

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-077

██████████
██████████

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on March 27, 2014, the Chair docketed the case and assigned it to ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 17, 2014, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, an ██████████ serving on active duty, asked the Board to remove from his record a negative CG-3307 Administrative Remarks ("Page 7")¹, dated January 19, 2005, documenting a formal investigation conducted by the applicant's command when the applicant admitted to using a Coast Guard computer to view an inappropriate photograph which had been attached to an e-mail the applicant received. The applicant stated that he was unjustly grouped with other personnel who had committed far worse offenses than he had. The applicant also stated that the inclusion of the negative Page 7 is unjust because the incident occurred over nine years ago and is not an accurate reflection of his character or behavior.

SUMMARY OF THE MILITARY RECORD

The applicant enlisted in the Coast Guard on October 4, 1994. On January 19, 2005, the applicant received a negative Page 7 which stated the following:

[O]n 13 Jan 2005, as a result of a formal investigation conducted by this command you admitted to using a Coast Guard computer to view inappropriate material that was sexually explicit and sexually oriented in nature. Your actions were clearly in violation of COMDTINST 5375.1A,

¹ An Administrative Remarks record entry, form CG-3307, better known as a "Page 7," is used to document a member's notification of important information, achievements, or counseling about positive or negative aspects of a member's performance in the member's military record.

Limited Personal Use of Government Office Equipment. By this blatant disregard of Coast Guard policy, you exercised poor judgment that is inconsistent with the professional expectations placed upon a petty officer in the United States Coast Guard. Additionally, your actions were prejudicial to good order and discipline and had the potential to create a hostile work environment for your shipmates.

Any further violation of this policy will result in more severe punitive actions.

The Page 7 is signed by the Executive Officer of the applicant's unit, and the applicant acknowledged receiving the Page 7 by signature on January 20, 2005.

VIEWS OF THE COAST GUARD

On August 4, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board grant relief in this case in accordance with the findings and analysis provided in a memorandum submitted by the Commanding Officer, Coast Guard Personnel Service Center (PSC).

PSC recommended that relief be granted. PSC argued that in accordance with Coast Guard policy, only the Commanding Officer may sign adverse administrative remarks and therefore the Page 7 should be removed from the applicant's record. To support this argument, PSC referenced Personnel and Pay Procedures Manual (PPPM), PPCINST M1000.2A, Change 14, Chapter 1.4.3., which states that "[o]nly the CO/OIC may sign Adverse Administrative Remarks (CG-3307) entries. However, [p]er CG Regulations, (7-I-9.F), an officer, temporarily succeeding to command may sign as acting."²

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 14, 2014, the Chair of the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The BCMR did not receive a response.

APPLICABLE LAW AND POLICY

Chapter 1 of the Personnel and Pay Procedures Manual (PPPM), PPCINST M1000.2A, that was in effect in 2005 states that "[t]he CO may authorize in writing for officers, Chief Petty Officers, First Class Petty Officers, and Second Class Petty Officers to sign forms and worksheets 'by direction,' subject to the following restrictions." The list of restrictions does not include the restriction about only a CO or OIC signing an adverse Page 7. That restriction went into effect in 2009.

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:

² Change 14 of PPCINST M1000.2A went into effect in 2009.

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. However, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service and begins upon the date of discharge from active duty.³ Because the applicant has remained on active duty since the disputed Page 7 was entered in his record, the three-year limitations period has been tolled. Therefore, the application is timely.

3. The applicant alleged that he was erroneously and unjustly given a negative Page 7, dated January 19, 2005, when he was grouped with personnel who had committed far worse offenses because he received an e-mail with an inappropriate photo attached to it and failed to delete it. The applicant also argued that the Page 7 is unjust because the incident occurred over nine years ago and is not an accurate reflection of his character or behavior. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁵

4. Under 10 U.S.C. § 1552, the Board is authorized to "correct an error or remove an injustice" in any Coast Guard military record. "Error" means a mistake of a significant fact or law and includes a violation by the Coast Guard of its own regulations.⁶ For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."⁷ The Board has authority to determine whether an injustice exists on a "case-by-case basis."⁸ Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"⁹ and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."¹⁰

³ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994).

⁴ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ *See Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) ("Error" means legal or factual error.); *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations.").

⁷ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

⁸ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

⁹ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

¹⁰ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

5. Chapter 1 of the Personnel and Pay Procedures Manual, PPCINST M1000.2A, in effect in 2005, when the applicant received the disputed Page 7, did not prohibit an Executive Officer from signing an adverse Page 7. The prohibition referenced by the Coast Guard did not go into effect until 2009 with Change 14 of PPCINST M1000.2A. At the time the applicant received the disputed Page 7 in 2005, no policy or regulation prohibited the Executive Officer from signing and entering the Page 7 in the applicant's record. In fact, in the absence of Change 14 of PPCINST M1000.2A, signing such a Page 7 appears to fall well within the authority an Executive Officer.¹¹

6. The applicant claimed that the Page 7 is unjust because it constitutes punishment similar to that received for worse transgressions at his unit, but failed to support this claim. He also alleged that the Page 7 is unjust because it is old and does not reflect his character. The Board does not remove documents from member's records just because they are old, and the applicant has not submitted any evidence supporting his claim that the Page 7 constituted disproportionate punishment. He has not overcome the presumption that the disputed Page 7 is accurate and fair. Therefore, the Board finds that the applicant has failed to prove by a preponderance of the evidence that the inclusion of the Page 7 in his record is erroneous or unjust.

7. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ Part 6-2-1.A. of Coast Guard Regulations, COMDTINST M5000.3B, defines the "Status, Authority, and Responsibility" of an Executive Officer as follows:

The executive officer is the direct representative of the commanding officer. All orders issued by the executive officer shall have the same force and effect as though issued by the commanding officer and shall be obeyed accordingly by all persons on board. In performance of duties, the executive officer shall conform to and effect the policies and orders of the commanding officer The executive officer shall be primarily responsible for the organization, coordination of effort, performance of duty, and good order and discipline of the entire command. ...

ORDER

The application of [REDACTED], USCG, for correction of his military record is denied.

October 17, 2014

