

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-039

██████████
██████████

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. The Chair docketed the case after receiving the completed application on December 1, 2016, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated August 18, 2017, 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, a ██████████ (E-6), asked the Board to correct his record by removing an Administrative Remarks form CG-3307 ("Page 7")¹ dated December 12, 2014, and all associated documentation from his record. The applicant claimed that his Commanding Officer (CO) unjustly and erroneously stated that he had found that the applicant had committed the offense of adultery, a violation of Article 134 of the Uniform Code of Military Justice (UCMJ), by a "preponderance of the evidence." The applicant argued that there was no supporting evidence to prove each element of that offense. He added that the charges against him had been dropped, which further proves there was not enough evidence to find by a preponderance that he had committed this offense. The applicant therefore asked that the Board remove the Page 7 in its entirety, redact the reference to this charge from his September 2015 performance evaluation, and remove any other associated documentation from his record.

The applicant provided a written statement to the Board in support of his application. He argued that the disputed Page 7 "wrongly states that by a preponderance of the evidence" he was found to have committed adultery. The applicant explained that the offense of adultery, under

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. Under Article 1.4.3. of PPCINST M1000.2B, the Personnel and Pay Procedures Manual in effect in 2014, adverse Page 7s documenting performance or disciplinary issues must be signed by the member's CO.

UCMJ Article 134, has three elements: that the accused wrongfully had sexual intercourse with a certain person; that, at the time, the accused or the other person was married to someone else; and that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Regarding the first element, that the accused wrongfully had sexual intercourse with a certain person, the applicant argued that no “factual evidence” was discovered during the course of the administrative investigation to prove that the applicant had had any sexual intercourse with another woman. He stated that the only documentation to “suggest a violation of this element” was a statement from the Executive Officer (XO) who alleged that the applicant had told him that he had gotten another woman pregnant. The applicant claimed that this statement was “taken out of context,” he was merely explaining to his XO that he had heard rumors to this effect and was not validating them. He reiterated that there has never been any evidence that he had engaged in a sexual relationship with anyone not his wife.

Regarding the second element, that the accused was married to someone else, the applicant admitted that he was legally married to his wife at the time. He did inform his command on several occasions that he and his now ex-wife had separated, albeit non-legally. In January 2014, the applicant informed his CO that he and his wife had separated. The applicant explained that he informed his Command because his wife, who was a member of the Coast Guard Reserve, had applied to be the unit’s Ombudsman, and the applicant felt that their separation might cause a conflict of interest. In May 2014, his wife heard of the applicant’s “friendship” with another woman. The applicant stated that he went to his XO to inform him of the situation, as he feared rumors would begin to circulate. The XO reportedly stated that he had not heard any rumors, and thanked the applicant for bringing the situation to his attention. The applicant claimed that the XO informed him that he had not violated any policies and that he had acted in good faith to protect himself.

As to the third element, that the conduct of the accused was to the prejudice of good order and discipline of the armed forces, the applicant stated that the “alleged relationship” did not affect his “high level of work performance.” He added that at no point did he misuse government resources nor was he accused of doing so. The applicant stated that the marks on his September 30, 2014, Enlisted Employee Review (EER), which covered the period of the alleged misconduct, proves that his performance was “superior and excellent to CG standards.” His separation from his wife and “friendship” with another woman was kept private from most of his co-workers, and his alleged conduct had no effect on morale at his unit or his wife’s unit. In addition, the applicant stated that the friendship with the other woman ended in August 2014, before any administrative action was initiated.

In support of his application, the applicant provided related documentation, which is discussed below in the Summary of the Record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on June 29, 2000.

On November 17, 2014, a Report of Offense and Disposition was created charging the applicant with having violated UCMJ Article 134, Adultery. (This report is not in the applicant's record, but he submitted it with his application.) The report lists three members at witnesses. The details of the offense state that the applicant, "a married man, did Sep/Oct 2014, wrongfully have sexual intercourse, with a woman, not his wife." Under the heading Action of Executive Officer, the disposition was checked as Dismissed, with a hand-written note that states "negative 3307, counseling." Under the heading of Action of Commanding Officer, the Dismissed with Warning box was checked.

On November 19, 2014, a Lieutenant junior grade was designated at the Preliminary Inquiry Officer (investigator) for the investigation into the actions of the applicant to determine if he had engaged in wrongful sexual intercourse with a woman who was not his wife. The investigator was directed to conduct an investigation to include findings of facts and recommendations in accordance with the Coast Guard Administrative Investigations Manual, COMDTINST M5830.1.

On December 10, 2014, the applicant acknowledged and signed a statement of his rights. The document states that the applicant was suspected of "wrongfully having sexual intercourse with a woman other than his wife...He is also suspected of having a child out of wedlock." The applicant initialed next to each of his listed rights and checked the boxes indicating that he did not wish to consult an attorney and that he desired to make a statement or answer questions.

On December 12, 2014, the applicant's Command received a memorandum regarding the outcome of the administrative investigation. The investigator noted that he had been tasked with investigating the matter surrounding allegations that the applicant had violated UCMJ Article 134. He stated that the applicant and all personnel interviewed fully cooperated and were available for interviews. The applicant was advised of his rights and chose not to consult an attorney. The investigator stated that after reviewing the charges and all statements of facts, he determined that the charge of adultery "should not be considered as enforceable regarding the prevailing evidence and circumstances." The investigator made the following findings of fact: that the applicant was married to his wife, an OS1, who was a member of the Coast Guard Reserve; the applicant and his wife began having marital issues around January 2013; around March 2014, the applicant informed his CO that he and his wife would be separating; at no point did the applicant and his wife apply for a court order to legally separate; from April to September 2014, the applicant "began having an affair with another woman he met at a bar"; neither the applicant nor his wife answered when asked if the applicant had had sexual intercourse with the other woman; and the applicant acknowledged that he had an affair and that the woman might be pregnant to his XO.

The investigator prepared an "Opinions" section, in which he stated that the applicant was "not in violation of Article 134" because his actions did not meet the criteria for all elements of Article 134. The investigator found that the applicant was married to his wife and that they had never legally separated. The applicant, being an E-7, was held to a "higher standard and his actions did not uphold the core values of the US Coast Guard." The investigator stated that he did not uncover "explicit evidence that undoubtedly prove[d]" that the applicant had had sexual intercourse with a woman other than his wife or that he had impregnated another woman. The investigator noted that as a Preliminary Inquiry Officer, he did not have access to enough evidence or

resources (such as cell phone records) to advocate that the applicant receive non-judicial punishment (NJP). He recommended, therefore, that the applicant not be given NJP, that the Coast Guard Investigative Service be contacted so that they may gather more “critical personal information,” and that the applicant be ordered to discontinue further contact with the other woman.

With the memorandum, the investigator provided summaries of each of the interviews he conducted. The first was a summary of an interview with the applicant. The applicant voluntarily offered insight to the events that lead to the Article 134 charge. The applicant stated that “turmoil” began in his marriage when he discovered that his wife had engaged in “inappropriate dialogue” with another man. The applicant did not think that his wife had sexual intercourse with the man, but he did not approve of their interactions. The applicant stated that he began watching his wife closely and monitored her cell phone calls and text messages. After monitoring her contacts for a while, he decided it would be best for them to separate to decide whether to stay together. He decided to inform his Command once they made the decision to separate, although they never sought legal documentation pertaining to their separation. Shortly after the separation, the applicant “began having an affair with a woman he met at a bar.” The applicant characterized the affair as “more of a friendship than a romantic relationship.” He did not provide identifying information about the woman and declined to answer questions regarding any sexual intercourse or the possibility that he had impregnated her. The applicant stated that he and his wife had sought counseling and were attempting to “get their marriage back on track.”

With the summary of the interview, the investigator also included a statement from the applicant. The applicant stated that he and his wife began having marital difficulties in January of 2013. Although his wife did not have a physical relationship with another man, it was “enough to bring distance and issues” to their marriage. The applicant confronted his wife about the relationship with the other man in January 2014 and informed her that he would not move forward with her if she continued to talk to the other man. He stated that he found out in March 2014 that she had not held up their “agreement” so the applicant decided it would be best for them to separate. The applicant informed his CO and told him that this decision would not affect his work. He made arrangements to live with friends while he got a release from government housing so that he could move his wife and children to their house nearby which was tenant-occupied. The applicant was unable to get a release from government housing, and because of the financial difficulty it would bring to live separately, the applicant and his wife decided to continue living together in the housing unit until their home was available.

The applicant stated that he and his family moved to their home in July 2014. The applicant moved into the basement unit of the house while he attempted to locate other housing options. In September 2014, the applicant and his wife discussed their housing situation, and it was at this time that the applicant informed his wife of the relationship he had with the other woman. He told her that it was not a “serious relationship” but more of a “friendship” while he was dealing with the ending of his marriage. After this conversation, the applicant and his wife decided to give their marriage another try and that he would no longer speak with the other woman. The applicant stated that he ended the relationship with the woman. He claimed that the woman was not happy about this, and she reached out to the applicant’s wife to “convey her feelings for [the applicant].” The applicant stated that the women proceeded to tell his wife inaccurate information. He and his

wife discussed this conversation, and his wife reportedly believed that the woman had not been truthful and “was just hurt in [his] absence.”

While the applicant and his wife were working on their marriage, his wife apparently spoke to a friend who was married to a Coast Guard member. His wife told the applicant that the friend had heard rumors that the applicant was having an affair. The applicant stated that he felt it would be in his best interest to inform his Command that rumors had started, that only a few people at the Command were aware of his relationship status with his wife, and that he had a friendship with another woman for about four months until he and his wife decided to get back together. The applicant took leave from mid-October to mid-November 2014 to attend to unrelated family issues. During this time he was questioned regarding his affair and the allegation that he had gotten another woman pregnant. Two days after returning to work, he received a Report of Offense and Disposition for an Article 134 violation. The applicant stated that this whole situation is extremely private and he only informed a few members of his command what was going on so as to protect himself.

The investigator included a statement from the applicant’s XO regarding the events in question. The XO stated that during the first two weeks in November 2014, he heard that a rumor was going around housing that the applicant had been unfaithful to his wife and had gotten the other woman pregnant. The XO asked another member of the unit to get information from one of the applicant’s close friends, a BMC. The BMC reportedly stated that to the best of his knowledge, the rumors were true. At this time, the applicant was on leave. When the applicant returned from leave, the XO sat down with him to discuss the rumors, among other family-related issues. During this conversation, the applicant “willingly admitted that he did have an affair with another woman, with whom he [was] having a child.”

The investigator prepared a summary of an interview with the BMC. BMC stated that the applicant “never specifically admitted to having sexual intercourse” with the other woman. The BMC had drawn that conclusion himself and stated that the applicant never provided direct information that would suggest the accusations were true or false. If the BMC asked the applicant about the alleged affair, the applicant reportedly would respond stating that he was “taking care of the whole ordeal.” The BMC also stated that he knew the applicant and his wife were having marital difficulties and that they intended to separate.

Lastly, the investigator provided a summary of his interview with the OS1, the applicant’s wife. The OS1 stated that turmoil began in their marriage in 2013 when the applicant began to “disapprove of an existing friendship,” which, she claimed, dated back to high school. She and her husband agreed to separate, but that was not “necessarily possible since they were living in on-base housing and he could not afford to move out.” When they were released from housing around July 2014, they both moved back to their home. The OS1 stated that at the time, she was unaware that the applicant was “engaging in an affair with another woman.” When the applicant informed her of the affair, she began to have conversations with the woman to find out what exactly had happened between them. The OS1 told a friend, the wife of a Coast Guard member, about the affair. The OS1 declined to answer questions regarding whether the applicant had impregnated the other woman or if the applicant had had sexual intercourse with her. She also declined to provide any identifying information about the other woman.

The disputed Page 7 is dated December 12, 2014. It is signed by the CO and was acknowledged and signed by the applicant on December 18, 2014. It states the following:

You are being counseled for your actions surrounding the extramarital affair between yourself and a woman who is not your spouse. Although I am convinced by the preponderance of the evidence that you committed the offense of UCMJ Article 134 (Adultery), I have decided that non-judicial punishment is inappropriate at this time; however, your unacceptable behavior is contrary to the Coast Guard's Core Values and is of great concern to this Command.

As a Chief, you are expected to hold yourself to a higher standard and lead by example. Putting yourself in a position that could greatly affect your career, and the good order and discipline of the unit, is objectionable behavior for a senior enlisted.

Your failure to take accountability for your actions displays a lack of the requisite leadership abilities required of a Chief Boatswain's Mate. Absent of a demonstrated and sustained improvement in performance, you can anticipate a Not Recommended on your next Enlisted Employee Review.

VIEWS OF THE COAST GUARD

On April 28, 2017, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis in a memorandum on the case prepared by the Coast Guard's Personnel Service Center (PSC).

PSC stated that the applicant received a negative Page 7 for his adulterous relationship after his CO had received the report of the investigation. PSC stated that Coast Guard officials are afforded the presumption of regularity, and the applicant has not proven by a preponderance of the evidence that the contested Page 7 is either erroneous or unjust. The CO has the vested authority to determine the appropriate disposition of cases. The Rules for Courts-Martials (RCM) 306 outlines the disposition options for COs who choose to dispose of alleged UCMJ violations. One of those options is "administrative action" which includes issuing a Page 7. Administrative actions may even be taken if the CO holds NJP proceedings and dismisses the case. In the applicant's case, PSC claimed, the CO chose not to hold NJP proceedings and instead counseled the applicant via Page 7, which was warranted under the circumstances. PSC therefore recommended that the Board deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 2, 2017, the Chair sent a copy of the Coast Guard's opinion to the applicant and invited him to respond within 30 days. No response was received.

APPLICABLE LAW AND REGULATIONS

Part V of the Manual for Courts-Martial United States provides basic rules for COs in conducting masts and imposing NJP under Article 15 of the UCMJ. Paragraph 1.d.(2) states that the CO "exercise[s] personal discretion in evaluating each case, both as to whether [NJP] is appropriate, and, if so, as to the nature and amount of punishment appropriate." 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 (RCM) 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 ...”

Article 1.D.1.f. of the Military Justice Manual, COMDTINST M5810.1E, states that “[t]he burden of proof required in order to award punishment at NJP is a preponderance of the evidence. ... Each element of each offense ... must be supported by a preponderance of the evidence.”

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 submission and applicable law:

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

2. The applicant asked the Board to remove an erroneous and unjust negative Page 7, dated December 18, 2014, from his record. 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.² 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.”³

3. The disputed Page 7 is administrative documentation of the applicant engaging in an adulterous relationship. The investigation into the alleged UCMJ Article 134 violation uncovered evidence that the applicant had engaged in a relationship with a woman other than his legal wife. The investigation provided evidence that the applicant had had an affair with another woman in 2014. Despite the fact that the XO reported that the applicant had admitted to him that he had impregnated another woman, the investigator also found that there was not sufficient evidence to warrant NJP. According to RCM 306, however, it is the CO, not the investigator, who has the authority to decide whether an offense has been committed, and the CO is afforded several choices on how to dispose of an alleged offense. One of those options is administrative action, which may include counseling. The record shows that the applicant’s CO chose to administratively counsel the applicant on a negative Page 7 regarding his adulterous relationship.

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. The applicant complained that his CO could not have found by a preponderance of the evidence that he had committed adultery due to the findings of the investigation. The Board disagrees. The XO stated that the applicant had admitted that he had impregnated another woman, and the CO could rely on this evidence. In addition, the applicant admitted that he had an affair. As noted above, however, his CO had the authority to make his own determination about the facts and the preponderance of the evidence and to act accordingly. That the investigator opined that he had not found enough evidence to warrant NJP did not prohibit the CO from finding that there was sufficient evidence to prove all of the elements of the Article 134 charge by a preponderance of the evidence and from taking either administrative or disciplinary action against the applicant.⁴ The CO's choice to counsel the applicant about his violation of Article 134 on a negative Page 7 was entirely within his authority. The Board therefore finds no error or injustice in the disputed Page 7.

5. Accordingly, relief should be denied because the applicant has not proven by a preponderance of the evidence that the disputed Page 7 is erroneous or unjust.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁴ RCM 306(a).

ORDER

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

August 18, 2017

