

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-028

██████████ ██████████ ██████████
ME1 (former)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on February 17, 2022, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated January 27, 2023, 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 former Maritime Enforcement Specialist (ME1/E-6), asked the Board to correct his record by upgrading his reenlistment code from RE-3 to RE-2 and by removing two negative CG-3307s (“Page 7s”) dated August 22, 2016, and September 8, 2016, wherein he was counseled for violating Article 107 and Article 134 of the Uniform Code of Military Justice (UCMJ) by making a false official statement and wrongfully interfering with an administrative proceeding.

The applicant, through counsel, alleged that the disputed Page 7s are erroneous because nowhere in the Coast Guard Investigative Report was he accused of making false official statements or of interfering with an adverse administrative proceeding. In addition, the applicant alleged that the August 22, 2016, Page 7 stated that he would receive several adverse actions as a result of the alleged UCMJ violations. Specifically, the August 22, 2016, Page 7 stated that the applicant would receive a Special Enlisted Evaluation Report, which the applicant alleged he was never given, a mark of “Not Recommended for Advancement,” which the applicant alleged he never received, and a recommendation to withdraw the applicant’s name from the E-6 advancement list, which the applicant stated never happened because he was promoted on September 1, 2016. According to the applicant, the only threat contained in the August 22, 2016, Page 7 that his Command followed through on was that he would not be recommended for

enlistment into the Coast Guard Reserve, which was accomplished when they gave him a reenlistment code of RE-3 upon his discharge.

To support his application, the applicant provided documents he acquired in response to a Freedom of Information Act (FOIA) request, which included the Coast Guard Investigative Service's (CGIS) interviews and witness statements. Those documents relevant to the applicant's request are summarized below.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on May 12, 2008.

On August 31, 2015, the Coast Guard Investigative Services (CGIS) received notification that the applicant was in possession of Coast Guard Service Wide Examination (SWE) materials. As such, the applicant was investigated. Preliminary information indicated that during a joint patrol, a member of the applicant's unit had requested SWE study material from the applicant, at which point the applicant had allowed the other service member to copy the study material from the applicant's external hard drive. According to the CGIS report, after having received the study materials, the member realized that the materials contained unauthorized copies of official Coast Guard advancement tests.

After advising the applicant of his rights, CGIS investigators interviewed the applicant regarding his possession of copies of previous advancement exams. They advised him that he was suspected of wrongful possession and distribution of the examination materials. According to the CGIS report, the applicant acknowledged that he had reviewed the SWE study material, had recognized photographs of prior examinations, and knew that it was wrongful to possess photographs of prior examinations. The applicant told investigators that he had received the photographs from a senior petty officer (SPO) while on a joint patrol. The applicant explained to investigators that the environment and attitude of his meeting with the SPO gave him a feeling of a senior petty officer talking to a MK2, not a friend trying to help by providing privileged information. The applicant stated that he had perceived the situation in a context of the SPO providing him with the benefit of knowledge. The applicant admitted that the matter of the advancement exams was discussed with the SPO while they sat on the mess deck and that the SPO had not warned the applicant about any potential consequences for his actions. The applicant informed investigators that the SPO never told him to delete any data relating to the study materials and that the SPO cut his conversation with the applicant short after another service member entered the mess deck. Finally, the applicant told investigators that he had not seen or spoken to the SPO since his joint patrol ended.

In an email dated August 5, 2016, the applicant stated the following:

I am writing to provide an accurate account of my career intentions in addition to the standard CG PSC-2845 that is currently being routed. Over the past few months my family and I have been under a lot of stress with regards to an investigation as well as the receipt of orders to [a cutter]. Moving from [his current location] at the present time would cause unnecessary hardship for my family due to my wife's college commitments and my son's special needs. It is my understanding that I am still up for transfer from [his unit] pending the results of the investigation and/or disciplinary action. Due to the above-mentioned circumstances, my intention is to separate in lieu of orders (SILO) when new orders are received. I truly appreciate the opportunities the

command has given me and their assistance with all I have been going through. I am currently in the hiring process with the [a civilian entity] of [city]. Therefore, it is with a heavy heart that I am requesting to be separated from the USCG OOA [on or about] November 1st, 2016. My enlistment currently ends on March 20th, 2017. I have already attended the TGPS course, and my discharge physical will be completed in the next week or two. I have reached out to the In Service Transfer Team (ISTT) in regards to enlisting in the SELRES and intend on completing that process to drill locally. Please do not hesitate to contact me for further clarification or documentation.

On August 15, 2016, the applicant's CO informed the applicant of his intent to discharge him from the Coast Guard. The CO further informed the applicant that he had recommended that the applicant receive an Honorable discharge. Finally, the CO informed the applicant of his right to submit a statement on his own behalf, which, if submitted, would be included in the CO's memorandum recommending the applicant's discharge. The applicant acknowledged the counseling and did not object to being discharged.

On August 15, 2016, the applicant submitted a memorandum, "Statement for Discharge Request," wherein the applicant requested an early separation, in lieu of orders, to take effect on November 1, 2016.

On August 15, 2016, the applicant's CO sent a memorandum to the Coast Guard Personnel Service Center, Enlisted Personnel Management Division (PSC-EPM) wherein he recommended that PSC-EPM approve the applicant's request to be discharged in lieu of orders.

On August 22, 2016, the applicant was issued a negative Page 7 wherein he was informed that the CGIS investigation had concluded. The Page 7, which the applicant acknowledged with his signature, stated the following:

The investigation showed that you engaged in certain acts and such acts were in violation of the following: Article 92, UCMJ Failure to obey order or regulation, Article 107, UCMJ, False official statements, and Article 134, UCMJ, Wrongful interference with an adverse administrative proceeding. The allegations in this investigation are serious, in complete violation of our Core Values: Honor, Respect, and Devotion to Duty and this Command has zero tolerance for such behavior. Furthermore, as a Second Class Petty Officer in the United States Coast Guard and a Maritime Law Enforcement Specialist, you are entrusted with enforcing federal laws, rules and regulations. Your conduct has violated the trust and responsibility inherent in such a position. The following actions will be captured in your record to document your unacceptable behavior:

1. You will receive a special Enlisted Evaluation Report, to further document these facts;
2. You will receive a mark of Not Recommended for Advancement, and will not receive a mark for good conduct;
3. This command will submit recommendation to PSC-EPM and PPC to withdraw your name from the advancement list for E-6; and
4. You will not be recommended to Enlist in the United States Coast Guard Reserve.

According to the Coast Guard's database, the applicant advanced to ME1/E-6 on September 1, 2016.

On September 8, 2016, the applicant received a second Page 7 wherein he was provided with a reenlistment interview pursuant to Article 1.A.5. of the Enlisted Accessions, Evaluations,

and Advancements Manual, COMDTINST M1000.2. The applicant was informed that he met reenlistment criteria but had failed to receive his Commanding Officer's (CO's) positive recommendation for reenlistment due to the applicant's misconduct. This Page 7 further noted that the CGIS investigation had shown that the applicant had engaged in certain acts and such acts were in violation of Articles 92, 107, and 134 of the UCMJ.¹ The applicant also signed this Page 7 in acknowledgement.

On September 19, 2016, PSC issued separation orders for the applicant to be honorably discharged on November 1, 2016, due to "miscellaneous/general reasons" with an RE-3 reenlistment code.

On November 1, 2016, the applicant received an honorable discharge and a reenlistment code of RE-3.

On February 8, 2017, CGIS closed its investigation into the applicant noting that the applicant's command had resolved the matter administratively by issuing him a negative Page 7, discharging him from active duty, and not recommending him for reenlistment.

VIEWS OF THE COAST GUARD

On October 12, 2022, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant alternate relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG stated that the investigation supports the applicant's violation of Article 92, UCMJ, by failing to obey an order or regulation by possessing and distributing photographs of prior examinations. He argued, however, that the applicant has met his burden of proving that there was an error or injustice with the language contained within the applicant's August 22, 2016, and September 8, 2016, negative Page 7s. The JAG explained that upon review of the CGIS investigation, the language contained in the Page 7s regarding the applicant's violations of Article 107 and 134 of the UCMJ, could not be substantiated and as such, the language should be stricken from the Page 7s.

The JAG recommended that the Board make the following changes to the applicant's records:

Redact the following language from the August 22, 2016, Page 7:

"...Article 107, UCMJ, False official statements, and Article 134, UCMJ, Wrongful interference with an adverse proceeding."

Redact the following language from the September 8, 2016, Page 7:

¹ The language used in the September 8, 2016, Page 7 regarding the CGIS investigation and the applicant's conduct was verbatim to the August 22, 2016, Page 7.

“...Article 107, UCMJ, False official statements, and Article 134, UCMJ, Wrongful interference with an adverse proceeding.”

Regarding the applicant request to have his reenlistment code upgraded from an RE-3 to an RE-2, the JAG argued that no relief should be granted. The JAG explained that the RE-2 reenlistment code is exclusively for service members who have retired from the Coast Guard and since the applicant was discharged from the Coast Guard and not retired, he is not entitled to an RE-2 reenlistment code and as such, his current enlistment code should stand.

The Coast Guard did not address the applicant’s complaints about the statements about what actions his CO intended to take on the Page 7 dated August 22, 2016.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 25, 2022, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. As of the date of this decision, no response was received.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.² The applicant received and signed the disputed Page 7s and was discharged in 2016. Therefore, the preponderance of the evidence shows that he knew of the Page 7s in 2016 and his application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.³ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”⁴ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”⁵ Although the applicant in this case did delay filing the application and has not justified his delay, the Coast Guard has recommended that the Board grant some relief in this case. Therefore, the Board finds that it is in the interest of justice to excuse the untimeliness of the application.

² 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

³ 10 U.S.C. § 1552(b).

⁴ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁵ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant alleged that two negative Page 7s in his record are erroneous and unjust. 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 the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ 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."⁷

5. The applicant alleged that the negative Page 7s in his official military record are unjust and should be removed because they contain factually inaccurate and unsubstantiated statements regarding violations of Articles 107 and 134 of the UCMJ. The Coast Guard agreed with the applicant that the statements pertaining to violations of Articles 107 and 134—making a false official statement and interfering in an adverse administrative proceeding, respectively—could not be substantiated in the investigation and should be redacted. The Board has reviewed the CGIS investigation and agrees with the applicant and the Coast Guard that the statements contained in the Page 7s regarding violations of Articles 107 and 134 of the UCMJ are unsubstantiated and should therefore be redacted from the Page 7s.

6. The applicant has failed to prove by a preponderance of the evidence, however, that the remainder of the statements regarding his violation of Article 92—Failure to obey order or regulation, of the UCMJ—were erroneous or unjust. The preponderance of the record shows that the applicant knew that he was wrongfully in possession of unauthorized copies of previously administered advancement exams and that he shared those exams with other service members. Therefore, the Board finds that the statements in the Page 7s regarding the applicant's violation of Article 92 of the UCMJ are supported by a preponderance of the evidence and, as such, should remain in the Page 7s.

7. The applicant argued that Page 7 dated August 22, 2016, should also be removed because it contains statements about administrative measures his CO intended to take but did not. The Page 7 states that his command was going to do the following:

1. You will receive a special Enlisted Evaluation Report, to further document these facts;
2. You will receive a mark of Not Recommended for Advancement, and will not receive a mark for good conduct;
3. This command will submit recommendation to PSC-EPM and PPC to withdraw your name from the advancement list for E6; and
4. You will not be recommended to Enlist in the United States Coast Guard Reserve.

According to the applicant, the first three actions were not taken because he did not receive a special EER with a Not Recommended for Advancement mark and was allowed to advance to ME1/E-6. The Coast Guard did not address these claims in the advisory opinion, and the Coast

⁶ 33 C.F.R. § 52.24(b).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

Guard's database shows that the applicant advanced to ME1/E-6 on September 1, 2016. Because a CO's recommendation for advancement is the most important criterion for advancement,⁸ the applicant would not have advanced if his CO had withdrawn his recommendation for advancement in August 2016, had submitted a special EER with a recommendation against advancement, or had submitted a recommendation to remove the applicant's name from the advancement list. Therefore, the Board finds that the preponderance of the evidence shows that the applicant's command never completed the first three administrative actions enumerated on the Page 7. Although the enumerated list uses the future tense to indicate intended actions, the Board finds that the preponderance of the evidence shows that the first three intended actions are misleading because the CO did not actually take those actions. Therefore, the Page 7 dated August 22, 2016, should also be corrected by removing the first three numbered action items on the list. However, the record does show that the applicant was not recommended for reenlistment and so the fourth action item on the list should not be removed.

8. The applicant alleged that his RE-3 reenlistment code was erroneous and unjust, and unfairly prejudiced him from being able to enter the Coast Guard Reserve. However, on March 18, 2010, the Coast Guard issued ALCOAST 125/10 wherein new Separation Program Designator (SPD) and reenlistment code guidance was issued. Specifically, the ALCOAST states that for the separation code KND, the default reenlistment code is RE-3. This same ALCOAST further states that the default code for members separated prior to the end of the enlistment in most cases is RE-3. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when it issued him a reenlistment code of RE-3. Moreover, the RE-2 code he requested is reserved for retired members. As such, the applicant's request to have his reenlistment code upgraded should be denied.

9. Therefore, the Board finds that the applicant's request to remove the disputed Page 7s from his record and his request to upgrade his reenlistment code should be denied, but the Page 7s should be corrected by removing the following language:

From the CG-3307 dated August 22, 2016, this language should be removed:

- "Article 107, UCMJ, False official statements, and Article 134, UCMJ, Wrongful interference with an adverse administrative proceeding."
- "1. You will receive a special Enlisted Evaluation Report to further document these acts."
- "2. You will receive a mark of Not Recommended for Advancement, and will not receive a mark for good conduct."

⁸ Article 3.A.4.b.3. of the Enlisted, Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2A, states, "The CO/OICs recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system."

- “3. This Command will submit recommendation to PSC-EPM and PPC to withdraw your name from the advancement list for E6; and”

From the CG-3307 dated September 8, 2016, this language should be removed:

- “Article 107, UCMJ, False official statements, and Article 134, UCMJ, Wrongful interference with an adverse administrative proceeding.”

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of former ME1 [REDACTED] [REDACTED] USCG, for correction of his military record is denied, but alternate relief is granted. The Coast Guard shall correct his negative CG-3307s dated August 22, 2016, and September 8, 2016, as follows:

The Coast Guard shall remove the following language from the CG-3307 dated August 22, 2016:

- “Article 107, UCMJ, False official statements, and Article 134, UCMJ, Wrongful interference with an adverse administrative proceeding.”
- “1. You will receive a special Enlisted Evaluation Report to further document these acts.”
- “2. You will receive a mark of Not Recommended for Advancement, and will not receive a mark for good conduct.”
- “3. This Command will submit recommendation to PSC-EPM and PPC to withdraw your name from the advancement list for E6; and”

The Coast Guard shall remove the following language from the CG-3307 dated September 8, 2016:

- “Article 107, UCMJ, False official statements, and Article 134, UCMJ, Wrongful interference with an adverse administrative proceeding.”

January 27, 2023

[REDACTED] Digitally signed by [REDACTED]
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