


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-086

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION


This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on April 1, 2004, upon the BCMR's receipt of the completed application.

This final decision, dated December 29, 2004, is 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 asked the Board to reinstate him on the 2003 eligibility list for appointment to chief warrant officer (CWO) and to remove an adverse Administrative Remarks form CG-3307 ("page 7") from his record.

The applicant alleged that his name was removed from the CWO eligibility list and the page 7 was entered in his record after a civilian employee at the Xxxxx unjustly accused him of sexual harassment but before the Equal Employment Opportunity (EEO) investigation was complete. He alleged that the EEO investigation later revealed that the complaint was unsubstantiated. Therefore, he argued, his removal from the list and the page 7 are erroneous and unjust.

The applicant alleged that the entire situation was handled improperly and that he was denied due process and the right to a full and fair hearing. He alleged that the fact that the Commandant did not take final action to disapprove the recommendation of a Special Board that he be reinstated on the CWO eligibility list until 90 days later was inexcusable.

The applicant stated that he was denied due process because he was never “placed on report.” He stated that, had he been placed on report, he would have had the chance to call witnesses and question his accusers. Instead, he “was treated as little more than a bystander throughout this process, and other than being given the opportunity to make a statement, ... had no knowledge of what course the investigation was taking or what my accusers were saying.” He pointed out that he was away from the Xxxxx on temporary active duty for much of the duration of the investigation, and he alleged that the actions taken against him were “based on scant information and relied solely on collaborated [sic] statements of my accuser and her friends in retaliation for being terminated by the CG Xxxxx due to her own misconduct.”

The applicant further alleged that a summary of disciplinary and administrative actions posted on the Coast Guard’s intranet website includes the following: “E-8 permanently removed from the 2003 CWO Appointment List due to sexually harassing a civilian employee.” The applicant stated that when a former shipmate pointed this notation out to him, he was not certain whether he was the E-8 in question or not because of the conclusion of the EEO investigation. He stated that he asked the Xxxxx command and discovered that he was in fact the E-8 mentioned on website and that the Headquarters legal staff had revised the entry at the urging of the Xxxxx command. He stated that “[t]his troubles me even more because now, after taking action against me for charges that were later determined to be unsubstantiated, the XXXXX as well as Coast Guard Headquarters still is not sure what it was I did in the first place.”

In support of this allegation, the applicant submitted a copy of an email conversation concerning the website entry. The email indicates that a friend of his forwarded him a list of “military administrative actions” off the website. In addition to the language about the removal of an E-8 quoted above, the list shows that an E-7 was removed from the same eligibility list for failing to ensure boat crew certifications at his unit and that another E-7 was removed from the list for having been arrested for driving under the influence (DUI). The applicant stated in an email to the Xxxxx command that he “probably could have swallowed something like ‘inappropriate behavior’ on the message which still turns my stomach but [not] ‘sexual harassment.’” In response, a commander stated that he had “persuaded HQ legal that they made an administrative error” and that the website entry now reads as follows: “An E-8 was permanently removed from the 2003 CWO Appointment List for engaging in inappropriate personal relationships, tolerating unprofessional employee conduct, and failing to adhere to Coast Guard core values.”

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in 1981. He became a supply specialist and when that specialty was abolished became a food service specialist. He has accu-

mulated many years of sea service on various cutters and has received three Achievement Medals, a Commendation Medal, and other personal and unit awards. On March 11, 1998, he received training on human relations, interpersonal relationships, and fraternization, in accordance with Article 8.H. of the Personnel Manual.

On June 17, 2001, the applicant became the manager of the Xxxxx Xxxx at the Coast Guard Xxxxx in Xxxxxxx. He received excellent performance evaluations. On his annual performance evaluation dated September 30, 2002, he received two marks of 7 (on a scale of 1 to 7 with 7 being best), nine marks of 6, and thirteen marks of 5, and was recommended for advancement. On January 27, 2003, CO of the Xxxxx nominated him for a special award for his successful management of the Xxxx.

An undated letter from the Commandant in the applicant's record indicates that he was informed that he had been appointed a CWO by the Secretary and that the date of appointment would be June 1, 2003. The letter also informed him that he was required to remain "physically and otherwise qualified" until he took the oath of office on that day.

Administrative Investigation

On April 2, 2003, the CO of the Xxxxx ordered a lieutenant to conduct an informal investigation of "all the facts and circumstances surrounding the alleged sexual harassment by [the applicant] while discharging his duties as the Xxxxx Xxxx Manager." The CO noted that no hearing was required but that a report with findings should be prepared.

On April 3, 2003, the investigating officer (IO) interviewed the applicant by telephone. The record contains a form titled "Article 31(B), UCMJ, and *Miranda/Tempia* Rights," which is signed by the IO and dated April 3, 2003 (but not by the applicant¹) and indicates that the applicant was informed during the telephone conversation of his right to remain silent and to consult an attorney and of the fact that anything he said could be used as evidence against him "in any court-martial, nonjudicial proceeding, administrative proceeding, or civilian court." The form also indicates that the applicant was advised that he was suspected of violating Article 92 of the Uniform Code of Military Justice (UCMJ), Article 8.H. of the Personnel Manual, and Chapter 5.E. of the EEO Manual by having an "[u]nduly familiar/inappropriate personal relationship between superior & subordinate" and that, after being informed of his rights, the applicant "desire[d] to make a statement and/or answer any questions."

Also on April 3, 2003, the applicant wrote and signed a statement for the IO and faxed it to him. In it, the applicant stated that he had "never sexually harassed [Ms. D]

¹ The applicant made no allegation with respect to this form, which he submitted with his application.

nor any other female or male employee.” He stated that a dispute arose because in February 2003 he only had three bartenders (Ms. H, Ms. D, and Ms. B), two of whom—Ms. D and Ms. B—were intermittent, part-time employees and under federal law could only work up to 19 hours per week and wanted to work even fewer hours. Therefore, he sometimes had no one willing to tend bar and would have to do so himself, get an active duty member to serve, or close the bar. Moreover, he was advised that as of April 1, 2003, Ms. H, his only full-time employee at the bar, would become just an intermittent employee. Therefore, because he was already having trouble filling the schedule for bartenders to cover the 43.5 hours per week that the bar was open, in early March 2003 with the consent of his supervisors, he hired a fourth intermittent bartender, Ms. M. Because Ms. M had to be trained, during one week in March, he scheduled her for three “break-in” days and a Friday and left Ms. D off the schedule that week. Ms. D called him and became very upset about being left off the schedule, and he tried to find time in the schedule when she could work, but he had to make his decision “based on efficiency of operations.”

In her statement to the IO, Ms. D, who filed the EEO complaint, wrote that she had been working at the Xxxxx Xxxx about one day a week for five years to supplement her full-time income from the Coast Guard. She stated that the applicant

has asked me out on several occasions since he came on board at the Xxxxx, most recently was at a retirement party which was on Friday February 28, 2003. When I came to work he made the comment to me about all he was going to see the rest of the night was blue because of the blue sweater I was wearing. He continued throughout the evening making these comments in front of many of the customers and he even asked me if I would go out with him that weekend. Of course, I just laughed, which is how I have always handled the situation. He then asked me if I wanted to come over to his house after I closed the bar and I played that off by saying yeah right. Before he left that evening he wrote his number down and gave it to me and told me to call him and he would take me out. ... This is not the first time he has asked me out, and I am not the first bartender he has asked out as he has asked the others out on numerous occasions as well. Up until now I have just brushed the comments off and made a joke about it, but it seems now I am being treated unfairly because I am not interested in going out with him.

Ms. D also stated that in March 2003, when she saw that the applicant had given Ms. M her (Ms. D’s) and Ms. B’s usual work nights, she complained to the applicant, but he said, “I did the schedule last night and [Ms. H and Ms. M] picked their days so I guess you don’t get to work this month.” Ms. D stated that she tried to get the matter resolved fairly and that the applicant later promised her she could continue to work every other Wednesday, as she had been doing, but that he then reneged on that promise and prepared a schedule that gave her only one day of work for the month. She stated that the applicant’s position was that Ms. H had to get three days a week under her contract and that he was giving Ms. M—the new bartender with whom he had just been on a date—the days she wanted and that Ms. D and Ms. B—who had worked there for years and repeatedly refused his requests for dates—would only get the

remaining shifts. Ms. D alleged that she was told that if she did not like the schedule, she should quit and that Ms. H was told that Ms. D and Ms. B were now just “fill ins.” On March 19, 2003, one week after her discussion with the applicant, she was fired allegedly because of an incident that had occurred three months before when she had had to call security to remove an abusive customer from the bar and then after closing had asked someone else to help her count the money, contrary to policy.

Ms. B also provided a statement to the investigator. She stated the following:

Not long after being employed at the Xxxxx [in 2001, the applicant] started asking me to go out with him. ... [J]ust about every time I worked and he was there, he would ask me on a date and a few times asked me to his condo for dinner or to watch a movie. I would always tell him no, but he would continue to ask. Sometimes while I was working he would tell my customers that I was his girlfriend and that I was going to be his wife. A few times he even told my customers I was his wife. Now considering that I work for tips, this put a damper on my take home that night.

I know when [the applicant] came here and took over the Xxxx, he would always ask [Ms. D] out on dates. Finally, [Ms. D] went out on a date with him. They only went out one time, but that didn't stop [him] from asking her out until [she] got a boyfriend. Then he backed off a bit. As soon as she would become single again it would start all over again. Or at least little comments here and there. I went to dinner with him one time also on a Sunday [with] my daughter. ... [W]e never went out again, not because he stopped asking but because I said no. When I started working at the Xxxxx, I told [him] ... that I don't date any of my customers or co-workers.

... [Ms. M] was hired making \$8.00 an hour. That's more than what I made. So of course that immediately became an issue. I confronted [the applicant] as soon as I heard and he put in for a raise for me. In less than a week of employment [he] went out on a date with [Ms. M]. ... [M]y aunt works there and saw them there. At this point [he] doesn't ask me out anymore. Not since [Ms. M] started. I guess he was tired of me turning him down.

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Drinking on the job. [The applicant] has always allowed us to drink while working. ... This only changed after the conflict at a Christmas Party [Ms. D] worked for WW. ... [A customer became loud and abusive, and Ms. D called security to escort him out.] [The applicant] told me about 3 weeks ago that he sided with [Ms. D] that night because even he had [had] people help him out and count money behind him after a super busy night like she had.) He was not upset about her having the help at all but said that he understood and had been there himself. Yet [Ms. D] was terminated for defending herself by calling security and for trying to secure the Xxxx's money by having another person recheck her counting after such a busy evening.

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... [A]t least a month after that, [Mr. L] came in and said he didn't want the barmaid to drink while working. We all said okay, no problem. Yet about two weeks after that [the applicant] told me that he didn't care if we drank but not to overdo it or put it on display. Even while I was training [Ms. M] I mentioned to him that she wanted to make a drink [for herself] and he said, “go ahead.” When I worked last Thursday ... someone offered to buy me a beer. [The applicant] was sitting at the bar having a drink himself. I told the customer thank you but no thanks I'm not allowed to drink while I work. [The applicant] said go ahead and have one. I told him no I don't think so. He wasn't gonna

pull a quick one on me and especially since the camera had been installed. He again told me it was okay. So I made a big deal out of it to make sure the regulars sitting next to him heard it, and told him to get the beer for me if it was okay for me to have it. He got up and got me a beer and proceeded to tell me that he was the only one who views the videos and since he was leaving for two weeks that the camera was not even [turned] on. [However, she later discovered that it was turned on.]

Ms. B further stated that the applicant had left her off the schedule as well as Ms. D to allow Ms. M to train, and that if two bartenders were present, they had to split the tips, which was a hardship.

Ms. H also provided a statement to the IO. She wrote that she had worked at the Xxxx for nine years and had trained Ms. D, but that in October 2001, the applicant told Ms. D that she might get a raise, even though Ms. H had never gotten a raise. She stated that the applicant "had asked [Ms. D] out on a date on several occasions, and they had been on one date together." Thereafter, Ms. H spoke to the personnel office and received a raise. Ms. H stated that the applicant went on a date with Ms. B soon after she was hired in 2001. She stated that Ms. M was hired at \$8.00 per hour, which is "inflated for a new bartender without experience." Ms. H further stated that she "believe[s] that raises for the part-time bartenders are not done on job performance, job experience or tenure at the Xxxxx Xxxx."

Ms. M told the IO that she never went out on a date with the applicant, but that they did go out to dinner together with a friend of hers.

The IO also received statements from two other Xxxx employees who wrote that the applicant had been having trouble keeping the bar staffed with a bartender and had hired Ms. M to have full coverage. Another member stated that one night when Ms. D was wearing a blue sweater at the bar, the applicant made comments about it, such as when he went home, all he was going to see was blue. This member also stated that the applicant had been on one date each with Ms. B, Ms. D, and Ms. M soon after they were hired. The applicant's supervisor wrote a statement indicating that he had never before had a complaint about the applicant's performance.

On April 11, 2003, the IO completed his informal administrative investigation and submitted his report to the applicant's CO. The report indicates that Ms. D had been upset by the work schedule made by the applicant for the months of March and April because her hours were reduced after Ms. M was hired and given two nights a week "to gain experience." The IO found that the applicant had asked Ms. D "out on dates on several occasions"; that he had gone out to dinner with Ms. B and her daughter once and "[a]fter the date, he repeatedly asked her to go out with him again"; that he went out to dinner with Ms. M and a friend of hers shortly after she was hired; and that at a party at the Xxxx on February 28, 2003, he commented on a blue sweater worn by Ms. D several times while she was tending the bar.

On April 24, 2003, the CO of the Xxxxx, as the Final Reviewing Authority for the investigation, approved the IO's findings. The CO wrote that the applicant "established inappropriate personal relationships with female subordinate bartenders" at the Xxxx in violation of Article 8.H. of the Personnel Manual. He wrote that "[t]hese relationships in combination with lax management of the Xxxxx Xxxx, by tolerating bartender tardiness, improper fiscal practices and drinking while on duty, jeopardized an appearance of impartiality and undermined respect for [the applicant's] authority." The CO noted that a page 7 documenting the applicant's conduct would be put in his record; that the applicant would receive remedial training in accordance with Article 8.H. and the EEO Manual; that a special enlisted evaluation would be prepared to address his inappropriate conduct; and that his command recommendation for appointment to CWO would be rescinded.

Consequences of the Investigation

On April 30, 2003, the applicant's command officer (CO) at the Xxxxx prepared the following page 7 entry, which the applicant signed in acknowledgment:

This is an adverse administrative remarks entry documenting your misconduct. Specifically, you displayed poor judgment by developing a pattern of inappropriate and unacceptable personal relationships (more than occasional, non-romantic social relationships) with female subordinate bartenders at the USCG Xxxxx Xxxxx Xxxx. Engaging in inappropriate personal relationships violated Chapter 8-H of ... the Coast Guard Personnel Manual and fell below the standard of conduct expected of a Senior chief Petty Officer and a supervisor. These relationships in combination with lax management of the Xxxxx Xxxx (not properly disciplining bartenders for tardiness, improper fiscal practices and drinking while on duty) jeopardized an appearance of impartiality and undermined respect for you. You are hereby ordered to review the Commandant's policy on personal relationships found in Chapter 8-H of the Coast Guard Personnel Manual and discuss them with your immediate supervisor.

In addition to this CG-3307, a letter will be sent from this command to Commander, Coast Guard Personnel Command (OPM-1) withdrawing the command recommendation for promotion to Chief Warrant Officer (CWO). This will not prevent you from competing for CWO in the future, as long as you meet all eligibility requirements and earn a positive recommendation from your next command. Your performance, outside of this specific area, has been exceptional and the USCG Xxxxx employees have greatly benefited significantly [sic] from the improvements you implemented at the Xxxxx Xxxx.

You are also advised that further display of inappropriate conduct will result in further administrative or disciplinary action.

Also on April 30, 2003, the CO sent the Commander of the Coast Guard Personnel Command (CGPC) a letter regarding the CO's "recension of command recommendation to CWO." The CO cited the applicant's "poor judgment with regard to his personal and professional relationships with the civilian employees that he supervised" as

the cause of the rescission. The CO noted that the applicant "was not aware that his professional judgment and personal relationships with his civilian subordinate employees were not appropriate" and that as an E-8, he was "expected to know where the boundaries [were] or how to determine them."

On May 1, 2003, a copy of the report of the administrative investigation was provided to the applicant with the opinions and recommendations of the investigating officer redacted in accordance with 5 U.S.C. § 552(b)(5) as "pre-decisional correspondence ... covered by the deliberative process privilege."

On May 5, 2003, the applicant submitted a letter appealing the action of the Final Reviewing Authority and his CO's decision to remove his recommendation for promotion to CWO. He argued that the investigation was conducted in a way that denied him due process; that the Commandant's policies concerning interpersonal relationships had been misinterpreted; and that the actions taken against him were "disproportionate to the alleged misconduct." He argued that the employee only complained after she had been fired and noted that the Coast Guard's administrative investigation was completed before the EEO investigation had even begun. He alleged that when the investigating officer telephoned him to interview him, the applicant asked whether the interview was for the investigation begun as a result of the EEO complaint and received an affirmative response. Therefore, he was not aware that it was a separate, administrative investigation. He alleged that he "was preoccupied at the time and, quite frankly, did not fully grasp the gravity of the situation since I did not feel as though I had done anything wrong in the first place." He alleged that he did not know the administrative investigation was under way until it had concluded and that it was unfair that the copy of the administrative investigation that he received omitted the opinions and recommendations that the IO provided to his CO.

The applicant further stated that all of his off-duty associations with "the individuals in question" were non-intimate and non-romantic. He stated that he went to dinner with one female employee and her daughter once; that he went to lunch with another female employee and her daughter and then turned down an invitation to attend a movie with them; and that he went to dinner with a third female employee and a friend of hers once. He stated that the atmosphere at these meals was casual and that he "never felt that [his] intentions would be construed otherwise by anyone. [He] never pressured any of these individuals to date [him] and never pursued a romantic relationship with any of them."

The applicant also argued that the statement concerning his "lax management" of the Xxxx was erroneous in light of the fact that he "took a financially struggling Xxxx and immediately turned it into a revenue producing facility. Net profits initially increased by 20% while customer complaints decreased by 80% Subsequent reviews ... indicate that revenues increased by 33% from the previous year." He

alleged that his responses to employee tardiness and other problems were appropriate and "carried out with the full knowledge of" his chain of command. He stated that he did not pursue punitive or administrative action for employees' tardiness and last-minute absences because they were single mothers dealing with child-care problems. Therefore, with the agreement of his chain of command, he hired another bartender to allow greater flexibility even though he knew it would increase competition for available workdays. He alleged that he always prepared the work schedule "to best suit the needs of the Xxxx's operation and with the input of the individuals involved," as well as with the consent of his supervisors. He alleged that he never prepared the bartenders' work schedules based on favoritism and that it was impossible to satisfy everyone in making the schedule. He further alleged that he never observed or condoned bartenders drinking alcohol while on duty.

The applicant wrote that his removal from the CWO eligibility list was disproportionately severe in light of his actual actions and the more lenient way much worse behavior had been treated in the past. He stated that it amounted to a reduction in rank based only on the unsubstantiated, inaccurate allegations made by three female employees who are close friends. He pointed out that one, Ms. D, had just been fired, and another, Ms. H, had just been demoted to a much lower paying position, and that he himself had opposed these administrative actions.

The applicant attached to his letter a statement signed by a CWO4, who stated that the applicant had previously told him unequivocally that he was not interested in pursuing a relationship with these employees because of the problems it might cause at work. He also stated that he was with the applicant when the applicant received the call from Ms. B inviting him to brunch with her daughter.

On May 12, 2003, the applicant received his third Achievement Medal for superior performance as manager of the Xxxxx Xxxx at the Xxxxx from July 2001 to May 2003. The citation notes that his "vast business managerial knowledge contributed to the impressive revenue increase" of the Xxxx, that he had improved the décor and menus, and that he had devoted a lot of time and energy to organizing special events.

On July 24, 2003, a Special Board composed of three commanders convened to assess whether the applicant should be reinstated on the CWO eligibility list. The Special Board found that "as documented in the record, there does not appear to be a persistent or particularly egregious character flaw or pattern of poor judgment in [the applicant's] performance of duties. In consideration of PERSMAN 1.D.3.b. and 1.d.10, the board recommends reinstatement on the CWO eligibility list."

On August 1, 2003, the Commander of the CGPC forwarded the report of the Special Board to the Assistant Commandant for Human Resources with a recommendation that that board's findings and recommendation be approved. The Assistant

Commandant for Human Resources asked the Chief Counsel to review the report to determine whether the Commandant to disapprove it.

On September 12, 2003, the Deputy Chief Counsel informed the Assistant Commandant for Human Resources that “[t]here is sufficient evidence upon which the investigating officer and commanding officer could have concluded, and on which [the Commandant] can rely, that [the applicant] solicited on several occasions dates or other social interaction outside the workplace with personnel he supervised directly, and that an appearance arose that he used his position for this purpose; that he created an appearance of partiality and a perception of unfairness concerning his official interactions with his employees; and that he undermined respect for his position by his solicitations, and from the appearance of partiality he created. There is also sufficient evidence from which to conclude that his repeated comments concerning an employee’s attire constituted sexual harassment.” The Deputy Chief Counsel noted that the report of the Special Board “does not refute the findings of the investigation concerning misconduct. He concluded that the Commandant could “reasonably conclude that the evidence in this case is sufficient to cast doubt” on the applicant’s moral and professional qualifications for appointment to CWO—contrary to the findings of the Special Board—as required for removal from an eligibility list under Article 1.D.10.a.1. of the Personnel Manual.

On September 29, 2003, the Assistant Commandant for Human Resources forwarded the report of the Special Board and the Deputy Chief Counsel’s memorandum to the Commandant with a recommendation that it be disapproved. He stated that the applicant’s “behavior toward his subordinates in this situation [was] at least a severe lapse in judgment. [He] clearly solicited dates on several occasions The consequences of his conduct should have been obvious to him and the results of his conduct were entirely foreseeable. ... [He] needs to regain the confidence of his superiors before being considered for promotion.” The Assistant Commandant also stated that the applicant’s behavior “casts doubt on [his] moral or professional qualifications,” as required for removal from an eligibility list under Article 1.D.10.a. of the Personnel Manual.

On October 29, 2003, the acting Commandant of the Coast Guard disapproved the recommendation of the Special Board pursuant to Article 1.D.10.a.1. of the Personnel Manual.

EEO Investigation

On November 13, 2003, the EEO investigator completed a report on her investigation. The report contains Ms. D’s complaint and affidavits by the applicant and Ms. B with the same allegations and arguments contained in the report by the IO. The EEO investigator’s report indicates that Ms. D failed to pursue her complaint after filing it on

April 14, 2003. She did not respond to the EEO investigator's requests for further information and names of witnesses.

VIEWS OF THE COAST GUARD

On August 17, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. TJAG adopted the findings in a memorandum on this case prepared by CGPC.

CGPC stated that the "command endorsement is a critical element in the selection of suitable candidates for appointment to CWO. All candidates are required to have command recommendation for appointment at the beginning of the process and to retain it until appointed." CGPC stated that after receiving allegations of improprieties, the applicant's CO exercised his discretion to convene an informal fact-finding investigation to help him determine the facts of the case. CGPC stated that because it was an informal investigation convened in accordance with the Administrative Investigations Manual (COMDTINST M5830.1), the applicant was not entitled to party rights.

CGPC stated the Personnel Manual prohibits sexual harassment and inappropriate personal relationships. Under Article 8.I. of the Personnel Manual, sexual harassment is defined as "any intentional action or omission that results in the adverse treatment of a person because of that person's sex." Moreover, COMDTINST 5350.21D states that sexual harassment "includes unwelcome sexual advances; requests for sexual favors; and other verbal or physical conduct of a sexual nature that is made a condition of employment, affects employment decisions, unreasonably interferes with work performance and creates an intimidating or hostile work environment." Under Article 8.H., an inappropriate personal relationship is defined as a relationship "regardless of gender, that either in actuality or in appearance jeopardizes the member's impartiality, undermines the respect for authority inherent in a member's rank or position, results in members improperly using the relationship for personal gain or favor, or violates a punitive article of the UCMJ." CGPC stated that the applicant's CO "set aside the sexual harassment charge for further inquiry" but "concluded there were numerous instances of inappropriate personal relationships between the applicant and his coworkers." CGPC stated that a separate EEO investigation "later determined that sexual harassment did not take place."

CGPC pointed out that the CO followed proper procedure in placing the page 7 in the applicant's record and that the page 7 does not mention the charges of sexual harassment. CGPC stated that after the CO rescinded his recommendation for appointment to CWO, a Special Board was convened in accordance with Article 1.D. of the Personnel Manual to consider removing the applicant's name from the eligibility list. The applicant was allowed to submit a statement in his own behalf. CGPC stated that, although the Special Board did not recommend removal of the applicant's name from the list, under Article 1.D.10., the final decision is made by the Commandant. CGPC stated that the Personnel Manual places no time constraints on the Commandant's decision. CGPC stated that the Commandant decided to remove the applicant from the list

because “he did not feel [the applicant] had the moral and/or professional qualities to receive a commission as a Chief Warrant Officer.”

CGPC stated that its summary of disciplinary actions initially erroneously described the applicant’s case as an E-8 sexually harassing a civilian employee and that it was corrected to reflect the actual findings of inappropriate personal relationships.

TJAG argued that the applicant was afforded all due process and that he failed to submit sufficient evidence to overcome the presumption of regularity afforded to the Coast Guard. TJAG argued that the Commandant had decided that the applicant’s “behavior indicated a lack of the qualities necessary for a commissioned officer” and that “[d]eference to military decision makers must be at its zenith in situations such as these.” TJAG argued that the BCMR “should not disturb the Commandant’s reasoned exercise of the discretion entrusted to him.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 18, 2004, the Chair sent the applicant copies of views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 8.H. of the Personnel Manual (COMDTINST M1000.6A) contains regulations concerning inappropriate relationships among Coast Guard personnel. Article 8.H.1.c. states that “[p]rofessional interpersonal relationships always acknowledge military rank and reinforce respect for authority. Good leaders understand the privilege of holding rank requires exercising impartiality and objectivity. Interpersonal relationships which raise even a perception of unfairness undermine good leadership and military discipline.” Article 8.H.1.e. states that because of their leadership roles, “relationships involving officers or chief petty officers merit close attention.”

Article 8.H.2.c., entitled “Acceptable Personal Relationships,” states that “Service custom recognizes that personal relationships, regardless of gender, are acceptable provided they do not, either in actuality or in appearance: 1. Jeopardize the members' impartiality, 2. Undermine the respect for authority inherent in a member's rank or position, 3. Result in members improperly using the relationship for personal gain or favor, or 4. Violate a punitive article of the UCMJ.”

Article 8.H.2.d., entitled “Assessing the Propriety,” states the following:

While some situations are clearly discernible and appropriate action is easily identified, others are more complex and do not lend themselves to simple solutions. Evaluating interpersonal relationships requires sound judgment by all personnel. Factors to consider in assessing the propriety of a relationship include:

1. The organizational relationship between the individuals: whether one member can influence another's personnel or disciplinary actions, assignments, benefits or privileges;
2. The relative rank and status of the individuals: peers, officer and enlisted, CPO and junior enlisted, supervisor and subordinate, military and civilian, instructor and student; and
3. The character of the relationship; e.g., personal, romantic, marital.
 - a. Personal relationship: Non-intimate, non-romantic association between two or more people (of the same gender or not), such as occasional attendance at recreational or entertainment events (movies, ball games, concerts, etc.) or meals. (Does not involve conduct which violates the UCMJ.)
 - b. Romantic relationship: Cross-gender sexual or amorous relationship. (Does not involve conduct which violates the UCMJ.)
 - c. Unacceptable relationship: Inappropriate and not allowed under Service policy. Resolution normally administrative. Relationship must be terminated or otherwise resolved once recognized.
 - d. Prohibited relationship: Violates the UCMJ. Resolution may be either administrative, punitive, or both as circumstances warrant.

Article 8.H.3.a. provides the following as examples of "acceptable personal relationships": "1. Two crewmembers going to an occasional movie, dinner, concert, or other social event. 2. Members jogging or participating in wellness or recreational activities together." Article 8.H.3.b. provides the following as examples of "unacceptable relationships": "1. Supervisors and subordinates in private business together. 2. Supervisors and subordinates in a romantic relationship."

Article 8.H.3.c. provides the following as examples of "unacceptable conduct": "1. Supervisors and subordinates gambling together. 2. Giving or receiving gifts, except gifts of nominal value on special occasions. 3. Changing duty rosters or work schedules to the benefit of one or more members in a relationship when other members of the command are not afforded the same consideration."

Article 8.H.6.c. states that counseling concerning unacceptable relationships or conduct "may be informal or more formal, including written documentation by Administrative Remarks, Form CG-3307 or an Administrative Letter of Censure ([see] Article 8.E.4)."

Article 8.H.6.f. states that "[a]s warranted, commands may recommend separation, removal or withdrawal of advancement recommendations, appointment to another status, or promotions."

Article 8.I.2.a. states that the Coast Guard "is committed to maintaining a work environment free from unlawful discriminatory practices and inappropriate behavior."

All acts of sexual harassment are degrading to the offended individual and detrimental to the military profession.”

Article 8.I.2.b. states the following:

Commanding officers and officers in charge have a responsibility to look into all allegations of sexual harassment and to take prompt and effective action. They must be aware of all courses of action available to them to deal with sexual harassment allegations. They generally fall into three categories - discrimination complaint processes, administrative processes and UCMJ provisions. These actions are not mutually exclusive and two or all three of them may be pursued simultaneously. The actions taken by a command in a particular case will depend upon the severity of the conduct, the state of the evidence, the limits of the commander's authority, and other such factors. ...

3. Prompt appropriate administrative action should be taken simultaneously with discrimination complaint processes, with respect to sexual harassment offenders, when a command has sufficient information to reasonably believe an incident has occurred. It is not necessary to await the completion of the procedures set forth in the above paragraph. Commands have a wide variety of actions available which include but are not limited to informal or formal counseling, evaluation in performance reports, and formal performance reviews, which could lead to separation.

Article 1.D.1.a. of the Personnel Manual states that

Chief Warrant Officers (CWOs) are commissioned officers of the Coast Guard who serve in grades established by law and have authority commensurate with this status. CWOs are mature individuals with appropriate education and specialty experience who have shown through demonstrated initiative and past performance they have the potential to assume positions of greater responsibility requiring broader conceptual, management and leadership skills. While administrative and technical specialty expertise is required in many assignments, CWOs must be capable of performing in a wide variety of assignments that require strong leadership skills. Enlisted and officer experience provide these officers a unique perspective in meeting the Coast Guard's roles and missions.

Article 1.D.2.a.13. states that the “final eligibility step in the warrant officer appointment process is obtaining the commanding officer's recommendation. After meeting all of the eligibility requirements, members must submit a request to their commanding officer to obtain a recommendation for appointment to warrant grade.”

Article 1.D.3.a. states the following:

The commanding officer's well-considered, affirmative recommendation is the most important eligibility requirement in the warrant officer appointment process. Regardless of how much time in service or time in grade a member may have or the existence of other personal considerations, he or she must earn the commanding officer's recommendation. Commanding Officers (COs) shall base recommendations for appointment to warrant grade first on the person's qualities of leadership, personal integrity, and potential to perform successfully as a warrant officer. COs must never permit technical competence and ability to perform in a warrant specialty to overshadow the member's potential to perform successfully as a warrant officer. Appointment as a warrant officer

is not another step in the enlisted promotion process and shall not reward enlisted members for faithful or extended service or completion of minimum service requirements. Meeting the minimum standards for advancement as an enlisted member should not be enough to earn members the commanding officer's recommendation to apply for appointment to warrant grade. A CO shall not recommend a member whose personal conduct and associations constitute reasonable grounds for rejection on the basis of loyalty.

Article 1.D.3.b. states that before recommending a member for appointment to CWO, a CO

shall thoroughly evaluate members seeking their recommendation for appointment to warrant grade to ensure they possess the qualities of character and leadership required of warrant officers. In addition to affirming that the member recommended meets all minimum eligibility requirements as well as the particular requirements for the chief warrant officer specialty defined in Article 1.D.13., the following suitability issues shall be carefully evaluated prior to making a recommendation to allow the member to compete: a. demonstrations of character inconsistent with Coast Guard core values; ... and f. sexual harassment or discrimination.

Article 1.D.10.a. provides the following procedure for removing a member's name from the Final Eligibility List for appointment to CWO:

1. A candidate may be removed from either the Preboard or Final Eligibility List if information is discovered which casts doubt on the candidate's moral or professional qualifications for appointment to warrant grade. ... The action may be initiated by the commanding officer or Commander (CGPC-c). The candidate's name will be removed without conducting a special board. The recommendation from a commanding officer or superior in the chain of command shall be by letter to Commander (CGPC-opm)
2. The candidate shall have an opportunity to review the recommendation and shall be permitted to make such comments as desired by endorsement. If Commander (CGPC-c) initiates the action, the candidate shall be advised in writing of the contemplated actions and the reasons therefore and given the opportunity to communicate to the special board in writing via the chain of command.
3. The recommendation shall be reviewed at the Coast Guard Personnel Command by a special board of senior officers. The special board shall consist of at least three officers in the grade of commander or above. The membership shall include a representative from the Headquarters or CGPC division having cognizance of the candidate's specialty. After a thorough review of the candidate's record, the special board 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.
4. The recommendations of the special board shall be forwarded to the Commandant for approval, modification, or disapproval.

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 10 U.S.C. § 1552. The application was timely.

2. Absent specific evidence to the contrary, the Board presumes that Coast Guard officers, including the applicant's CO, have acted correctly, lawfully, and in good faith in performing their duties. 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The applicant bears the burden of proving that, in removing his name from the CWO eligibility list and in entering the page 7 in his record, the CO abused his discretion by failing to act lawfully, correctly, or in good faith.

3. Under Article 1.D.3.a. of the Personnel Manual, a CO "shall base recommendations for appointment to warrant grade first on the person's qualities of leadership, personal integrity, and potential to perform successfully as a warrant officer. COs must never permit technical competence and ability to perform in a warrant specialty to overshadow the member's potential to perform successfully as a warrant officer." According to Article 1.D.10.a.1., a candidate for CWO "may be removed from either the Preboard or Final Eligibility List if information is discovered which casts doubt on the candidate's moral or professional qualifications for appointment to warrant grade." Therefore, the applicant's argument that he should not have been removed from the CWO list because he managed the Xxxxx Xxxx quite profitably and received an award for doing so is unpersuasive. Technical competence—as manifested in Xxxx profits and improvements—is not the only basis on which a recommendation for appointment to CWO is made.

4. Various provisions in Article 1.D. of the Personnel Manual make it clear that to make and sustain a recommendation for appointment to CWO, a CO must have confidence in the member's integrity, maturity, ability to lead, and readiness for the responsibilities inherent in a commission. In light of these criteria, the Board finds that the applicant's conduct toward his civilian employees, as revealed by the administrative investigation, provided his CO with an ample basis for losing confidence in the applicant's moral and/or professional qualifications; withdrawing his recommendation; and initiating the removal of the applicant's name from the CWO eligibility list. The fact that the EEO investigation did not conclude that the allegations of sexual harassment were substantiated does not persuade the Board that the CO was wrong to have lost confidence in the applicant's suitability for appointment to CWO. The statements by the three civilian employees in the IO's report provide a reasonably consistent and coherent description of conduct by the applicant that was very unwise and obviously inappropriate for a supervisor.

5. The applicant complained that, when he answered the IO's questions, he thought he was speaking to the EEO investigator. However, the IO's report indicates that the applicant was advised of his rights and of the fact that any answers he provided could be used against him. Although the *Miranda/Tempia* form in the report is not signed by the applicant because the interview was telephonic, the IO's dated signature and notations indicate that the applicant was advised of the contents of the form. The applicant argued that he should have been allowed to question his accusers at a hearing, but he cited no regulation that gives him such rights during an informal investigation, and the Board knows of none.

6. The applicant alleged that the Commandant erred and committed injustice in disapproving the Special Board's recommendation and taking more than 90 days to do so. The record indicates, however, that the Coast Guard provided the applicant with all due process in accordance with Article 1.D.10.a. in removing his name from the CWO eligibility list. As the applicant himself indicated, the removal of his name will have a tremendous impact on his career, and the Board cannot find that the Coast Guard committed an error or injustice in acting with caution and due deliberation.

7. The applicant argued that it was improper for the Commandant to act before the EEO investigation was complete. However, he cited no rule that prohibits commands from taking appropriate administrative action in response to misconduct prior to the completion of a related EEO complaint, and the Board knows of none. The Board notes that Article 8.I.2. of the Personnel Manual allows COs to take prompt administrative action against someone accused of sexual harassment before an EEO investigation is complete. Moreover, the CO did not base his actions upon a finding of sexual harassment; he based them upon finding that the applicant exercised "poor judgment by developing a pattern of inappropriate and unacceptable personal relationships (more than occasional, non-romantic social relationships)."

8. The applicant also alleged that the page 7 is inaccurate and unfair because he was unjustly accused. He alleged that the description of his performance as "lax management" is erroneous and unfair in light of the profitability of the Xxxx and the award he received. The Board finds, however, that the statements provided by the applicant's employees provided his CO with a sufficient basis to draw and document the conclusions in the page 7. Their statements indicate that he repeatedly asked them to socialize with him at restaurants or in his own home and that he failed to enforce Coast Guard policies by condoning their consumption of alcohol while bartending and allowing others to count the bar's proceeds.

9. The applicant complained that his removal from the CWO eligibility list was inaccurately described for a short time as being due to sexual harassment on a Coast Guard web site. However, the documentation on the web site was anonymous,

and the applicant has not proved that he has suffered any harm as a result of the temporary error.

10. The applicant has failed to prove by a preponderance of the evidence that the disputed page 7 and his removal from the CWO eligibility list are erroneous or unfair. Accordingly, his request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

