

**DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 161-96

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**TECHNICAL AMENDMENT TO FINAL DECISION**

On December 5, 1997, the Chief Counsel of the Coast Guard requested clarification, or a technical amendment of the order, in this case. It said that the original order in this case was confusing and should be clarified by a technical amendment. The Coast Guard suggested that the following order be substituted for the one in the Final Decision of BCMR No. 161-96. The substitute order proposed by the Coast Guard was as follows:

The application of [the applicant] for correction of his military record is granted to assure that his record shall be the same as it would have been in the absence of the error or injustice. Specifically, the disputed NJP and any reference to it shall be deleted from the applicant's record, and his date of rank as chief shall be the date at which he would have been so advanced in the absence the NJP."

**FINDINGS**

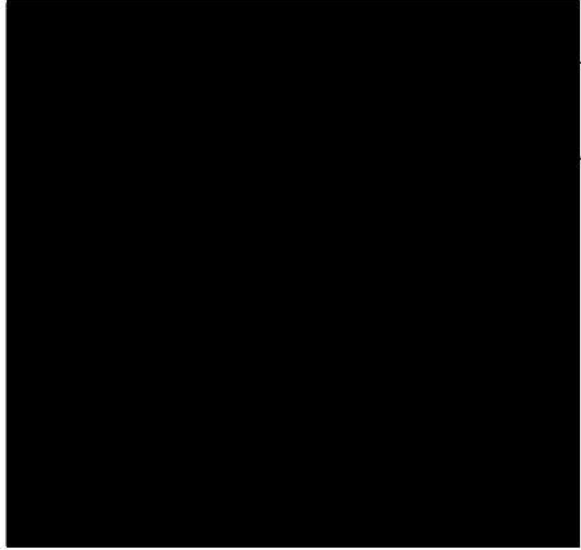
The Board agrees that the original order in Docket No. 161-96 is confusing and would be clearer if the technical proposal of the Coast Guard were substituted for it. The Board reaffirms that it was its intent to make the applicant's record the same as it would have been in the absence of the NJP.

**[ORDER AND SIGNATURES ON FOLLOWING PAGE]**

**ORDER**

The order of the Board, in BCMR Docket No. 161-96, shall be amended to read as follows:

The application of [REDACTED] USCG for correction of his military record is granted to assure that his record shall be the same as it would have been in the absence of the error or injustice. Specifically, the disputed NJP and any reference to it shall be deleted from the applicant's record, and his date of rank as chief shall be the date at which he would have been so advanced in the absence the NJP.



DEC 23 1997

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DECISION OF THE DEPUTY GENERAL COUNSEL


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:

02-8, 1997

  
Rosalind A. Knapp  
Deputy General Counsel  
Delegate of the Secretary  
Department of Transportation

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**FINAL DECISION**

**█** Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on September 16, 1996, upon the BCMR's receipt of the applicant's request for correction of his military record.

This is the final decision in this case, dated September 26, 1997. It is signed by three duly appointed members who were designated to serve as the Board in this case.

**Request for Relief**

The applicant, a telecommunications specialist first class (TC1; pay grade E-6), asked the Board to set aside the NJP (non-judicial punishment) imposed on him on May 19, 1995 and to advance him to chief petty officer.

The applicant alleged that he was standing the evening watch in "CommCen" (the Communications Center) on March 23, 1995. At approximately 9 P.M., he allegedly "became ill and was overcome with severe stomach cramps" and had an "immediate need to use the restroom." He claimed that he instinctively rushed to the restroom and was away from the CommCen for about 10 minutes.

On May 19, 1995, the applicant was awarded NJP for violating Articles 86 and 92 of the Uniform Code of Military Justice (UCMJ) on the ground that he absented himself from his watchstation for at least 10 minutes without obtaining permission or notifying anyone that he was departing. In August 1995, a message was placed in his record stating that his name had been removed from the May 1996 chief's eligibility list for promotion and that he would remain ineligible for the May 1997/98 service wide exam (SWE) on the ground that an

individual seeking advancement to pay grade E-7 must have no court martial convictions or NJPs for 24 months prior to the SWE qualification deadline.

The applicant asked the Board to expunge the NJP and to modify the collateral consequences on the ground that he "had no control over the circumstances which caused [him] to leave [his] watch." He said the punishment awarded him was disproportionate to the misconduct for which he was punished, and he said that "[e]very watchstander who has worked in the Commcen has left the space to use the restroom ." As a practical matter he alleged "that he was forced to work in a locked room without a restroom for an entire shift."

He concluded by summarizing the relief requested: "I respectfully request that the NJP imposed on me on 19 May 1995 be set aside and expunged from my Military Record and that I be advanced to the pay grade of Chief Petty Officer."

#### Views of the Coast Guard

On August 26, 1995, the acting chief of the Coast Guard congressional and governmental affairs staff advised a United States Senator that "the punishment in this case, and its administrative effects, were in accordance with law and proportionate to the offense." The acting chief said that watchstanders who must use the restroom while on duty are allowed to use one inside the Rescue Coordination Center (RCC), which is adjacent to CommCen, "provided that they notify one of the RCC duty officers so that their watch station may be covered." The applicant admitted that he did not notify anyone that he would be absent. According to the acting chief, the applicant "could easily have notified the duty officer on the way to the restroom."

On August 21, 1997, the Chief Counsel of the Coast Guard recommended that relief be denied to the applicant on the ground that he had not proved error or injustice on the part of the Service. The Chief Counsel said that the applicant's claim that he was unable (emphasis in text) to notify anyone prior to abandoning his station "is contrary to the facts."

The Chief Counsel affirmed the collateral consequences of the NJP, as follows:

For a First Class Telecommunications Specialist to abandon his watch, without notifying others so that they could cover his important duties, is clearly a disciplinary problem deserving of appropriate action, and casts doubt on his suitability to bear the responsibilities of a Chief Petty Officer.

### **Applicant's Response to the Views of the Coast Guard**

On September 19, 1997, the Board received a lengthy fax from the applicant in response to the views of the Coast Guard. The applicant said that he had "good solid proof" that the Service committed error or injustice, unless the Board believes that he must meet a higher standard of proof: Is "[being sick] in the middle of the Communication Center floor the only kind of proof they will accept?"

The applicant alleged (1) that the Service used the system to protect only its own interest; (2) that it did not furnish him with legal advice; and (3) that it was wrong in saying that it was the applicant's "fault that [he] had to make an emergency trip to the restroom." The applicant said that he did not abandon his station; he merely went to the restroom and returned in less than ten minutes. "I was under no requirement to notify the OPS Center or anyone else" because there was no such rule, regulation, order, or other requirement. "[N]o such order or regulation exist[ed]."

The applicant said he "just went to the rest room ." He "did not do anything that everyone else in the Coast Guard isn't allowed to do."

### **FINDINGS AND CONCLUSIONS**

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard, the military record of the applicant, and applicable law:

1. The Board has jurisdiction to determine the issues in this proceeding under section 1552 of title 10, United States Code. The application is timely.

2. On March 23, 1995, the applicant was the qualified watchstander in the Fourteenth District Communications Center (CommCen). He was the only qualified watchstander in CommCen, which was located adjacent to the Fourteenth District Rescue Coordination Center (RCC).

3. There was no restroom in CommCen, but watchstanders were permitted but not required to use a restroom inside the RCC.

4. On March 23, 1995, while standing watch, the applicant became ill and needed to use a restroom immediately. He rushed to the restroom "just down the hall," rather than to the one inside the RCC. As a result, the CommCen was

Final Decision: BCMR Docket No. 161-96

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left unattended during the 10 minutes the applicant was away from his station. No duty officer at RCC was notified of his absence during that period.

5. The Coast Guard did not show the Board a rule or regulation that prohibited a watchstander from leaving his duty station to go to the restroom. It also did not introduce a duly promulgated rule or regulation that prohibited a member from going unattended to the restroom without notifying anyone that he would be absent. The applicant said that when he first reported to CommCen, "[he] was told to use the specific restroom that [he] used and that is the one [he] utilized since the first day and no one ever said otherwise. The proof here is the ABSENCE of any rule or regulation directing [him] to use a particular restroom."

6. The commanding officer (CO) stated that the applicant's need to use the restroom on March 23, 1995 was not so urgent as to make him unable to make the proper notification to the Command Center personnel that he was leaving the space. The CO was not, however, an eyewitness to the situation, and neither the CO or any other officer had notified the applicant that violation might mean an NJP for abandoning a duty station.

7. The applicant was awarded NJP on May 19, 1995. The commanding officer found that the applicant had violated two punitive articles of the UCMJ: Article 86, by absenting himself from his watchstation, and Article 92 (by failing to obey a Telecommunications Watch Center Standard Operating Procedures. The applicant was reduced in grade from E-6 to E-5 (suspended for six months); the Service entered two page seven (administrative remarks) entries regarding the NJP; and terminated a period of eligibility for a good conduct award. Having been awarded an NJP, he was automatically barred him from being promoted to chief for two years after the imposition of the NJP.

8. The applicant has established by a preponderance of the evidence that the Coast Guard committed an error or injustice in awarding him an NJP for going to the restroom without first securing a substitute to cover his duty station.

9. The Coast Guard has not established that the applicant was prohibited from leaving CommCen to use the restroom.

10. Accordingly, the application should be granted.

**ORDER**

The application of [REDACTED], USCG, for correction of his military record is granted to assure that his record shall be the same as it would have been in the absence of the error or injustice. Specifically, the disputed NJP and any reference to it shall be deleted from the applicant's record, and he shall be deemed qualified to take the next Servicewide Examination (SWE) for the grade of chief petty officer (E-7). If he is selected at that examination, his date of rank as chief shall be the date at which he would have been so promoted in the absence of the NJP.

