy. When she told him she would report his behavior, he told her he had advised the command of his actions and that they approved, which was not true. She did not report the incident earlier because she feared reprisal. The page 7 further indicates that the applicant was ordered to undergo training in civil rights and human relations but that no disciplinary action would be taken because this harassment incident had predated the incident and counseling documented in the page 7 dated June 11, 199x.

APPLICANT'S ALLEGATIONS

The applicant alleged that the page 7s "are false and have affected my military career despite my outstanding performance for the past 13 years." He alleged that one of the women who accused him of sexual harassment has since tried to harm his career by mailing copies of the page 7s to his last two commanding officers.

The applicant also alleged that in November 199x he was in xxx place on the 199x Final Eligibility List for appointment to the rank of chief warrant officer (CWO). He alleged that he was removed from the list when it was discovered that the two disputed page 7s were not in the paper copy of his personal data record (PDR) when it was reviewed by the CWO appointment board, although the page 7s were in his electronic PDR file. He alleged he would have been promoted to CWO on June 1, 199x, if his name had not been removed from the list.

The applicant submitted with his application several statements from superiors and other members who served with him in xxxx and from members who have served with him since. These submissions are summarized below.

In addition, to support his allegation that he has been harassed by one of his former accusers, the applicant submitted a copy of an e-mail message dated August 9, 199x, from the husband of xxx, the member whose accusations were documented in the page 7 dated June 25, 199x, to the Master Chief Petty Officer

of the Coast Guard.² The husband, a chief petty officer, wrote the following after learning that the applicant had again been chosen for appointment to CWO in 2000:

I'm writing in hopes that you will take action to right a wrong that is being committed. You are already familiar with my wife's situation. In March she provided you an approximately 20 page statement describing the sexual and other harassment she underwent while assigned to xxx. The acts were committed by [the applicant]. Presently, [the applicant] is number x on the CWO promotion message. This should not be. As you already know, he advanced to E-x unscrupulously. He does not deserve to be a chief, CWO, or even to be in my Coast Guard. I did not intervene on my wife's behalf when we were in xxx for a few reasons: I was not aware of the extent of harassment, I did not think it appropriate to intervene, nor was I asked. ...

[The applicant] is a cancer that has been allowed to spread. ... I feel removal of [the applicant's] name from the CWO promotion list and a full CGIS investigation with possible future disciplinary action is appropriate.

...

SUMMARY OF THE APPLICANT'S RECORD

The applicant enlisted in the Coast Guard on January 20, 198x. He attended "A" School and became a radioman (xx).³ In the 1980s, he served as a xxxx at Group xxx and xxxx at Air Station xxx. In 1991, he was assigned to xxxx as a xxxx, where he was advanced to xxxx (xxxx).

The two disputed page 7s were entered in the applicant's PDR in June 199x, while he served in xxxx. In December 199x, the applicant received evaluation marks of 7 (the highest possible mark) for "Professional/Specialty Knowledge" and "Developing Subordinates." Two page 7s that documented these marks indicated that he had developed an excellent training program that permitted the members of his section to be promoted much faster than usual. In addition, for his service inxxxx, he received a Letter of Commendation from his CO, who stated that he had qualified for, and performed the duties of, xxxxx in record time. The CO praised him as a "consummate professional" who "expertly managed all aspects of [his] xxxx section."

In 199x and 199x, the applicant served as a xxxxx at xxxx. From 199x until the date he applied to the BCMR, he served as the xxxxx in charge at Group xxx.

² This e-mail message was for a short time available to anyone who visited the Master Chief's web site. Apparently, the problem has been fixed.

³ The skill rating "xxxxxx" has since been changed to "xxxxxxxxx."

He has been awarded the Coast Guard Achievement Medal four times: once for his service in xxxxx and three times for his service in xxxxxx. He has also received many marks of 7 on his performance evaluations.

On xxxxx, 199x, the 199x CWO Final Eligibility List resulting from the 199x Warrant Appointment Board was issued. The list was effective from xxx, 199x, to xxxxx. Among members in the xxxxxx, the applicant's name appears xxxxx on the list.

On November 27, 199x, the applicant was notified by the Coast Guard Personnel Command (CGPC) that a special board would be convened to determine whether his name should be reinstated on the CWO eligibility list. CGPC indicated that his name had been removed from the list "upon receipt of notification that your Headquarters Personnel Data Record was incomplete at the time it was considered by the Warrant Appointment Board" because the two disputed page 7s were not in the PDR. He was invited to submit comments to the special board.

On xxxxxxx, 199x, a special board was convened to consider reinstating the applicant on the CWO eligibility list. On xxxxx, 199x, CGPC forwarded the special board's report to the Commandant with an endorsement of its recommendation that he be reinstated on the list.

On xxxxxxx, 199x, the Commandant disapproved the special board's recommendation, but ordered that, if the applicant reapplies for CWO, neither the special board's report nor the results of the previous selection board should be made available to the next selection board.

The applicant reapplied for CWO in 199x and appeared in xxxx place (up from xxxx place the year before) on the xxxx Final Eligibility List. The two disputed page 7s were in his record before this appointment board. He was recently appointed to CWO2.

AFFIDAVITS

The CO who signed the two disputed page 7s submitted a statement signed on May 24, 1999. The CO stated that in 199x, the applicant "was deeply troubled and frustrated by" what the applicant believed was a "personality conflict" with xxxx. The applicant told him that he did not agree with the second disputed page 7 but did not fight it because "he wanted to put the situation behind him." The CO further stated that, after receiving additional training in leadership and human relations, the applicant "performed in an exemplary manner ultimately resulting in the award of the CG Achievement Medal." In

addition, the CO stated that, while he believes he handled both situations correctly, "if it means that the [page 7] dated 25 JUN 9x needs to be removed from [the applicant's] record in order to rectify this injustice, then I support that."

A xxx stated that he was stationed in xxx from 199x to 199x. In 199x, he stated, he was asked to work in and "monitor" the applicant's section because of complaints from someone who "felt threatened" by the applicant. The xxx stated that xxx was a member of the section at that time. The xxx stated that, while the applicant "had a very strong and hard leadership style," he never saw the applicant "mistreat, belittle, or offend anyone working for him, nor did he ever sexually harass any female member of the section." The xxx said that the applicant's "style of leadership offended [xxx, a female petty officer], and I believe she thought it was personal."

A xxxx (xxxx) who supervised the applicant in xxxx signed a statement on June 9, 199x, indicating that the applicant was a "dedicated, proactive leader" who "personified the word 'professional.'" He stated that "an incident arose between [the applicant] and [xxxx] which, in my opinion was then, and is now, part of her personal vendetta against [the applicant]."

A xxx who worked closely with the applicant in xxxx from May 199x through June 199x, signed a statement on June 10, 199x, praising the applicant's work and leadership highly. He also stated that he "never witnessed or remembered [the applicant] harassing or degrading any individual he made contact or worked with."

Another xxx who worked in the applicant's xxx station in xxx also signed a statement on June 10, 199x. This xxx stated that the applicant "was always fair and professional to all his xxxxxxx. His standards as well as most of the folks in the section were very high. I never witnessed any poor treatment or actions which may have been considered harassing or degrading."

Another xxx who worked in xxx stated that the applicant was "a firm and fair leader."

A xxx signed a statement indicating that he served under the applicant in xxxx from May 199x to May 199x. Although their section included members of both genders and varied ethnic backgrounds, he stated, he "never witnessed any animosity among the section or observed anything but professional behavior from [the applicant]."

Another xxx, who worked at the xxx in xxx from 199x through 199x, stated that the applicant was a very helpful supervisor who never treated her different-

ly though she was a single parent. The applicant, she stated, "wanted everyone to have the same successes and the same rewards."

A YN2 (yeoman second class) who opened the mail for the xxxxxxxx in xxxxxx, where the applicant worked in 199x and 199x, signed a statement dated June 10, 199x. The YN2 stated that he had received a page 7 in the mail concerning the applicant and an incident in xxxxxx. He did not know where it came from, and a copy of the page 7 was already in the applicant's record. He brought it to the attention of his supervisor and the applicant, who told him "the history concerning this incident."

A YN3 who opened the mail for Group xxxxxxxx, where the applicant has worked since 199x, signed a statement dated June 10, 199x, relating the following incident: "[In the mail] I received a Page 7 (3307) concerning [the applicant] and a female member at a unit in xxxxxx. I showed it to my supervisor [a petty officer] who checked [the applicant's] PDR [personal data record]. The page 7 was already in his PDR so we gave it to [the applicant] for his records. [The applicant] stated that this had happened at his prior unit and that he wished it would stop." The YN3 also praised the applicant's work.

A CWO who served as Comptroller for Group xxxxxx in the fall of 199x described his own experiences with xxxx. He stated that, while they served together on the Coast Guard cutter xxx in the mid 1990s, she frequently complained of sexual harassment and discrimination. He described her behavior as "extremely irrational" and "hysterical." The CWO also stated that he believes xxxx "has continued in her attempts to ruin [the applicant's] career due to my observations onboard xxx and numerous references in her speech regarding xxxx and [the applicant]."

A xxx signed a statement on May 25, 199x, indicating that she worked under the applicant from June 199x to June 199x. She stated that he "always made me feel comfortable and a member of the group, and gave me as many responsibilities as anyone else. ... [H]e was always very kind and patient with me. ... I WAS ALWAYS TREATED FAIRLY."

VIEWS OF THE COAST GUARD

On February 17, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request for lack of proof.

The Chief Counsel argued that, "although it appears that Applicant is a high performing individual who can take great pride in his career accomplish-

ments, none of that evidence rebuts or specifically calls into question the substantial evidence of sexual harassment presented by the statements taken from Coast Guard members as part of the Command's review of this matter in June 199x or a Coast Guard Investigative Service (CGIS) investigation into this matter dated 11 March 199x." The Chief Counsel argued that the Report of Investigation, a copy of which he attached to his advisory opinion, proves that the applicant's CO "did not act arbitrarily or capriciously when he chose to document Applicant's conduct as sexual harassment in the June 199x CG-3307 entries." In addition, the Chief Counsel noted that in his statement submitted to the BCMR on the applicant's behalf, his former CO clearly stood by his decision to issue the page 7s.

Finally, the Chief Counsel noted that the applicant has been appointed to CWO2 and that, as an officer, his enlisted records, including the two disputed page 7s, "are no longer maintained as an active part of his military record (e.g., only the Applicant's Officer Record will be used for any personnel action in the future)." The Chief Counsel noted but did not address the following issues, which he called "[n]ot material to the central issues of this case and not alleged as error by Applicant": absence of the disputed page 7s from the applicant's PDR prior to first selection board; removal of the applicant's name from the CWO appointment list; and whether the applicant's conduct amounted to sexual harassment (because he has not admitted to the conduct in question). He offered to address these issues at the Board's request.

SUMMARY OF THE REPORT OF INVESTIGATION⁴

On March 25, 199x, the Chief of the Law Enforcement Branch of the xxxxxx District approved a Report of Investigation into sexual harassment allegedly committed by the applicant and another member at xxxxx. The investigator concluded that the applicant had "sexually harassed various women at xxxxx." These conclusions were based on interviews with members of the applicant's section in xxxx. Several witnesses confirmed the allegations of sexual harassment on which the two disputed page 7s are based. Many members, both male and female, indicated that prior to June 199x, they had witnessed the applicant sexually harassing female members or had heard the applicant say that women do not belong in the military or make similarly hostile remarks. Other members indicated that they had heard of such incidents. One member stated that she had neither experienced nor heard of any harassing behavior by the applicant.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

⁴ The Chief Counsel stated that this report was not releasable to the applicant and should be returned to the Coast Guard upon completion of this case.

On February 18, 2000, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited him to respond within 15 days. On March 15, 2000, the applicant responded.

The applicant stated that although he was recently appointed to CWO, he has lost six months of increased pay and allowances because the Coast Guard failed to maintain his PDR correctly. He alleged that, when he received a copy of his PDR, 15 other documents were missing in addition to the two disputed page 7s. He alleged that the six-month delay in his appointment will "cause a chain reaction for the rest of my career," costing him thousands of dollars. He argued that the fact that he appeared higher on the list issued by the second appointment board, which saw the two disputed page 7s, proves that the six-month delay in his appointment, caused by the Coast Guard's error, was unjust.

APPLICABLE LAWS

COMDTINST 5350.21, contains "The Commandant's Human Relations and Sexual Harassment Policy Statements" issued on October 9, 1990. The statement prohibits sexual harassment and requires all Coast Guard personnel "to actively demonstrate their own commitment and support of these policies" and "to avoid any vestige of discrimination based on ... gender ... in any thoughts or actions affecting our personnel"

COMDTINST 1000.14A, "Preparation and Submission of Administrative Remarks (CG-3307)," authorizes commanding officers to prepare negative page 7 entries for the PDRs of members who commit acts that are contrary to Coast Guard rules and policies but that the officer, in his discretion, does not deem serious enough to require non-judicial punishment or court martial.

Article 1.D.10.b. of the Personnel Manual (COMDTINST M1000.6A) states that "[a] candidate will be removed from the Preboard or Final Eligibility Lists if information is discovered which casts doubt on the candidate's moral or professional qualifications."

Article 1.D.10.c. of the Personnel Manual states that, if a member's commanding officer or a superior officer recommends that he be removed from the eligibility list, "the recommendations shall be reviewed at the Coast Guard Personnel Command by a special board of senior officers ... [which] shall recommend to the Commandant either that the candidate be reinstated on the Final Eligibility List or that the candidate not be reinstated on the Final Eligibility List."

Article 5.B.5.b of the Personnel Manual provides that “[a] warrant officer whose name has been removed from the list of selectees ... [due to the receipt of adverse information about him] shall be considered for promotion by the next regularly scheduled selection board. If selected by this board, the warrant officer’s name shall be replaced without prejudice on the list from which it was removed. The date of rank is the date it would have been had the member’s name not been removed; pay and allowances accrue from the date of rank.” This article applies only to CWOs who are competing for promotion, however, not to enlisted members competing for appointment to CWO.

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 submissions, and applicable law:

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

2. The applicant submitted several statements from members indicating that they have not witnessed or been the target of any sexual harassment by the applicant. However, none of the statements he submitted expressly refutes the harassment documented in the two disputed page 7s. Moreover, the disputed page 7s and the Report of Investigation indicate that the female members’ allegations were corroborated by witnesses. Therefore, the preponderance of the evidence indicates that the applicant’s commanding officer acted correctly, in accordance with COMDTINSTs 5350.21 and 1000.14A, in preparing the two disputed page 7s.

3. The applicant submitted evidence indicating that one of the targets of his sexual harassment has sent copies of at least one of the disputed page 7s to his subsequent commands and has attempted to prevent his appointment to CWO. However, the evidence does not prove that the female member’s efforts have had any improper effect upon the Coast Guard’s actions regarding his eligibility for CWO. Even assuming that it was her efforts that drew CGPC’s attention to the incompleteness of his record before the first appointment board, CGPC’s decision to remove him from the eligibility list because of the incompleteness would not therefore be in error or unjust.

4. The applicant alleged that an error by the Coast Guard in maintaining his PDR caused him to be removed from the 199x CWO eligibility list and therefore not be appointed to CWO on June 1, 199x. Although he did not

expressly ask to have his appointment to CWO back dated,⁵ he did allege that his failure to be appointed to CWO on June 1, 199x, was an injustice. Therefore, the Board concludes that the date of the applicant's appointment to CWO has been properly raised by the applicant as an issue to be decided in this case.

5. The Chief Counsel identified the administrative error of the incompleteness of the applicant's PDR before the first appointment board as an issue in this case but chose not to address it, although he offered to address it at the request of the Board. However, the Chief Counsel's advisory opinion was not submitted until February 17, 199x, more than eight and one-half months after the applicant submitted his application. Therefore, insufficient time remained in the Board's ten-month statutory period for deciding the case under 14 U.S.C. § 425 for the Board to (a) request and receive additional arguments from the Chief Counsel, (b) forward them to the applicant for response within 15 days, in accordance with 33 C.F.R. § 52.82(d), and (c) duly deliberate and meet to decide the case.

6. The applicant appeared xxx on the 199x Final Eligibility List for appointment to CWO and would have been appointed to CWO on June 1, 199x, except for the incompleteness of his record. The record indicates, and the Chief Counsel has admitted, that the applicant was removed from the list only because the Coast Guard erred by failing to include the two disputed page 7s in his record. Since June 199x, the applicant has been stationed in xxxxxx, xxxx, and xxxx, while his PDR has been maintained in Washington, D.C. There is no evidence that the incompleteness of the applicant's record before the first appointment board was due to any fault of his own.

7. Although a special board recommended that the applicant be reinstated on the 199x Final Eligibility List after reviewing his complete record, the Commandant disapproved the recommendation. In doing so, the Commandant reasonably required the applicant to re compete before the next appointment board with the two negative page 7s in his record. However, the Commandant also ordered that the applicant be allowed to compete before the next appointment board as if for the first time, with no record of his previous attempt or of his removal from the eligibility list in his PDR.

8. After the applicant's record was corrected to include the negative page 7s, he competed before the next CWO appointment board, which put him in xxx place on the xxxx Final Eligibility List, even higher than he had been on the 199x list. Therefore, the Board concludes that the applicant would have been

⁵ The applicant's failure expressly to request this relief may be due to the fact that when he applied to the BCMR on June 1, 1999, the new CWO eligibility list had not yet been issued and he had not yet been appointed CWO.

selected for appointment to CWO by the first appointment board even if the disputed page 7s had been in his PDR.

9. The applicant has proved by a preponderance of the evidence that an administrative error by the Coast Guard caused him to be appointed to CWO several months late. He has also proved by a preponderance of the evidence that, if the Coast Guard had not erred, he would have been appointed to CWO on June 1, 199x. Although Article 5.B.5.b. of the Personnel Manual applies only to the promotion of CWOs rather than to their appointment, the Board finds that the remedy provided in Article 5.B.5.b. and the Commandant's decision to allow him to re compete without prejudice are indicative of both the injustice suffered by the applicant because of the Coast Guard's error and the measure of relief due.

10. Therefore, the Board should grant partial relief by back dating the applicant's appointment to CWO2 to June 1, 199x. However, the two disputed page 7s should not be removed from the applicant's record because he has failed to prove that they are in error or unjust.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of XXXXXXXX, USCG, is hereby granted in part as follows:

His date of rank and date of appointment to CWO2 shall be changed to June 1, 199x.

He shall receive any back pay and allowances due him as a result of this correction.
