

N.B.: The delegate of the Secretary approved the minority dissenting opinion in this case and granted the relief shown on the last page on December 22, 2000.

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-052

FINAL DECISION FOLLOWING REMAND

██████████ Attorney-Advisor:

This case was remanded to the Board by the Secretary's delegate, the Deputy General Counsel, for additional consideration in accordance with the provisions of section 52.64(b) of title 33 of the Code of Federal Regulations on December 23, 1999. The original recommended final decision in this case was signed on November 3, 1999.

Subsequent to the case being remanded, the Board asked the Coast Guard if it would submit further evidence that might shed new light on the issues raised in the Deputy General Counsel's decision remanding the case to the Board. The Coast Guard declined to submit further evidence.

This recommended final decision on remand, dated February 29, 2000, is signed by two of the three duly appointed members who were designated to serve as the Board in this case. The third member of the Board signed a separate, dissenting opinion.

RELIEF REQUESTED

The applicant, a xxxxxxxxxxxxxx on active duty in the Coast Guard, asked the Board to correct her record by removing a court memorandum (form CG-

3304) and a page 7 administrative entry (form CG-3307) indicating that she had been awarded non-judicial punishment (NJP) on May 26, 198x.

APPLICANT'S ALLEGATIONS

The applicant alleged that, in 198x, when she began working as a recruiter in the Coast Guard Recruiting Office in xxxxxxxx, she received a direct order to file false claims for travel and entertainment expenses. She was told to file for the maximum allowance of \$60 per month whether or not she actually incurred those expenses. The extra money was to serve as her "Pro" pay. She alleged that she felt uncomfortable with the order, and she checked with her chain of command. However, every member of her chain of command told her to submit the claims because it was "an accepted practice in recruiting." She alleged that as one of the lowest ranking members in the office, a xxxxxxxx, she obeyed the orders until she was transferred to the xxxxxxxx in xxxxxxxx, in July 198x.

On May 25, 198x, she was told that the practices at the recruiting office and the claims of 125 recruiters had been investigated and that she had been charged with filing false claims. She was told that she was the first to be punished, and she was advised to choose to appear before a captain's mast the next day rather than risk a court-martial, which might result in harsher punishment. Therefore, the applicant alleged, being then 7 months pregnant and believing that others would be similarly or more harshly punished, she went to mast the next day and received NJP. Thereafter, she repaid the entire sum owed, approximately \$1,400, although because of the statute of limitations, she was only charged with \$113.11 worth of false claims. Her command entered the forms CG-3304 and CG-3307 into her file.

At the time of her mast, the applicant assumed that other members who had worked at the recruiting office—particularly the officers who had ordered her to make false claims—would also be charged and punished. However, in 199x, she learned that she "was the only recruiter that had received NJP, the others did not and had, in fact, continued to advance in their careers." The applicant listed the names of 10 other members who, she alleged, worked in the recruiting office, outranked her, filed false claims, and yet did not receive NJP.

Upon this discovery, the applicant "followed the procedures in the Military Justice Manual and requested from the CO at xxxxxxxx that the NJP ... be 'set aside'" but was told to apply to the BCMR. Within 90 days, however, she was transferred and advanced to the rank of chief yeoman. Therefore, she thought that the NJP would no longer affect her career, and she did not apply to the BCMR. However, in 199x, when she became eligible for promotion to xxxxxx, she realized that the NJP might stop her promotion. Therefore, she

alleged, she followed the procedures in COMDTINST M1080.10D for having documents removed from a personnel record. On January 15, 199x, the Coast Guard Personnel Command (CGPC) informed her that she should apply to the BCMR for the correction.

IEWS OF THE COAST GUARD

On July 14, 1998, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief.

The Chief Counsel alleged that, to remove an NJP from a member's record, the Board must find "(1) that the commanding officer's determinations regarding commission of an offense were clearly erroneous; (2) that the accused suffered material prejudice due to clear procedural error; or (3) that the punishment imposed was a clear abuse of the broad professional discretion accorded military commanders under Article 15, UCMJ [Uniform Code of Military Justice], to take corrective action so as to maintain the good order and discipline within the service."

The Chief Counsel argued that the applicant's NJP was neither in error nor unjust because her commanding officer in xxxxxxx "found that she had knowingly presented false and fraudulent claims amounting to \$113.11 in violation of Article 132 UCMJ." The Chief Counsel stated that the applicant has presented no evidence indicating that her commanding officer's determination was erroneous.

The Chief Counsel stated that the applicant has presented no proof that other former recruiters who were equally or more culpable than her failed to receive NJP. Moreover, the Chief Counsel argued, "the decision of whether to impose [NJP] for a proven offense is committed by law to the commanding officer's discretion." Therefore, "even if similarly situated former recruiters assigned to *other* commands did not receive the level of punishment that Applicant did, it would not establish error or injustice in the punishment imposed upon Applicant by Commanding Officer, xxxxxxxxxxxx."

The Chief Counsel further alleged that because the applicant did not appeal her NJP at the time, the matter "should be deemed waived." The Chief Counsel also pointed out that, by accepting NJP, the applicant avoided the risk of receiving much harsher punishment by court-martial. Furthermore, he argued, her claim should be barred by the doctrine of laches because "[i]n the nine years since her NJP, memories have faded, and documents have become less available, if they still exist at all, making it impracticable or impossible to rebut or to verify her claims."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 16, 1998, the Chairman sent the applicant a copy of the Chief Counsel's advisory opinion and invited her to respond within 15 days.

On July 30, 1998, the applicant responded to the views of the Coast Guard. In response to the Chief Counsel's argument that the applicant had not proved other recruiters who were equally culpable had not been punished, the applicant argued that the proof is in the hands of the Coast Guard because they can provide copies of the records of the other recruiters she has named and the report of the investigation. However, the applicant did submit an affidavit from a former recruiter who confirmed many of the applicant's allegations (see below).

The applicant argued that her acceptance of NJP, rather than court-martial, and her failure to appeal the NJP should not be held against her because she "naively trusted [her] senior leaders to be doing a uniform and fair thing," and she "could not see, at the time, that this punishment would have very far-reaching effects upon [her] career." Furthermore, she thought that the records of her NJP would be removed from her record upon her next reenlistment, which was just three months away. "A change in administrative policy which requires that the Court Memorandum, CG-3304 be kept in the Personnel Data Record forever, versus being purged at the end of each enlistment, had been promulgated at CG Headquarters two months prior to my NJP but had not been implemented by training or practice yet at xxx."

The applicant argued that, in filing the false claims, she essentially obeyed an order that she should have disobeyed. She pointed out that members who may have done much worse things but who were punished just a few months earlier would have had the records of their NJPs removed when their enlistments expired. She alleged that it is unfair for the records of this NJP to be preventing her advancement to xxxxxxxxxx,¹ while the careers of those who had ordered her to file the false claims had not been harmed.

RESPONSE OF THE CHIEF COUNSEL

On September 3, 1998, the BCMR forwarded a copy of the applicant's response to the Chief Counsel in accordance with 33 C.F.R. § 52.82(a). The BCMR also wrote to Coast Guard Investigations, requesting a copy of the report of the investigation that resulted in the applicant's NJP. On September 23, 1998, the Chief Counsel stated that his recommendation remained unchanged, and

¹ The applicant was advanced to xxxxxxxxx in June 199x, after she filed her BCMR application.

Coast Guard Investigations informed the BCMR that no report of the investigation could be found.

APPLICANT'S SUBMISSION OF FURTHER EVIDENCE

In response to the Coast Guard's responses, the applicant waived her right to a decision within 10 months under 14 U.S.C. § 425 so that she might seek and submit more affidavits from fellow recruiters. She also asked the BCMR to continue to search for a report of the investigation. In January and March 1999, the applicant submitted further affidavits (see below). Copies of this evidence were forwarded to the Chief Counsel, but he did not respond. In April 21, 1999, after unsuccessful attempts to find the report of investigations by telephone, the Chairman again wrote Coast Guard Investigations a formal request for the report. On June 2, 1999, the Coast Guard responded, stating that the report had been transferred to the Federal Records Center and would be retrieved from there. On June 22, 1999, Coast Guard Investigations forwarded a copy of the report of the investigation of the filing of false claims by recruiters in the xxxx office to the BCMR.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on xxxxxxxx, 197x, and completed recruit training on xxxxxxxx, 197x. She was first assigned to Coast Guard headquarters in Washington, D.C., where she served until June 198x while being promoted from xxxxxxxxxxxx and then to xxxxxxxx. For her service at headquarters, she received a personal letter of thanks and commendation from the Commandant and a Coast Guard Achievement Medal.

In July 198x, the applicant was transferred to the recruiting office in xxxx, XX, where she served as a recruiter until June 198x. For her service at the recruiting office, she received an Achievement Medal. The citation to the medal states that the applicant displayed superior performance, initiative, enthusiasm, perseverance, diligence, judgment, and devotion to duty.

In June 198x, the applicant was transferred to the XXX in Xxxxxx, XX, where she was promoted to xxxxxxxx.

On May 26, 198x, the applicant went to mast before a commander at the xxxxxxxx. On June 13, 198x, a court memorandum was placed in the applicant's record indicating that she had been found guilty of filing false claims. Her punishment, "reduction to the rate of xxx, [was] suspended for the remainder of current enlistment contingent upon restitution of claims." On June 13, 198x, a page 7 entry was placed in the applicant's record indicating that she had

received a mark of 2 (on a scale of 7) for poor conduct. On June 15, 198x, a page 7 entry was placed in her record concerning the schedule by which she was to repay \$1,473.86 in accordance with the NJP.²

On 10 June, 199x, the applicant wrote to her commanding officer at the Xxxxxx XXX asking that her NJP be set aside. On September 8, 199x, she was told that “[s]ince over three years have elapsed, it is impossible for me to assemble the facts in your case in order to make a proper decision.” She was encouraged to apply to the BCMR.

On December 18, 1997, the applicant applied to the CGPC for the removal of the records of her NJP pursuant to COMDTINST M1080.10D. She stated that she was “not convinced that the circumstances surrounding [her] NJP did not contain elements of discrimination, specifically [she] was the only one in an office of five recruiters that received NJP for following a ‘standard procedure’ – all the other recruiters were senior to [her] and received, at the most, a page 7.”

On January 5, 1998, the applicant’s commanding officer forwarded her request for correction to the CGPC “strongly recommending approval.” Her commanding officer stated as follows:

In reviewing the circumstances surrounding the NJP in question, I believe [the applicant’s] assertion that there may have been prejudicial factors present has merit. Since the investigation which precipitated the Mast was conducted after many of the affected recruiters had been transferred, disposition of the resulting charges was left to the commands where the recruiters had been transferred to. . . . Only much later was she able to determine that only she was singled out for NJP in this instance. Further, Coast Guard policy at the time of punishment was to purge such records upon reenlistment. Subsequent change to that policy leaves this stand-alone document in an otherwise stellar record. . . .

While deliberations of the xxxxx selection board are sealed, I am convinced that she would easily have been selected but for the presence of the NJP within her file. . . .

On June 1, 199x, the applicant was promoted to xxxxxxx. On June 1, 199x, the applicant was promoted to xxxxxx. Since her NJP, the applicant has received numerous marks of 7 (highest possible mark) in her evaluations.

Affidavits Signed by Other Recruiters

² Apparently, because of the statute of limitations, the applicant was found liable only for false claims in the amount of \$113, but she alleged that she volunteered to pay the entire amount.

A member who was a petty officer first class at the time she worked in the recruiting office from April 198x to December 198x and is now a xxxxxx (xxxxx) signed the following statement:

On reporting to [USCG Recruiting Office xxxx, XX], both the OinC [Officer in Charge] and the XPO [Executive Petty Officer] ... instructed me that I was required to put in reimbursement requests for lunches and other recruiting personal expenditures at the maximum rate of \$60 a month, even when such expenses were not incurred. Their reasoning was that that money would serve as our Pro pay. The then CCGxx (xx), a [lieutenant] ... and [a senior chief petty officer], condoned this practice throughout the then xx District. Further fraudulent claims on travel vouchers were made when both the OinC and XPO would piggy back onto my travel claims even though they had not made the travel. The OinC and XPO would later pressure me and the other recruiter, [the applicant], to file similar travel claims with them. Failure to go along with them often resulted in poor performance evaluations and or verbal abuse in the office. I can only assume they wanted us to file fraudulent claims with them so that we wouldn't report them. Often the office government vehicles, of which one had USCG RECRUITING, on the sides of it would be found day or night at local bars. When approached on these acts of misconduct both the OinC and the XPO would blow up and there was simply no reasoning with them. These practices were fluent throughout the then xx District. After 2 years in this environment and no safe way out, I requested via letter to be reassigned, asking for any ship any shore unit xxxx coast, due to irreconcilable differences. It was clear to me that with the acceptance of these activities from the district down that there was no way I could remain in recruiting. The emotional and professional retribution that the OinC and his XPO used would certainly end my previously high performance career. On departing, the XPO had one final meeting with me and that was to find out if I would stir up any investigations into their misconduct. I told him I just wanted out of the office and as far away as I could get. ... This statement is not the first on this subject that I have made. Sometime in 198x - 199x Coast Guard Intelligence interviewed me while I was stationed in xxxxxx, XX. It is my opinion that [the applicant] should not have been held responsible for the misconduct pressured onto her and myself during that recruiting tour.

A xxxxxx who served in the recruiting office from June 198x to June 198x signed the following statement on the applicant's behalf:

After reporting to the USCGC xxxxxxxx in July 198x, I was the subject of an investigation into subject allegations conducted by the Coast Guard Intelligence out of the XX Coast Guard District in xxxxxxxx. I was told and I understood that all recruiters with the XX District were also subject

to the same investigation. I told the investigator that I was led to believe it was a common and accepted practice for all recruiters to submit claims for reimbursement for miscellaneous expenses, even false ones, and that I did file these claims. The justification for this practice was that since Coast Guard recruiters did not get the same Proficiency Pay as Department of Defense recruiters, it was "our" way to get equal entitlements, so we did it. I never heard another word concerning the investigation or the results thereof. At the time, I had no personal knowledge of any one else being subject to the same investigation.

I will not drop names, but I was later asked by my previous Officer in Charge as to what happened as a result of my investigation. I told him "nothing". I still do not believe that any of the Officers in Charge of the XX District recruiting offices were ever subject to the same investigation. Why not?

A member who was a petty officer first class when he served in the xxxx recruiting office submitted the following statement:

Upon reporting to the USCG Recruiting Office in xxxx, XX, I was told by the Executive Petty Officer ... that all recruiters filed an out-of-pocket expense report to compensate the Coast Guard recruiters for not receiving "recruiter pay" or SDAP like the other armed services recruiters received. I mentioned to him that this did not seem appropriate. He stated that the Officer in Charge stated that all the people in his office would file or none would and that the latter was not an option to us. The Finance Officer from the Recruiting Command in xxxxxx would send us our claims back occasionally with hand written notes to make this entry or another to make it look better. I was told that this was an approved procedure and the Recruiting Command knew and approved them each month. This went on until a new Officer in Charge and Executive Petty Officer were in position.

... Approximately two years after transferring to xxxxxx I had heard that there was an investigation going on in a couple of the xxxxxx offices for falsifying claims. After looking into this matter, I realized the investigation included recruiters that had filed out-of-pocket claims. I informed my OIC that I had also filed false out-of-pocket claims but was ordered to do so by my OIC and XPO in xxxx. We in turn notified the Commanding Officer of the Central Recruiting Command in xxxxx that I had been involved in similar incidents that were currently being investigated. Members of Coast Guard Intelligence visited me for a period of one year to give statements and to answer questions about others that were involved.

At the end of the investigation, I was called by the Executive Officer (XO) of the Recruiting Command. He informed me that the total for the out-of-

pocket claims was \$1100.00. He stated that I did not have to reimburse the Coast Guard but that it would look good if I did. I was informed that I would receive a Page 7 entry into my record as my only punishment unless I did not pay the monies back to the Coast Guard which would look bad and Non-Judicial Punishment may be held in the future as they would have to reevaluate my situation. I feel this was another example of the way the entire investigation was held so I in turn immediately paid the money to the Coast Guard to "cut my losses". The only punishment I received was a Page 7 for poor judgment on my part.

There was no standard procedure of punishment for the personnel involved. Lower ranking individuals seemed to be given harsher punishments than the superiors that orchestrated the situation and who forced their subordinates to follow unlawful orders.

Character References Submitted by the Applicant

A commander who supervised the applicant in 199x signed an affidavit attesting to the applicant's "high moral character" and "exemplary behavior." The applicant "chose truthfulness and candor when it would have been easier to accept less objective versions of others."

A senior chief petty officer who has known the applicant since 199x signed an affidavit stating that the applicant "conducts herself in a very professional manner both in official and social settings. ... She is a very loyal and honest individual whose core values are extremely high."

A chief petty officer who worked with the applicant for 4 years during the mid 1990s signed an affidavit stating that she "is the strongest leader I have met in my 18 years of Coast Guard service. She exemplifies honesty, integrity, and respect, and fosters the same values in those she comes in contact with."

Summary of the Report of Investigation of the Applicant

On xxxxx, 198x, the commanding officer of the xxxxxxxxxx Recruiting Office in xxxxxxxxx, wrote to the commander of the XX Coast Guard District requesting an investigation. He wrote, "It has come to my attention that a problem may exist at Recruiting Office xxxx concerning the submission of fraudulent travel claims, out-of-pocket expense claims, etc. General information concerning this matter surfaced during an investigation of Recruiting Office xxxxxxxx for similar reasons."

On xxxxxx, 198x, an investigator in the Chief Law Enforcement Branch submitted a report on the investigation of five members, including the applicant, who had served as recruiters in the xxxx recruiting office.

The investigator reported that the current Officer in Charge [OinC], who was assigned to the recruiting office on xxxxx, 198x, following the xxxxxxx of the previous Officer in Charge, had discovered and stopped the practice of filing false claims. The new OinC stated that he had reported the false claims to his supervisors several times but received no response until November 198x, when he received a letter from the commanding officer of the xxxxx Recruiting Center stating only that anyone who was submitting false claims should stop.

The new OinC further stated that he had contacted the recruiting offices in xxxxx, xxxxx, xxxxx, and xxxxx and discovered that the practice of filing false claims was long-standing at those offices. At a conference for recruiting office OinCs in xx 198x, personnel from the xxxxxxx Recruiting Center questioned him about whether he had "blown the whistle" on the practice and counseled concerning his "bad attitude." They apparently did not believe him when he denied having "blown the whistle" because they told him that they "hoped no other names are mentioned and no other offices are brought into the investigation."

On April 13, 198x, the investigator attempted to interview one of the subjects (S#1) of the investigation, but he refused to answer questions before consulting a lawyer.

On April 18, 198x, the investigator visited the xxxx recruiting office and attempted to interview the applicant, who was still working there, but she refused to answer questions before consulting a lawyer. However, a XXX (S#2) who was also a subject of the investigation waived his rights and answered the investigator's questions. S#2 told the investigator that all claims submitted by the recruiters were legitimate, but he refused to sign a statement to that effect.

On July 11, 198x, the investigator reinterviewed S#1, who stated that he had decided to tell the truth and waive his right to consult a lawyer. S#1 stated that the practice of filing false claims had been ongoing at the xxxx recruiting office when he first arrived there in September 198x. He was instructed in the practice by the XPO. Both of the previous OinCs knew and condoned the practice. S#1 stated that he did not know the practice was wrong until the new OinC arrived and stopped the practice. However, he refused to sign a written statement.

On August 11, 198x, the investigator spoke again with S#2, who waived his rights. S#2 stated that the former OinC had told him to submit the false claims. S#2 claimed that “[e]veryone in [the xxxx office] was doing it and [the xxxxxx Recruiting Center] was aware it was going on.” He stated that he had discussed the matter with personnel at the Center but could not recall who. S#2 further stated that he stopped submitting false claims when the new OinC arrived, but he would not sign a written statement.

On November 18, 198x, the investigator spoke with another subject of the investigation, S#3.³ S#3 told him that the applicant had informed him about the practice of filing false claims soon after he arrived at the recruiting office in 198x. She told him that the practice was not “technically” approved but that “it was known about and an accepted abuse.” The applicant told S#3 that she did not want to file false claims but did so because the XPO had taken her “to the office storeroom and told her that she was no longer working at Headquarters and that she worked for him now and she would do things his way or he would have orders [to transfer] her within the day.” S#3 told the applicant that “he could stand up to [the XPO] better than a woman could.” However, soon thereafter, the XPO came to his desk, slid a blank claims for reimbursement for expenditures on it, and told him to fill it out. When S#3 questioned the XPO, he was told that the OinC wanted it done and S#3 “would do them.” S#3 then saw the applicant look at him with an expression “as if to say I told you so.” S#3 and the applicant then told the XPO that they did not want to submit the claims but were told by the XPO that “he ran the office and they would do as they were told.” S#3 told the investigator that he went along because “he was afraid to buck the system and wondered if anyone would stand behind him against a xxxx and xxxx [the XPO and OinC] with a combined 30 some years of active service and obviously someone else in district or elsewhere.” He stated that the OinC also requested the claims from him and that later he learned that the practice was widespread and well known throughout Coast Guard recruiting. The OinC told him that at a conference for recruiting office OinCs, personnel from the xxxxxx Recruiting Center had instructed the conferees to be “creative financiers,” which he and others at the conference interpreted as tacit approval of the practice of filing false claims. S#3 further stated that the XPO would review his claims and raise them to the allowed limit of \$60 per month, but when he heard rumors of an investigation, the XPO told them to file claims for about \$40 per month.

On January 25, 198x, the investigator requested an interview with the applicant, but she refused to speak to him before consulting a lawyer. He called her on February 3, 198x, and she still refused to speak to him because the Coast

³ S#3 is the petty officer first class who signed the third affidavit excerpted on page 7, above.

Guard legal staff had told her “they could provide no legal service for her unless charges were brought against her.”

The investigator determined which claims filed by the subjects of the investigation were false by contacting some of the potential recruits with whom the subjects had claimed to eat lunch and submitted claims for the costs of the lunches. By this method, the investigator reviewed 27 of the applicant’s monthly claims filed between March 198x and June 198x. He determined that they contained \$1,546.85 worth of false claims, averaging \$57.29 per month. The investigator reviewed 13 of the monthly claims filed by S#1 from October 198x to May 198x. S#1’s fraudulent claims totaled \$734.57,⁴ or \$56.50 per month, on average. The investigator reviewed 10 monthly claims filed by S#2 in August and September 198x and from November 198x to June 198x and determined that the fraudulent claims totaled \$544.16, or \$54.42 per month, on average. The investigator reviewed 17 monthly claims filed by S#3 from August 198x to April 198x. S#3’s fraudulent claims totaled \$956.31 and averaged \$56.25 per month. The investigator reviewed 4 monthly claims that the unit’s XPO, S#4, filed in March, September, and October 198x and April 198x. The XPO’s fraudulent claims for those months totaled \$240.00 and averaged \$60.00. The investigator reported that the review of monthly official expenditure claims was still incomplete.

APPLICABLE LAWS

Under Article 121 of the UCMJ, embezzlement is a form of larceny. The maximum possible sentence imposed by a court-martial for a conviction for larceny of military property worth more than \$100 is dishonorable discharge; forfeiture of all pay and allowances; and confinement for 10 years.

Under Article 15 of the UCMJ, the maximum possible sentence imposed by a captain’s mast is correctional custody for up to 30 days; forfeiture of one-half pay for up to two months or detention of one-half pay for up to three months; reduction in grade; extra duties for up to 45 days; and restriction to certain areas for up to 60 days.

According to Chapter 100-3(f) of the Military Justice Manual (COMDT-INST M5810.1A), “if at the time [NJP] is to be imposed the accused is no longer assigned or attached to the unit, the alleged offense should be referred for appropriate action to a competent authority in the chain of command over the individual concerned.”

⁴ The investigator added the column of false claims to \$793.47. It is unclear whether he miscalculated or whether he failed to include a monthly claim in his report.

Under section 916(d) of the Rules for Courts-Martial, “[i]t is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”

According to Article 8-D-2a. of the Personnel Manual (COMDTINST M1000.6A), a copy of each letter of censure issued pursuant to Article 15 of the UCMJ shall be retained in a member’s official personnel record. According to Article 8-D-3, a copy of the court memorandum shall also be filed in an applicant’s personnel record.

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 section 1552 of title 10 of the United States Code.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that she was punished for filing false claims pursuant to direct orders. She alleged that the practice of filing false claims was widespread among recruiters in the XX District. She further alleged that, although she was ordered to file false claims, she was punished more harshly than her superiors whom she was obeying and than other recruiters of higher rank. The Chief Counsel did not deny these allegations.

4. The Chief Counsel argued that the applicant’s request should be denied under the doctrine of laches. However, the Board finds that discovering the facts and results of such a widespread investigation, even xxx years after the fact, is not sufficiently onerous to justify denying the applicant’s request.

5. The Chief Counsel argued that the applicant had waived her right to contest her NJP because she failed to appeal it in 198x. The Board finds that the applicant’s failure to waive her NJP did not constitute waiver of her right to seek relief from the Board.

6. Under the Uniform Code of Military Justice (UCMJ), acting pursuant to orders is a complete defense unless the member knew or should have known the orders to be unlawful. Rules for Courts-Martial, 916(d). It is clear from the record that the applicant knew the order to file false claims was unlawful and yet obeyed it anyway. Therefore, the fact that she was following an order is no defense and did not justify her actions.

7. The Coast Guard's Report of Investigation and affidavits submitted by the applicant support her allegations that she was pressured to file false claims by her chain of command. However, the evidence fails to establish the level of coercion sufficient to negate her intent to file false claims: She was not threatened with bodily harm, only with early transfer. Moreover, during her almost five years at the unit, there was plenty of time for her to report the problem to Coast Guard officers outside of the recruiting command, but she failed to do so.

8. The applicant admitted that she filed false claims when she went to mast in 198x. She was given the option of contesting her case before a court-martial but chose to accept NJP. In doing so, she waived certain procedural rights but avoided the potentially much greater punishment that could be imposed by court-martial. The applicant has not proved by a preponderance of the evidence that she was deprived of any due process she did not voluntarily waive.

9. The applicant argued that the affidavits she submitted prove that she was punished more harshly than those who outranked her and who ordered her to file the false claims. Therefore, she argued, it is unjust for the records of her NJP to remain in her record and hamper her career especially since, when she accepted NJP, she did not know that those forms would remain in her record past the end of her enlistment.

10. The Record of Investigation and affidavits indicate that all of the recruiters, the Officer in Charge, and the Executive Petty Officer of the applicant's unit filed false claims in similar amounts on a monthly basis for as long as they worked there. Most of these members outranked her and thus arguably should have received harsher punishments. See *United States v. Burton*, 1998 Lexis 429, *4 (CCA); *United States v. D'Amico*, 199x Lexis 624, *5 (AFCMR); *United States v. Guaglione*, 27 M.J. 268, 271 (CMA 198x); *United States v. Means*, 10 M.J. 162, 165 (CMA 198x); *United States v. Capps*, 1 M.J. 1184, 1188 (AFCMR 1976). On the other hand, the applicant's tenure at the unit was longer than some of the others', resulting in a larger total of money embezzled. Given the incompleteness of the Report of Investigation and the record, it is impossible for the Board to determine exactly the culpability of the members of the applicant's unit and

compare their punishments to that of the applicant. However, the apparent lack or insufficiency of punishment of the other members who filed false claims does not constitute an injustice against the applicant. While it is in the public interest for justice to be applied with an even hand, co-defendants and co-conspirators have no right to exactly equal punishment. See *United States v. Reeder*, 29 M.J. 563, 564 (AFCMR 198x). Moreover, although the Report of Investigation is incomplete and there is some evidence indicating that the applicant was more severely punished than those who were arguably more culpable, there is no evidence that the applicant was targeted for investigation or punishment because of any prejudice.

11. Under Article 15 of the UCMJ, Congress gave commanding officers wide discretion to maintain order and discipline within their units by offering NJP, in lieu of court-martial, for a minor offense that requires more than an administrative reprimand. Such discretion inherently means that not all members will receive exactly the same punishment for the same offense. Moreover, Chapter 100-3(f) of the Military Justice Manual (COMDTINST M5810.1A) provides that, "if at the time [NJP] is to be imposed the accused is no longer assigned or attached to the unit, the alleged offense should be referred for appropriate action to a competent authority in the chain of command over the individual concerned." Therefore, the applicant's case was properly referred to her command in Xxxxxx, and there is no evidence indicating that her commanding officer at Xxxxxx was unaware that she had been intimidated and ordered to file the false claims by her chain of command in xxxx. Furthermore, the applicant presented no evidence indicating that her commanding officer in Xxxxxx abused his discretion with respect to her NJP or committed any error or injustice in adjudicating her case and awarding the NJP.

12. As the court stated in *United States v. Capps*, 1 M.J. 1184 (AFCMR 1976), "appropriateness of a sentence in a case under review is to be determined on the basis of its own facts and circumstances, not on a comparison with sentences in other cases. ... The factors that must be evaluated in determining an appropriate sentence for the particular offender in light of the offenses and the facts and circumstances of the case are numerous and complex. Each case is unique. Thus seldom, if ever, is the sentence imposed in one case truly relevant to that which should be adjudged in another. It is only in the most unusual of circumstances that sentences in other cases are germane to the question of what sentence should be approved in a case under review." *Id.* at 1187 (citations omitted). In light of this principle and the wide discretion accorded commanding officers in awarding NJP, the Board should not second-guess the lawful and reasonable decision made by the applicant's commanding officer with regard to her punishment.

13. The dissenting Board member argues that, given the breadth of the conspiracy and embezzlement, the Coast Guard should have ensured that members were punished consistently in accordance with their rank and culpability and that the Coast Guard's apparent failure to do so caused an injustice against the applicant. However, we do not agree that the Coast Guard's decision to permit the culpable members' commanding officers to exercise their discretion under Article 15 of the UCMJ was wrongful or unjust so as to require removal of a record of a crime to which the applicant confessed.

14. The applicant has not proved by a preponderance of the evidence that she was unfairly punished for the embezzlement she committed or that it is unjust for the records of that embezzlement to remain in her personnel records.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of XXXXXXX, USCG, is hereby denied.

[REDACTED]

[REDACTED]

(see Dissenting Opinion Following Remand)

[REDACTED]

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-052

DISSENTING OPINION FOLLOWING REMAND

██████████ Attorney-Advisor:

This case was remanded to the Board by the Secretary's delegate, the Deputy General Counsel, for additional consideration in accordance with the provisions of section 52.64(b) of title 33 of the Code of Federal Regulations.

This dissenting opinion following remand, dated February 29, 2000, is signed by one of the three duly appointed members who were designated to serve as the Board in this case.

FINDINGS AND CONCLUSIONS

This dissenting opinion following remand adopts the Findings numbered 1, 2, 3, 4, 5, 6, and 9 that appear in the majority's final decision following remand. The following findings and conclusions are based on the applicant's military record and submissions, the Coast Guard's submissions, and applicable law, as summarized in the Board's majority recommended decision in this case:

1. The Coast Guard's Report of Investigation and the affidavits submitted by the applicant prove that she was ordered to file false claims by her chain of command. She was intimidated and threatened with immediate transfer, which would have been detrimental to her career, if she failed to file false claims. The Report of Investigation and the affidavits also show that the filing of false claims was a widespread practice among recruiters in the XX District and several other Coast Guard districts in the 1980s and that the punishment of some recruiters who filed false claims was carried out separately by the new commands to which recruiters had been transferred. The new commands exercised their own discretion in determining what level of punishment was appro-

priate. The Chief Counsel did not deny or present any evidence contradicting these findings.

2. While it is clear from the record that the applicant knew the order to file false claims to be unlawful, it is also clear that she and other recruiters tried to avoid following the order by verifying it up her unit's chain of command. Unfortunately, her chain of command verified her supervisor's unlawful order, and she did not complain of the unlawful order outside of her chain of command. It is apparent from the Report of Investigation and the affidavits of other recruiters that the consequences of attempting to whistleblow on the embezzlement could have been quite negative for the whistleblower. Thus, while the applicant tried to avoid filing false claims, she did not go out on a limb and jeopardize her career to do so. Although these facts may not legally negate her intent to embezzle, they certainly indicate that she would not have embezzled had she not been ordered and pressured to do so and had she not been told by her superiors that it was an accepted practice.

3. The Report of Investigation submitted by the Coast Guard indicates that, like the applicant, the other recruiters in her office, including those who outranked her and served in her chain of command, submitted false claims worth, on average, between \$54 and \$60 (the maximum allowed) each month. The sum total of the applicant's false claims revealed in the Report of Investigation is apparently larger than the other recruiters' totals only because the investigator submitted the report after completing his investigation of her claims but before finishing his investigation of other recruiters' claims. For example, the Report of Investigation shows that he investigated 27 of her monthly reports but only four of the monthly reports of the unit's XPO, who ordered her to file the false claims. However, in each of those four monthly reports, the investigator found at least \$60 worth of false claims. There is no explanation in the record of why the investigator failed to complete his investigation of the other recruiters or, if he did ultimately complete it, what the results were. It is also unclear whether the Coast Guard followed up on the evidence of widespread embezzlement condoned by the regional recruiting command by investigating and punishing recruiters in other units and districts.

4. The applicant submitted several affidavits indicating that she was punished more harshly than those who outranked her and who ordered her to file the false claims. The Coast Guard has possession of, but failed to submit, evidence concerning the amount of wrongdoing by, and punishment of, each of her superiors and the other recruiters who filed false claims. Therefore, the applicant has proved by a preponderance of the evidence that she was punished more harshly than those who ordered her to file the false claims and than recruiters of higher rank who filed false claims. This was unjust because mem-

bers of higher rank are supposed to be more accountable for their actions, not less. See *United States v. Burton*, 1998 Lexis 429, *4 (CCA); *United States v. D'Amico*, 199x Lexis 624, *5 (AFCMR); *United States v. Guaglione*, 27 M.J. 268, 271 (CMA 198x); *United States v. Means*, 10 M.J. 162, 165 (CMA 198x); *United States v. Capps*, 1 M.J. 1184, 1188 (AFCMR 1976).

5. While commanding officers must be able to exercise discretion in conducting NJP under Article 15 of the UCMJ, the evidence of widespread involvement, conspiracy, intimidation by superior officers, and unlawful orders revealed by the Report of Investigation clearly called for some oversight to insure that justice was applied fairly among those involved in the embezzlement. Higher ranking members are supposed to be held to higher standards, and this should be true especially in instances where higher ranking members have abused their positions to induce unlawful acts by their subordinates. Yet, the applicant has presented un rebutted evidence indicating that higher ranking members and members in her chain of command who ordered her to file false claims were not punished as severely as she was despite their greater culpability. Although the applicant waived certain procedural rights when she accepted NJP in lieu of court-martial, she did not waive her right to fair punishment.

6. The majority of the Board argues that "the apparent lack or insufficiency of punishment of other members who filed false claims does not constitute an injustice against the applicant." However, courts have long recognized that comparison of sentences is appropriate in connected or closely related cases. See *United States v. Capps*, 1 M.J. 1184, 1187 (AFCMR 1975); *United States v. Kent*, 9 M.J. 836, 837-39 (AFCMR 1980); *United States v. Olinger*, 12 M.J. 458, 460 (CMA 198x). Under *United States v. Kent*, 9 M.J. 836 (AFCMR 1980), courts may compare the sentences of members if (1) their unlawful activity is "closely related or connected"; (2) their sentences are highly disparate; and (3) there are no cogent reasons for the disparate punishment. *Id.* at 838. Moreover, the fact that different authorities may have imposed the sentences does not constitute a cogent reason for a disparity. *United States v. Coldiron*, 9 M.J. 900, 903 n5 (AFCMR 1980). The preponderance of the evidence indicates that the applicant received significantly harsher punishment, NJP, than did members who outranked her, ordered her to file false claims, and filed false claims themselves. There is no cogent explanation in the record of why the applicant should have been punished more harshly than her superiors, who were, if anything, more culpable than she. Therefore, the applicant's NJP was unjustly harsh in light of the punishment meted out to others who committed the same crime.

7. Although the applicant's NJP for embezzlement may not seem unjust when viewed in isolation, I am persuaded that, in light of the circum-

stances of this case, the applicant has suffered an injustice. She has proved that she was assigned to serve under a corrupt chain of command, whose members ordered her to embezzle and used threats to procure her acquiescence. She also presented un rebutted evidence that the Coast Guard meted out punishment inconsistently among those involved in the embezzlement and that she alone received NJP for filing false claims. Therefore, while the applicant's NJP could not be considered wrong if the Coast Guard had meted out punishments consistently and fairly among the recruiting command, I am convinced that it is in the interest of justice for the documents referring to her NJP to be removed from her record so that they may no longer retard her advancement. Therefore, the court memorandum dated June 13, 198x, and the page 7 entry dated June 15, 198x, which document the applicant's NJP should be removed from the file.

8. The applicant's record also contains a page 7 entry dated June 13, 198x, which notes only that she received a mark of 2 in conduct. The record indicates that other recruiters who filed false claims received negative page 7 entries in their records. The applicant has not shown by a preponderance of the evidence that the June 13, 198x, page 7 entry in her record is in error or unjust.

9. Accordingly, the applicant's request should be granted in part as shown in the recommended Order below.

ORDER

The application for correction of the military record of XXXXXXXXXX, USCG, is hereby granted in part as follows.

The court memorandum, form CG-3304, dated June 13, 198x, shall be removed from the applicant's record.

The page 7 entry, form CG-3307, dated June 15, 198x, shall be removed from the applicant's record.

Any other document referring to the applicant's mast on May 26, 198x, and her consequent NJP shall be removed from her record.

All other requests are denied.

No copy of the decisions and opinions issued in this case shall appear in the applicant's record.



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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-052

FINAL DECISION

██████████ Attorney-Advisor:

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. It was docketed on February 12, 1998, following the BCMR's receipt of the applicant's completed application.

This recommended final decision, dated November 3, 1999, is signed by two of the three duly appointed members who were designated to serve as the Board in this case. The third member of the Board signed a separate, dissenting opinion.

RELIEF REQUESTED

The applicant, a xxxxxx (xxxxx) on active duty in the Coast Guard, asked the Board to correct her record by removing a court memorandum (form CG-3304) and a page 7 administrative entry (form CG-3307) indicating that she had been awarded non-judicial punishment (NJP) on May 26, 198x.

APPLICANT'S ALLEGATIONS

The applicant alleged that, in 198x, when she began working as a recruiter in the Coast Guard Recruiting Office in xxxx, XX, she received a direct order to file false claims for travel and entertainment expenses. She was told to file for the maximum allowance of \$60 per month whether or not she actually incurred those expenses. The extra money was to serve as her "Pro" pay. She alleged that she felt uncomfortable with the order, and she checked with her chain of command. However, every member of her chain of command told her to submit the

claims because it was “an accepted practice in recruiting.” She alleged that as one of the lowest ranking members in the office, a xxxxxx (xxxx), she obeyed the orders until she was transferred to the xxxxx (XXX) in Xxxxxxx, xxxxxx, in July 198x.

On May 25, 198x, she was told that the practices at the recruiting office and the claims of 125 recruiters had been investigated and that she had been charged with filing false claims. She was told that she was the first to be punished, and she was advised to choose to appear before a captain’s mast the next day rather than risk a court-martial, which might result in harsher punishment. Therefore, the applicant alleged, being then 7 months pregnant and believing that others would be similarly or more harshly punished, she went to mast the next day and received NJP. Thereafter, she repaid the entire sum owed, approximately \$1,400, although because of the statute of limitations, she was only charged with \$113.11 worth of false claims. Her command entered the forms CG-3304 and CG-3307 into her file.

At the time of her mast, the applicant assumed that other members who had worked at the recruiting office—particularly the officers who had ordered her to make false claims—would also be charged and punished. However, in 199x, she learned that she “was the only recruiter that had received NJP, the others did not and had, in fact, continued to advance in their careers.” The applicant listed the names of 10 other members who, she alleged, worked in the recruiting office, outranked her, filed false claims, and yet did not receive NJP.

Upon this discovery, the applicant “followed the procedures in the Military Justice Manual and requested from the CO at XXX Xxxxxx that the NJP ... be ‘set aside’” but was told to apply to the BCMR. Within 90 days, however, she was transferred and advanced to the rank of xxxxxxxxx. Therefore, she thought that the NJP would no longer affect her career, and she did not apply to the BCMR. However, in 1997, when she became eligible for promotion to xxxxxx, she realized that the NJP might stop her promotion. Therefore, she alleged, she followed the procedures in COMDTINST M1080.10D for having documents removed from a personnel record. On January 15, 1998, the Coast Guard Personnel Command (CGPC) informed her that she should apply to the BCMR for the correction.

VIEWS OF THE COAST GUARD

On July 14, 1998, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief.

The Chief Counsel alleged that, to remove an NJP from a member's record, the Board must find "(1) that the commanding officer's determinations regarding commission of an offense were clearly erroneous; (2) that the accused suffered material prejudice due to clear procedural error; or (3) that the punishment imposed was a clear abuse of the broad professional discretion accorded military commanders under Article 15, UCMJ [Uniform Code of Military Justice], to take corrective action so as to maintain the good order and discipline within the service."

The Chief Counsel argued that the applicant's NJP was neither in error nor unjust because her commanding officer in Xxxxxx "found that she had knowingly presented false and fraudulent claims amounting to \$113.11 in violation of Article 132 UCMJ." The Chief Counsel stated that the applicant has presented no evidence indicating that her commanding officer's determination was erroneous.

The Chief Counsel stated that the applicant has presented no proof that other former recruiters who were equally or more culpable than her failed to receive NJP. Moreover, the Chief Counsel argued, "the decision of whether to impose [NJP] for a proven offense is committed by law to the commanding officer's discretion." Therefore, "even if similarly situated former recruiters assigned to *other* commands did not receive the level of punishment that Applicant did, it would not establish error or injustice in the punishment imposed upon Applicant by Commanding Officer, XXX Xxxxxx."

The Chief Counsel further alleged that because the applicant did not appeal her NJP at the time, the matter "should be deemed waived." The Chief Counsel also pointed out that, by accepting NJP, the applicant avoided the risk of receiving much harsher punishment by court-martial. Furthermore, he argued, her claim should be barred by the doctrine of laches because "[i]n the nine years since her NJP, memories have faded, and documents have become less available, if they still exist at all, making it impracticable or impossible to rebut or to verify her claims."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 16, 1998, the Chairman sent the applicant a copy of the Chief Counsel's advisory opinion and invited her to respond within 15 days.

On July 30, 1998, the applicant responded to the views of the Coast Guard. In response to the Chief Counsel's argument that the applicant had not proved other recruiters who were equally culpable had not been punished, the applicant argued that the proof is in the hands of the Coast Guard because they can provide copies of the records of the other recruiters she has named and the report of

the investigation. However, the applicant did submit an affidavit from a former recruiter who confirmed many of the applicant's allegations (see below).

The applicant argued that her acceptance of NJP, rather than court-martial, and her failure to appeal the NJP should not be held against her because she "naively trusted [her] senior leaders to be doing a uniform and fair thing," and she "could not see, at the time, that this punishment would have very far-reaching effects upon [her] career." Furthermore, she thought that the records of her NJP would be removed from her record upon her next reenlistment, which was just three months away. "A change in administrative policy which requires that the Court Memorandum, CG-3304 be kept in the Personnel Data Record forever, versus being purged at the end of each enlistment, had been promulgated at CG Headquarters two months prior to my NJP but had not been implemented by training or practice yet at XXX."

The applicant argued that, in filing the false claims, she essentially obeyed an order that she should have disobeyed. She pointed out that members who may have done much worse things but who were punished just a few months earlier would have had the records of their NJPs removed when their enlistments expired. She alleged that it is unfair for the records of this NJP to be preventing her advancement to xxxxxx,⁵ while the careers of those who had ordered her to file the false claims had not been harmed.

RESPONSE OF THE CHIEF COUNSEL

On September 3, 1998, the BCMR forwarded a copy of the applicant's response to the Chief Counsel in accordance with 33 C.F.R. § 52.82(a). The BCMR also wrote to Coast Guard Investigations, requesting a copy of the report of the investigation that resulted in the applicant's NJP. On September 23, 1998, the Chief Counsel stated that his recommendation remained unchanged, and Coast Guard Investigations informed the BCMR that no report of the investigation could be found.

APPLICANT'S SUBMISSION OF FURTHER EVIDENCE

In response to the Coast Guard's responses, the applicant waived her right to a decision within 10 months under 14 U.S.C. § 425 so that she might seek and submit more affidavits from fellow recruiters. She also asked the BCMR to continue to search for a report of the investigation. In January and March 1999, the applicant submitted further affidavits (see below). Copies of this evidence were forwarded to the Chief Counsel, but he did not respond. In April 21, 1999, after

⁵ The applicant was advanced to xxxxxx in June 199x, after she filed her BCMR application.

unsuccessful attempts to find the report of investigations by telephone, the Chairman again wrote Coast Guard Investigations a formal request for the report. On June 2, 1999, the Coast Guard responded, stating that the report had been transferred to the Federal Records Center and would be retrieved from there. On June 22, 1999, Coast Guard Investigations forwarded a copy of the report of the investigation of the filing of false claims by recruiters in the xxxx office to the BCMR.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on xxxxxx, 197x, and completed recruit training on xxxxxx, 197x. She was first assigned to Coast Guard headquarters in Washington, D.C., where she served until June 198x while being promoted from xxxxxxxxxx and then to xxxxx. For her service at headquarters, she received a personal letter of thanks and commendation from the Commandant and a Coast Guard Achievement Medal.

In July 198x, the applicant was transferred to the recruiting office in xxxx, XX, where she served as a recruiter until June 198x. For her service at the recruiting office, she received an Achievement Medal. The citation to the medal states that the applicant displayed superior performance, initiative, enthusiasm, perseverance, diligence, judgment, and devotion to duty.

In June 198x, the applicant was transferred to the XXX in Xxxxxx, XX, where she was promoted to xxxxxxxxxxxxxxx.

On May 26, 198x, the applicant went to mast before a commander at the xxxxxxxxxxxx. On June 13, 198x, a court memorandum was placed in the applicant's record indicating that she had been found guilty of filing false claims. Her punishment, "reduction to the rate of xxx, [was] suspended for the remainder of current enlistment contingent upon restitution of claims." On June 13, 198x, a page 7 entry was placed in the applicant's record indicating that she had received a mark of 2 (on a scale of 7) for poor conduct. On June 15, 198x, a page 7 entry was placed in her record concerning the schedule by which she was to repay \$1,473.86 in accordance with the NJP.⁶

On 10 June, 199x, the applicant wrote to her commanding officer at the Xxxxxx XXX asking that her NJP be set aside. On September 8, 199x, she was told that "[s]ince over three years have elapsed, it is impossible for me to assem-

⁶ Apparently, because of the statute of limitations, the applicant was found liable only for false claims in the amount of \$113, but she alleged that she volunteered to pay the entire amount.

ble the facts in your case in order to make a proper decision.” She was encouraged to apply to the BCMR.

On December 18, 199x, the applicant applied to the CGPC for the removal of the records of her NJP pursuant to COMDTINST M1080.10D. She stated that she was “not convinced that the circumstances surrounding [her] NJP did not contain elements of discrimination, specifically [she] was the only one in an office of five recruiters that received NJP for following a ‘standard procedure’ – all the other recruiters were senior to [her] and received, at the most, a page 7.”

On January 5, 199x, the applicant’s commanding officer forwarded her request for correction to the CGPC “strongly recommending approval.” Her commanding officer stated as follows:

In reviewing the circumstances surrounding the NJP in question, I believe [the applicant’s] assertion that there may have been prejudicial factors present has merit. Since the investigation which precipitated the Mast was conducted after many of the affected recruiters had been transferred, disposition of the resulting charges was left to the commands where the recruiters had been transferred to. . . . Only much later was she able to determine that only she was singled out for NJP in this instance. Further, Coast Guard policy at the time of punishment was to purge such records upon reenlistment. Subsequent change to that policy leaves this stand-alone document in an otherwise stellar record. . . .

While deliberations of the xxxxxx selection board are sealed, I am convinced that she would easily have been selected but for the presence of the NJP within her file. . . .

On June 1, 199x, the applicant was promoted to xxxxxxxxxxxx. On June 1, 199x, the applicant was promoted to xxxxxx. Since her NJP, the applicant has received numerous marks of 7 (highest possible mark) in her evaluations.

Affidavits Signed by Other Recruiters

A member who was a petty officer first class at the time she worked in the recruiting office from April 198x to December 198x and is now a xxxxxx (xxx) signed the following statement:

On reporting to [USCG Recruiting Office xxxx, XX], both the OinC [Officer in Charge] and the XPO [Executive Petty Officer] ... instructed me that I was required to put in reimbursement requests for lunches and other recruiting personal expenditures at the maximum rate of \$60 a month, even when such expenses were not incurred. Their reasoning was that that money would serve as our Pro pay. The then CCGxx (xxx), a

[lieutenant] ... and [a senior chief petty officer], condoned this practice throughout the then XX District. Further fraudulent claims on travel vouchers were made when both the OinC and XPO would piggy back onto my travel claims even though they had not made the travel. The OinC and XPO would later pressure me and the other recruiter, [the applicant], to file similar travel claims with them. Failure to go along with them often resulted in poor performance evaluations and or verbal abuse in the office. I can only assume they wanted us to file fraudulent claims with them so that we wouldn't report them. Often the office government vehicles, of which one had USCG RECRUITING, on the sides of it would be found day or night at local bars. When approached on these acts of misconduct both the OinC and the XPO would blow up and there was simply no reasoning with them. These practices were fluent throughout the then XX District. After 2 years in this environment and no safe way out, I requested via letter to be reassigned, asking for any ship any shore unit east coast, due to irreconcilable differences. It was clear to me that with the acceptance of these activities from the district down that there was no way I could remain in recruiting. The emotional and professional retribution that the OinC and his XPO used would certainly end my previously high performance career. On departing, the XPO had one final meeting with me and that was to find out if I would stir up any investigations into their misconduct. I told him I just wanted out of the office and as far away as I could get. ... This statement is not the first on this subject that I have made. Sometime in 198x - 199x Coast Guard Intelligence interviewed me while I was stationed in xxxxxx, XX. It is my opinion that [the applicant] should not have been held responsible for the misconduct pressured onto her and myself during that recruiting tour.

A xxxxxx who served in the recruiting office from June 198x to June 198x signed the following statement on the applicant's behalf:

After reporting to the USCGC xxxxxx in July 198x, I was the subject of an investigation into subject allegations conducted by the Coast Guard Intelligence out of the XX Coast Guard District in xxxxxx. I was told and I understood that all recruiters with the XX District were also subject to the same investigation. I told the investigator that I was led to believe it was a common and accepted practice for all recruiters to submit claims for reimbursement for miscellaneous expenses, even false ones, and that I did file these claims. The justification for this practice was that since Coast Guard recruiters did not get the same Proficiency Pay as Department of Defense recruiters, it was "our" way to get equal entitlements, so we did it. I never heard another word concerning the investigation or the results thereof. At the time, I had no personal knowledge of any one else being subject to the same investigation.

I will not drop names, but I was later asked by my previous Officer in Charge as to what happened as a result of my investigation. I told him "nothing". I still do not believe that any of the Officers in Charge of the XX District recruiting offices were ever subject to the same investigation. Why not?

A member who was a petty officer first class when he served in the xxxx recruiting office submitted the following statement:

Upon reporting to the USCG Recruiting Office in xxxx, XX, I was told by the Executive Petty Officer ... that all recruiters filed an out-of-pocket expense report to compensate the Coast Guard recruiters for not receiving "recruiter pay" or SDAP like the other armed services recruiters received. I mentioned to him that this did not seem appropriate. He stated that the Officer in Charge stated that all the people in his office would file or none would and that the latter was not an option to us. The Finance Officer from the Recruiting Command in xxxxxx would send us our claims back occasionally with hand written notes to make this entry or another to make it look better. I was told that this was an approved procedure and the Recruiting Command knew and approved them each month. This went on until a new Officer in Charge and Executive Petty Officer were in position.

... Approximately two years after transferring to Louisville I had heard that there was an investigation going on in a couple of the xxxxxxx offices for falsifying claims. After looking into this matter, I realized the investigation included recruiters that had filed out-of-pocket claims. I informed my OIC that I had also filed false out-of-pocket claims but was ordered to do so by my OIC and XPO in xxxx. We in turn notified the Commanding Officer of the xxxxx Recruiting Command in xxxxxx that I had been involved in similar incidents that were currently being investigated. Members of Coast Guard Intelligence visited me for a period of one year to give statements and to answer questions about others that were involved.

At the end of the investigation, I was called by the Executive Officer (XO) of the Recruiting Command. He informed me that the total for the out-of-pocket claims was \$1100.00. He stated that I did not have to reimburse the Coast Guard but that it would look good if I did. I was informed that I would receive a Page 7 entry into my record as my only punishment unless I did not pay the monies back to the Coast Guard which would look bad and Non-Judicial Punishment may be held in the future as they would have to reevaluate my situation. I feel this was another example of the way the entire investigation was held so I in turn immediately paid the money to the Coast Guard to "cut my losses". The only punishment I received was a Page 7 for poor judgment on my part.

There was no standard procedure of punishment for the personnel involved. Lower ranking individuals seemed to be given harsher punishments than the superiors that orchestrated the situation and who forced their subordinates to follow unlawful orders.

Character References Submitted by the Applicant

A commander who supervised the applicant in 199x signed an affidavit attesting to the applicant's "high moral character" and "exemplary behavior." The applicant "chose truthfulness and candor when it would have been easier to accept less objective versions of others."

A senior chief petty officer who has known the applicant since 199x signed an affidavit stating that the applicant "conducts herself in a very professional manner both in official and social settings. ... She is a very loyal and honest individual whose core values are extremely high."

A chief petty officer who worked with the applicant for 4 years during the mid 199xs signed an affidavit stating that she "is the strongest leader I have met in my 18 years of Coast Guard service. She exemplifies honesty, integrity, and respect, and fosters the same values in those she comes in contact with."

Summary of the Report of Investigation of the Applicant

On xxxxxxxx, 198x, the commanding officer of the xxxxxxxx Recruiting Office in xxxxxxx, xx, wrote to the commander of the XX Coast Guard District requesting an investigation. He wrote, "It has come to my attention that a problem may exist at Recruiting Office xxxx concerning the submission of fraudulent travel claims, out-of-pocket expense claims, etc. General information concerning this matter surfaced during an investigation of Recruiting Office xxxxxx for similar reasons."

On xxxxxxxx, 198x, an investigator in the Chief Law Enforcement Branch submitted a report on the investigation of five members, including the applicant, who had served as recruiters in the xxxx recruiting office.

The investigator reported that the current Officer in Charge [OinC], who was assigned to the recruiting office on June 1, 198x, following the xxxxxxxx of the previous Officer in Charge, had discovered and stopped the practice of filing false claims. The new OinC stated that he had reported the false claims to his supervisors several times but received no response until November 198x, when he received a letter from the commanding officer of the xxxxxxxx Recruiting Center stating only that anyone who was submitting false claims should stop.

The new OinC further stated that he had contacted the recruiting offices in xxxxxx, xxxxxxxx, xxxxxxxx, and xxxxxxxx and discovered that the practice of filing false claims was long-standing at those offices. At a conference for recruiting office OinCs in xxxxxx 198x, personnel from the xxxxxxx Recruiting Center questioned him about whether he had "blown the whistle" on the practice and counseled concerning his "bad attitude." They apparently did not believe him when he denied having "blown the whistle" because they told him that they "hoped no other names are mentioned and no other offices are brought into the investigation."

On April 13, 198x, the investigator attempted to interview one of the subjects (S#1) of the investigation, but he refused to answer questions before consulting a lawyer.

On April 18, 198x, the investigator visited the xxxx recruiting office and attempted to interview the applicant, who was still working there, but she refused to answer questions before consulting a lawyer. However, a CWO (S#2) who was also a subject of the investigation waived his rights and answered the investigator's questions. S#2 told the investigator that all claims submitted by the recruiters were legitimate, but he refused to sign a statement to that effect.

On July 11, 198x, the investigator reinterviewed S#1, who stated that he had decided to tell the truth and waive his right to consult a lawyer. S#1 stated that the practice of filing false claims had been ongoing at the xxxx recruiting office when he first arrived there in September 198x. He was instructed in the practice by the XPO. Both of the previous OinCs knew and condoned the practice. S#1 stated that he did not know the practice was wrong until the new OinC arrived and stopped the practice. However, he refused to sign a written statement.

On August 11, 198x, the investigator spoke again with S#2, who waived his rights. S#2 stated that the former OinC had told him to submit the false claims. S#2 claimed that "[e]veryone in [the xxxx office] was doing it and [the xxxxxxx Recruiting Center] was aware it was going on." He stated that he had discussed the matter with personnel at the Center but could not recall who. S#2 further stated that he stopped submitting false claims when the new OinC arrived, but he would not sign a written statement.

On November 18, 198x, the investigator spoke with another subject of the investigation, S#3.⁷ S#3 told him that the applicant had informed him about the

⁷ S#3 is the petty officer first class who signed the third affidavit excerpted on page 7, above.

practice of filing false claims soon after he arrived at the recruiting office in 198x. She told him that the practice was not "technically" approved but that "it was known about and an accepted abuse." The applicant told S#3 that she did not want to file false claims but did so because the XPO had taken her "to the office storeroom and told her that she was no longer working at Headquarters and that she worked for him now and she would do things his way or he would have orders [to transfer] her within the day." S#3 told the applicant that "he could stand up to [the XPO] better than a woman could." However, soon thereafter, the XPO came to his desk, slid a blank claims for reimbursement for expenditures on it, and told him to fill it out. When S#3 questioned the XPO, he was told that the OinC wanted it done and S#3 "would do them." S#3 then saw the applicant look at him with an expression "as if to say I told you so." S#3 and the applicant then told the XPO that they did not want to submit the claims but were told by the XPO that "he ran the office and they would do as they were told." S#3 told the investigator that he went along because "he was afraid to buck the system and wondered if anyone would stand behind him against a xxxxx and xxx [the XPO and OinC] with a combined 30 some years of active service and obviously someone else in district or elsewhere." He stated that the OinC also requested the claims from him and that later he learned that the practice was widespread and well known throughout Coast Guard recruiting. The OinC told him that at a conference for recruiting office OinCs, personnel from the xxxxxxxx Recruiting Center had instructed the conferees to be "creative financiers," which he and others at the conference interpreted as tacit approval of the practice of filing false claims. S#3 further stated that the XPO would review his claims and raise them to the allowed limit of \$60 per month, but when he heard rumors of an investigation, the XPO told them to file claims for about \$40 per month.

On January 25, 198x, the investigator requested an interview with the applicant, but she refused to speak to him before consulting a lawyer. He called her on February 3, 198x, and she still refused to speak to him because the Coast Guard legal staff had told her "they could provide no legal service for her unless charges were brought against her."

The investigator determined which claims filed by the subjects of the investigation were false by contacting some of the potential recruits with whom the subjects had claimed to eat lunch and submitted claims for the costs of the lunches. By this method, the investigator reviewed 27 of the applicant's monthly claims filed between March 198x and June 198x. He determined that they contained \$1,546.85 worth of false claims, averaging \$57.29 per month. The investigator reviewed 13 of the monthly claims filed by S#1 from October 198x to May

198x. S#1's fraudulent claims totaled \$734.57,⁸ or \$56.50 per month, on average. The investigator reviewed 10 monthly claims filed by S#2 in August and September 198x and from November 198x to June 198x and determined that the fraudulent claims totaled \$544.16, or \$54.42 per month, on average. The investigator reviewed 17 monthly claims filed by S#3 from August 198x to April 198x. S#3's fraudulent claims totaled \$956.31 and averaged \$56.25 per month. The investigator reviewed 4 monthly claims that the unit's XPO, S#4, filed in March, September, and October 198x and April 198x. The XPO's fraudulent claims for those months totaled \$240.00 and averaged \$60.00. The investigator reported that the review of monthly official expenditure claims was still incomplete.

⁸ The investigator added the column of false claims to \$793.47. It is unclear whether he miscalculated or whether he failed to include a monthly claim in his report.

APPLICABLE LAWS

Under Article 121 of the UCMJ, embezzlement is a form of larceny. The maximum possible sentence imposed by a court-martial for a conviction for larceny of military property worth more than \$100 is dishonorable discharge; forfeiture of all pay and allowances; and confinement for 10 years.

Under Article 15 of the UCMJ, the maximum possible sentence imposed by a captain's mast is correctional custody for up to 30 days; forfeiture of one-half pay for up to two months or detention of one-half pay for up to three months; reduction in grade; extra duties for up to 45 days; and restriction to certain areas for up to 60 days.

According to Article 8-D-2a. of the Personnel Manual (COMDTINST M1000.6A), a copy of each letter of censure issued pursuant to Article 15 of the UCMJ shall be retained in a member's official personnel record. According to Article 8-D-3, a copy of the court memorandum shall also be filed in an applicant's personnel record.

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 section 1552 of title 10 of the United States Code.
2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. The applicant alleged that she was punished for filing false claims pursuant to direct orders. She alleged that the practice of filing false claims was widespread among recruiters in the XX District. She further alleged that, although she was ordered to file false claims, she was punished more harshly than her superiors whom she was obeying and than other recruiters of higher rank. The Chief Counsel did not deny these allegations.
4. The Chief Counsel argued that the applicant's request should be denied under the doctrine of laches. However, the Board finds that discovering

the facts and results of such a widespread investigation, even x years after the fact, is not sufficiently onerous to justify denying the applicant's request.

5. The Chief Counsel argued that the applicant had waived her right to contest her NJP because she failed to appeal it in 198x. The Board finds that the applicant's failure to waive her NJP did not constitute waiver of her right to seek relief from the Board.

6. The Coast Guard's Report of Investigation and affidavits submitted by the applicant support her allegations that she was pressured to file false claims by her chain of command. However, the evidence fails to establish a sufficient level of coercion to negate her intent to file false claims.

7. The applicant admitted that she had filed false claims. She was given the option of contesting her case before a court-martial but chose to accept NJP. The applicant has not proved by a preponderance of the evidence that she was deprived of due process or that her command in Xxxxxxx committed any error or injustice in adjudicating her case or awarding the NJP.

8. The applicant argued that the affidavits she submitted prove that she was punished more harshly than those who outranked her and who ordered her to file the false claims. Therefore, she argued, it is unjust for the records of her NJP to remain in her record and hamper her career especially since, when she accepted NJP, she did not know that those forms would remain in her record past the end of her enlistment. However, the Board finds that the apparent lack of punishment of the other members who filed false claims does not constitute an injustice against the applicant. There is no evidence of abuse of discretion with respect to the applicant's punishment.

9. The applicant has not proved by a preponderance of the evidence that she was unfairly punished for the embezzlement she committed or that it is unjust for the records of that embezzlement to remain in her personnel records.

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

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of XXXXXXX, USCG,
is hereby denied.

[REDACTED]

[REDACTED]

(see dissenting opinion)

[REDACTED]

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-052

DISSENTING OPINION

██████████ Attorney-Advisor:

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. It was docketed on February 12, 1998, following the BCMR's receipt of the applicant's completed application.

This dissenting opinion, dated November 3, 1999, is signed by one of the three duly appointed members who were designated to serve as the Board in this case.

FINDINGS AND CONCLUSIONS

The following findings and conclusions are based on the applicant's military record and submissions, the Coast Guard's submissions, and applicable law, which are summarized in the Board's majority opinion in this case:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.
2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. The applicant alleged that she was punished for filing false claims pursuant to direct orders. She alleged that the practice of filing false claims was widespread among recruiters in the XX District. She further alleged that,

although she was ordered to file false claims, she was punished more harshly than her superiors whom she was obeying and than other recruiters of higher rank. She alleged that it was therefore unjust for the records of her NJP to remain in her record and hamper her career especially since, when she accepted NJP, she did not know that those forms would remain in her record past the end of her enlistment.

4. The applicant has proved by a preponderance of the evidence that she was ordered and coerced to file false claims by her chain of command. She has also proved by a preponderance of the evidence that the filing of false claims was a widespread practice among Coast Guard recruiters in the 1980s and that the punishment of some recruiters who filed false claims was carried out separately by members' new commands. The Chief Counsel failed to present any evidence contradicting these findings.

5. The Chief Counsel argued that the applicant's request should be denied under the doctrine of laches. However, discovering the facts and results of such a widespread investigation, even xxxx years after the fact, is not sufficient to justify denying the applicant's request.

6. The Chief Counsel argued that the applicant had waived her right to contest her NJP because she failed to appeal it in 198x. The applicant's failure to waive her NJP did not constitute waiver of her right to seek relief from the Board.

7. The evidence presented by the applicant indicating that she was punished more harshly than those who outranked her and who ordered her to file the false claims is necessarily anecdotal because she does not have access to the Coast Guard records of other members. However, in light of the Chief Counsel's failure to shed any light on this matter, the applicant has proved by the preponderance of the evidence that she was punished more harshly than those who ordered her to file the false claims and than recruiters of higher rank who filed false claims.

8. Although the applicant's NJP for embezzlement does not seem unjust when viewed in the abstract, the Board is persuaded that, under the circumstances of this case, she has suffered an injustice. The applicant has proved that she served under a corrupt chain of command, whose members ordered and coerced her to embezzle. She also presented un rebutted evidence that she alone received NJP for filing false claims. In light of the coercion and the apparent inconsistency of the punishments meted out by the Coast Guard, the applicant has proved by a preponderance of the evidence that it is in the interest of justice for the documents referring to her NJP to be removed from her record. There-

fore, the court memorandum dated June 13, 198x, and the page 7 entry dated June 15, 198x, which document the applicant's NJP should be removed from the file.

9. The applicant's record also contains a page 7 entry dated June 13, 198x, which notes only that she received a mark of 2 in conduct. The applicant has not shown by a preponderance of the evidence that this page 7 is in error or unjust.

10. Accordingly, the applicant's request should be granted in part.

ORDER

The application for correction of the military record of XXXXX, USCG, is hereby granted in part as follows.

The court memorandum, form CG-3304, dated June 13, 198x, shall be removed from the applicant's record.

The page 7 entry, form CG-3307, dated June 15, 198x, shall be removed from the applicant's record.

Any other document referring to the applicant's mast on May 26, 198x, and her consequent NJP shall be removed from her record.

All other requests are denied.

No copy of the decisions and opinions issued in this case shall appear in the applicant's record.

