

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-124

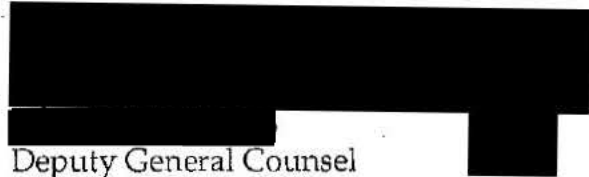
DECISION OF THE DEPUTY GENERAL COUNSEL
ACTING UNDER DELEGATED AUTHORITY

☒ I approve the recommended Order of the Board.

☐ I disapprove the recommended Order of the Board.

☐ I concur in the relief recommended by the Board.

DATE: April 4, 2000


Deputy General Counsel
as designated to act for the
Secretary of Transportation

DEPARTMENT OF TRANSPORTATION
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FINAL DECISION

██████████ 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 chief ██████████ pay grade E-7),¹ asked the Board to correct his military record by removing two negative "page 7" administrative entries (Form CG-3307) dated June 11, 1993, and June 25, 1993.

The page 7 entry dated June 11, 1993, and signed by the commanding officer (CO) of USCG ██████████ 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 ██████████ on the night of June 7, 1993. 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 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.

¹ The applicant was a ██████████ at the time he applied to the Board. However, he was recently ██████████

The page 7 dated June 25, 1993, signed by the same CO, documents a sexual harassment complaint based on incidents that occurred in the fall of 1992 but that only came to light after news of the June 7, 1993, incident and its aftermath spread. The complainant [RM3 M] 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, 1993.

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 1998 he was in [REDACTED] on the [REDACTED] 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 [REDACTED] 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 [REDACTED] 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 [REDACTED] from the husband of RM3 M, the member whose accusations were documented in the page 7 dated June 25, 1993, 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 [REDACTED]

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

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.

March she provided you an approximately 20 page statement describing the sexual and other harassment she underwent while assigned to [REDACTED]. The acts were committed by [the applicant]. Presently, [the applicant] is [REDACTED] on the CWO promotion message. This should not be. As you already know, he advanced to E-7 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 [REDACTED] 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, 1986. He attended "A" School and became a [REDACTED]. In the 1980s, he served as a [REDACTED] at Group [REDACTED] and [REDACTED]. In 1991, he was assigned to [REDACTED] as a [REDACTED] where he was advanced to [REDACTED].

The two disputed page 7s were entered in the applicant's PDR in June 1993, while he served in [REDACTED]. In December 1993, 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 in [REDACTED] he received a Letter of Commendation from his CO, who stated that he had qualified for, and performed the duties of, communications watch officer in record time. The CO praised him as a "consummate professional" who "expertly managed all aspects of [his] watch section."

In 1994 and 1995, the applicant served as a [REDACTED]. From 1995 until the date he applied to the BCMR, he served as the [REDACTED]. He has been awarded the Coast Guard Achievement Medal four times: once for his service in [REDACTED] and three times for his service in [REDACTED]. He has also received many marks of 7 on his performance evaluations.

On [REDACTED] CWO Final Eligibility List resulting from the [REDACTED] Warrant Appointment Board was issued. The list was effective from June [REDACTED]. Among members in the communications field, the applicant's name appears [REDACTED].

³ The skill rating [REDACTED]

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

On [REDACTED] 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 [REDACTED] and appeared in [REDACTED] 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 1992, the applicant "was deeply troubled and frustrated by" what the applicant believed was a "personality conflict" with RM3 M. 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 93 needs to be removed from [the applicant's] record in order to rectify this injustice, then I support that."

A [REDACTED] stated that he was stationed in [REDACTED] from 1990 to 1993. In 1991, 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 [REDACTED] stated that [REDACTED] was a member of the section at that time. The [REDACTED] 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 [REDACTED] said that the applicant's "style of leadership offended [REDACTED] a female petty officer], and I believe she thought it was personal."

A [REDACTED] (first class) who supervised the applicant in [REDACTED] signed a statement on June 9, 1999, indicating that the applicant was a "dedicated, proactive leader" who "personified the word 'professional.'" He stated that "an incident arose between [the applicant] and [REDACTED] which, in my opinion was then, and is now, part of her personal vendetta against [the applicant]."

A [REDACTED] who worked closely with the applicant in [REDACTED] from May 1992 through June 1994, signed a statement on June 10, 1999, 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 [REDACTED] who worked in the applicant's watch station in [REDACTED] also signed a statement on June 10, 1999. This [REDACTED] stated that the applicant "was always fair and professional to all his watchstanders. 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 [REDACTED] who worked in [REDACTED] stated that the applicant was "a firm and fair leader."

A [REDACTED] signed a statement indicating that he served under the applicant in [REDACTED] from May 1993 to May 1994. 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 [REDACTED] who worked at the [REDACTED] from 1991 through 1995, stated that the applicant was a very helpful supervisor who never treated her differently 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 [REDACTED] [REDACTED] where the applicant worked in 1994 and 1995, signed a statement dated June 10, 1999. The YN2 stated that he had received a page 7 in the mail concerning the applicant and an incident in [REDACTED]. 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 [REDACTED] where the applicant has worked since 1995, signed a statement dated June 10, 1999, relating the following incident: "[In the mail] I received a Page 7 (3307) concerning [the applicant] and a female member at a unit in [REDACTED]. 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 [REDACTED] in the fall of 1998 described his own experiences with [REDACTED]. He stated that, while they served together on the Coast Guard cutter [REDACTED] 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 [REDACTED] "has continued in her attempts to ruin [the applicant's] career due to my observations onboard [REDACTED] and numerous references in her speech regarding [REDACTED] and [the applicant]."

A [REDACTED] signed a statement on May 25, 1999, indicating that she worked under the applicant from June 1995 to June 1998. 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 accomplishments, 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 1993 or a Coast Guard Investigative Service (CGIS) investigation into this matter dated 11 March 1994." 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 1993 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, 1994, the Chief of the Law Enforcement Branch of the [REDACTED] approved a Report of Investigation into sexual harassment allegedly committed by the applicant and another member at [REDACTED]. The investigator concluded that the applicant had "sexually harassed various women at [REDACTED]. These conclusions were based on interviews with members of the applicant's section in [REDACTED]. 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 1993, 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

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.

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.

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 1999 CWO eligibility list and therefore not be appointed to CWO on June 1, 1999. 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, 1999, 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, 1999, 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 [REDACTED] Final Eligibility List for appointment to CWO and would have been appointed to CWO on [REDACTED] 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 1993, the applicant has been stationed in [REDACTED] 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 [REDACTED] Final Eligibility List after reviewing his complete record, the Commandant disapproved the recommendation. In doing so, the Commandant reasonably required the applicant to recompute 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

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

in [REDACTED] Final Eligibility List, even higher than he had been on the [REDACTED] list. Therefore, the Board concludes that the applicant would have been 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 [REDACTED]. 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 recompute 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 [REDACTED]. 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
, USCG, is hereby granted in part as follows:

His date of rank and date of appointment to CWO2 shall be changed to .

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

