

does not show how the YN2 received the earlier emails. Nor is there any unit information or signature block under the YN2's name. The YN2 claimed that "the charges ... were dismissed with a warning and the documents discussed should be removed from [the applicant's] record." On November 24, 2015, the applicant forwarded these emails to another YN1, who advised him to apply to the BCMR. The Sector Commander, who signed the disputed Page 7, was not a recipient or cc'ed on any of the emails submitted by the applicant.

Regarding his discovery of the alleged error, the applicant alleged that although he signed the disputed Page 7 in January 2011, after receiving the YN2's email in December 2012, he thought the Page 7 would be removed. He stated that he did not discover that it had not been removed until December 12, 2015.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on December 7, 1999. After recruit training, he attended "A" School. On May 17, 2000, while attending "A" School, the applicant received an alcohol incident for arriving more than an hour late for duty due to his consumption of alcohol.

Upon graduating from "A" School in late May 2000, the applicant was assigned to a cutter. On November 4, 2001, the applicant was counseled on a Page 7 about failing to perform prescribed security duties. On April 10, 2002, he was counseled on a Page 7 for exercising poor judgment by attempting to deceive military police who had stopped a shipmate for speeding, for appropriating a government vehicle without permission, and for lying about having used the vehicle. On May 9, 2002, the applicant was brought to mast. A Court Memorandum in his record shows that he was awarded a forfeiture of \$500.00 as NJP for dereliction of duty and making a false official statement. A Page 7 dated the day of the mast contains the following entries documenting the NJP and the termination of his eligibility period for a Good Conduct Medal:

This is an adverse administrative remark entry to document an "unsatisfactory" conduct mark due to non-judicial punishment (NJP) received this date. [The applicant] was found in violation of Article 92 (Dereliction in the performance of duty) and Article 107 (False Officer [sic] Statement) of the UCMJ [Uniform Code of Military Justice] and awarded the following punishment: Forfeiture of \$500.00 pay per month for one month.

Period of eligibility for Coast Guard Good Conduct award terminated this date due to assigned mark of "unsatisfactory" in the Conduct Performance Dimension. New period of eligibility for Good Conduct award commences 10MAY02.

Another Page 7 states that the applicant received a low mark of 2 (on a scale of 1 to 7) in the performance dimension Integrity on his performance evaluation dated May 30, 2002, because he had attempted to deceive military police on April 6, 2002, and had received NJP for dereliction of duty and making a false official statement. Before transferring from the cutter in May 2003, however, the applicant was awarded an end-of-tour Achievement Medal for superior performance.

In May 2003, the applicant reported for duty to a Sector office. While serving at the Sector office, the applicant advanced twice, from E-4 to E-5 and then to E-6. A Page 7 dated October 11, 2005, shows that he was selected as the Sector's Enlisted Person of the Quarter because he had proven himself to be an integral asset to the Sector by exceling when he was required to assume

the duties of the Operations Specialist in Charge of the Command Center for four weeks while the incumbent was away. Upon his transfer from the Sector in June 2007, the applicant received a second end-of-tour Achievement Medal.

In June 2007, the applicant reported for duty at another Sector. On March 31, 2010, he received a positive Page 7 commending him for his performance of duty in processing background investigations for security clearances. On January 20, 2011, the applicant received the disputed Page 7 in this case from the Sector Commander, which states the following:

30 Jan 2011: You are hereby counseled for your violation of UCMJ Article 92 (Failure to obey order or regulation) per [COMDTINST 5375.1B, titled "Limited Personal Use of Government Office Equipment"], and Article 108 (Military property of the United States – sale, loss, damage, destruction, or wrongful disposition). On more than a dozen occasions, you willingly visited prohibited and inappropriate internet sites on a government owned computer workstation. Some of these sites included streaming video such as "YouTube", inappropriate personal shopping sites such as "E-Bay" and "TheDirty," in which you viewed sexually explicit content. These actions resulted in the workstation being re-imaged several times and ultimately impacting Coast Guard Resources. This type of blatant disregard to military standards and our own Coast Guard Core Values is unacceptable. Any further violations of the aforementioned standards above will result in immediate disciplinary action.

On May 27, 2011, the applicant received an end-of-tour Letter of Commendation from the Sector Commander for demonstrating "superb leadership, exemplary initiative and profound dedication to duty."

In July 2011, the applicant reported for duty at a District Command Center, where he served as a Command Duty Officer watchstander and advanced to [REDACTED]/E-7. Upon completing a four-year tour of duty at the District Command Center, the applicant was awarded a Commendation Medal for outstanding achievement on June 4, 2015. On September 4, 2015, the applicant reenlisted for six years.

VIEWS OF THE COAST GUARD

On April 27, 2017, the Judge Advocate General (JAG) submitted an advisory opinion in which he adopted the findings and analysis of the case provided in an attached memorandum prepared by the Personnel Service Center (PSC) and recommended that the Board deny relief.

PSC alleged that the application is untimely because the Page 7 was entered in the applicant's record more than six years ago. PSC further stated that the Sector Commander who signed the disputed Page 7 has retired in the interim¹ and the report of the investigation is likewise unavailable. Therefore, PSC argued, the Coast Guard has been prejudiced in its ability to submit important evidence by the applicant's delay in contesting the Page 7. Therefore, PSC argued, the applicant's request should be denied on these grounds alone.

PSC also stated that the Page 7 is presumptively correct and was signed by the Sector Commander, who is no longer available to provide a statement. PSC noted that although the

¹ The captain who was the Sector Commander in January 2011 retired in 2015.

applicant told his supervisor that the Sector's investigation had exonerated him, the emails submitted by the applicant show that the applicant was taken to mast based on the investigation, and the Sector Commander dismissed the charges "with a warning."

PSC concluded that the applicant has not proven by a preponderance of the evidence that the Page 7 is erroneous or unjust. PSC stated that the fact that the Sector Commander dismissed the charges with a warning, instead of awarding NJP, does not prove that the Page 7 should be removed because the Sector Commander was authorized to counsel the applicant about his misconduct on the Page 7 instead of imposing NJP. PSC noted that Rule for Courts-Martial 306 states that commanding officers may dispose of UCMJ offenses by taking administrative action, which includes a Page 7. PSC stated that the Page 7 was not invalidated when the Sector Commander chose to dismiss the charges with a warning. Therefore, PSC recommended that the Board deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 2, 2017, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Part V of the Manual for Courts-Martial United States provides the rules for conducting masts and imposing NJP under Article 15 of the UCMJ. Paragraph 1g states that Article 15 does "not apply to include, or limit use of administrative corrective measures that promote efficiency and good order and discipline such as counseling, admonitions, reprimands, ... Administrative corrective measures are not punishment, and they may be used for acts or omissions which are not offenses under the code and for acts or omissions which are offenses under the code."

Rule for Courts-Martial 306(a) in the Manual for Courts-Martial United States states that "[e]ach commander has discretion to dispose of offenses by members of the command." Rule 306(c)(2) states that a "commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand ..."

Articles 1.D.9. and 1.D.15. of the Military Justice Manual provide that at the end of a mast, the CO should dismiss unsupported allegations and make findings about whether the member committed one or more offense. Article 1.D.17. states that the "commanding officer may decide not to punish a member by dismissing the matter with a warning. Such a decision may be based on either a lack of proof or a determination that punishment is not appropriate even though the member committed an offense(s). That decision is not considered NJP, and no Court Memorandum (Form CG-3304) entry shall be made in the member's service record." The CO may also impose NJP, refer the charges to court-martial, or decide further investigation is needed. Article 1.G.1. provides that COs may use "administrative corrective measures to further the efficiency of their commands or units" and that such measures "may be administered either orally or in writing."

Article 8.E.3. of the Personnel Manual in effect in January 2011 provides that when a commanding officer (CO) awards NJP, the Court Memorandum should be forwarded to the Personnel Command. Article 10.B.2. provides that when a member receives NJP, the command must prepare an adverse Page 7, which must state that an NJP occurred, and should begin, “This is an adverse supporting remarks entry for ...” to “clearly distinguish this type of remarks entry from all others.” Article 10.B.5.b.3.a. provides that the command must prepare a disciplinary performance evaluation when NJP is imposed. Article 10.B.8.b. states that a member’s eligibility period for a Good Conduct Medal terminates when NJP is imposed.

Article 14.B.2. of the Personnel Manual in effect in January 2011 allows a member to appeal a Page 7 through his chain of command. In September 2011, these provisions were moved to COMDTINST 1070.1.

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. Although the application was not filed within three years of the date the applicant signed the disputed Page 7 for entry in his record, it is considered timely because he has remained on active duty.²

2. The applicant alleged that a January 20, 2011, Page 7 in his record documenting counseling about viewing sexually explicit images on his Coast Guard computer is erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁴

3. The Board finds that the applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that the disputed Page 7 is erroneous or unjust for the following reasons:

a. As the Coast Guard argued, the unit’s documentation of the investigation of the applicant’s misconduct is no longer available to review and the Sector Commander who signed the Page 7 has retired, and so even if the applicant had submitted evidence that cast doubt on the propriety of the Page 7, the doctrine of laches would bar the claim. The doctrine of laches applies

² *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, 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).

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

when an applicant's delay in applying to the Board has prejudiced the Coast Guard's ability to produce evidence to show that the disputed military record is correct and just.⁵ Although the applicant alleged that he discovered the error in his record in 2015 because he relied on the email from the YN2 in 2012, the Board finds that the preponderance of the evidence shows that the applicant knew that the Page 7 was in his record in 2011 and was not misled. The YN2's email to the applicant and a YN1 claiming that "the documents" should be removed is not reliable evidence that the applicant was actually misled to believe that the Page 7 had been removed. In this regard, the Board notes that there is no evidence that the applicant ever followed the rules for appealing the Page 7 through his chain of command, as provided by Article 14.B.2. of the Personnel Manual, and no evidence that the Sector Commander, who authorized and signed the Page 7, ever agreed to its removal. The preponderance of the evidence shows that the applicant, having attended the mast and signed the Page 7, knew that it was entered in his record as counseling (a warning) in lieu of NJP and that the Sector Commander had not authorized its removal despite dismissing the charges at mast. Therefore, even though the Board's statute of limitations has been tolled because the applicant has remained on active duty, the doctrine of laches should bar the claim.⁶

b. Even if the doctrine of laches did not bar the claim, the disputed Page 7 was signed by the Sector Commander and there is no evidence in the record showing that the Sector Commander intended to withdraw it. The December 31, 2012, email from a YN2 to the applicant and a YN1—which was not cc'ed to any higher authority, much less the Sector Commander, but claims that "the documents" should be removed from the applicant's record—is unpersuasive. The other 2012 emails show that no Court Memorandum documenting NJP in December 2010 should be in the applicant's record (and none is) because the charges were dismissed with a warning at mast. The emails also show that the applicant had erroneously told his then-current supervisor that he had been exonerated by the investigation in 2010. The Sector Commander would not have signed the Page 7 stating that the applicant had committed the offenses if the applicant had been exonerated.

c. Under Article 15 of the UCMJ, paragraph 1g of part V of the Manual for Courts-Martial United States, and Articles 1.D.17. and 1.G.1. of the Military Justice Manual, the Sector Commander was authorized to dismiss the criminal charges against the applicant with a warning even though the Sector Commander found that the applicant had committed the offenses, and the Sector Commander was authorized to issue the warning either orally or in writing. The disputed Page 7 indicates that the Sector Commander found that the applicant had committed the offenses but decided to dismiss the charges and issue the warning in writing, instead of imposing NJP. Imposing NJP for violations of Articles 92 and 108 of the UCMJ would have had significant negative repercussions on the applicant's career. He would have received a disciplinary performance evaluation.⁷ His transfer orders would have been canceled.⁸ He would have been removed from an [REDACTED] advancement list if he was on one, and he would have been ineligible to compete for advancement to [REDACTED] for two years.⁹ He would have been ineligible for an appointment as a chief warrant officer for three years¹⁰ and ineligible for an assignment as an Officer in Charge or an

⁵ See *Lebrun v. England*, 212 F. Supp. 2d 5, 13 (D.D.C. 2002).

⁶ *Detweiler v. Pena*, 38 F.3d 591, 595 (D.C. Cir. 1994) (citing *Deering v. United States*, 223 Ct. Cl. 342 (1980)).

⁷ Coast Guard Personnel Manual, Article 10.B.5.b.3.a.

⁸ *Id.* at Articles 4.B.1.d. and 4.B.10.b.

⁹ *Id.* at Article 5.C.5.b.3.

¹⁰ *Id.* at Article 1.D.2.a.10.

Executive Petty Officer for two years.¹¹ His eligibility period for a Good Conduct Medal would have ended.¹² Moreover, in 2015, the receipt of NJP for violating Article 92 and 108 of the UCMJ would have made him ineligible to reenlist,¹³ and so he might have been discharged with sixteen years of service instead of being allowed to reenlist and remain on active duty until eligible for retirement in 2019.

d. The text of the Page 7 shows that it was not prepared to document receipt of NJP because pursuant to Article 10.B.2. of the Personnel Manual in effect in January 2011, Page 7s documenting NJP must state that NJP was awarded and should begin with specific language to “clearly distinguish this type of remarks entry from all others.” Unlike the Page 7 he received to document his NJP on May 9, 2002, the disputed Page 7 does not mention NJP and does not begin with the prescribed language. Therefore, the text of the disputed Page 7 shows that it was entered in his record not to document of NJP but to stand as the warning the applicant received in lieu of NJP.

4. Accordingly, the Board finds that the applicant has not proven by a preponderance of the evidence that the disputed Page 7 is erroneous or unjust. His request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ *Id.* at Articles 4.C.7.b. and 4.C.8.b.

¹² *Id.* at Article 10.B.8.b.

¹³ ALCOAST 093/14, para. B.2 f., makes members who have received NJP for an offense for which the maximum punishment under the UCMJ is a punitive discharge, which includes violations of Articles 92 and 108, ineligible for reenlistment.

ORDER

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

August 4, 2017

