DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2001-119

FINAL DECISION

[redacted]

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. This case was docketed upon the BCMR's receipt of the applicant's completed application on August 17, 2001.

This final decision, dated June 20, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a xxxxxx and first class petty officer (pay grade E-6), asked the Board to correct his record to show that he advanced to chief petty officer (pay grade E-7) on June 1, xxxx.[1]

The applicant alleged that at a captain's mast on May 5, xxxx, his commanding officer (CO) dismissed the charges against him with warning and placed him on probation for six months. If he met the terms of his probation, he alleged, he was supposed to be advanced at the end of the period. The applicant alleged that he met all of his CO's

[1] In support of his application, the applicant submitted several documents pertaining to a suit he filed in federal court regarding this matter. In his Complaint for Declaratory Relief to the court, he also requested removal of "any and all derogatory notations, including adverse enlisted performance evaluation marks, and adverse statements of understanding (CG-3307's)" from his record and a permanent injunction to stop the Coast Guard from transferring him from his office and position as a xxxxxx. The complaint was dismissed for failing to exhaust the administrative remedy provided by this Board. This section of the final decision is a summary of the applicant's allegations in his complaint to the court that are relevant to his case before the Board.

goals during the probationary period and received no guidance or mentoring. However, he was not advanced at the end of his probation.

The applicant alleged that, during his probation, certain members of his chain of command who were upset that the CO did not "throw the book" at him at the mast laid more "vindictive" and unsubstantiated charges against him. He alleged that the charges, for misusing a Government calling card and XXXX account for personal business, were false and unfair. He alleged that the phone calls and packages at issue were work-related and that they mostly predated both his mast and the evaluation period. He alleged that his phone calls were "largely related" to a 13-week training course in compassion he had been ordered to attend to help him "recover from personal upheaval and depression." He alleged that the training included psychotherapy that required him to identify "core hurts" and to talk to his mother "when these core hurts surfaced." If he had not had to take the course, he would not have had to call his mother. The applicant alleged that after completing the course, he informed his supervisor about his use of the calling card. His supervisor "expressed reservations" about his use of the calling card because the calls were not "xxxxxxxx related." Therefore, he repaid $58.63 in telephone charges but submitted a reimbursement claim for them. He alleged that his supervisor forwarded his claim but then unjustly reported him for misusing the calling card.

The applicant alleged that no action was taken against him regarding the alleged misuse of the calling card during his period of probation, which ended on November 5, xxxx. He alleged that the Coast Guard did not act on the charge until December xxxx. He alleged that this delayed action was improper as it allowed him to believe that "all was well." Moreover, he alleged that many members used calling cards "when a local travel claim was allowed" without being taken to mast. He submitted a copy of a November 27, xxxx, email message from the lieutenant who had represented him at mast. The lieutenant suggested that he had been "held to a higher standard because of the opinion that the outcome of the … mast wasn't … right."

The applicant alleged that in July xxxx, his supervisor made "inappropriate comments" about his compassion training. His supervisor indicated that he did not believe that the training was a legitimate process or that it was "producing the desired results." When he complained about his supervisor's comments, he was told that he could file a complaint alleging a violation of Article 134 of the UCMJ, which denotes making "disloyal statements," and he did so. However, on December 5, xxxx, he discovered that the executive officer (XO) of his unit had not forwarded his complaint to his CO.

The applicant alleged that on October 30, xxxx, he sent an email inquiring about his pending advancement. The very next day, the charge regarding his use of the XXXX account was made. He was shown the charges on November 15, xxxx. The applicant alleged that the approximately $70 he was said to have wrongfully charged to the

account was "endorsed and authorized by supervisory personnel and/or proper under various Coast Guard directives" and was definitely "Coast Guard related." He alleged that he reasonably used the account for his own administrative needs because his isolated post had no Integrated Support Command, no Personnel Reporting Unit, and no medical facilities, which might otherwise have sent the packages for him. He further alleged that his use of the account fell within the scope of "For Official Use Only" or "Quasi-Official." Moreover, he alleged, the officer assigned to investigate the charge had been xxxxxed into the Coast Guard by his supervisor and therefore had a conflict of interest in investigating the complaint against him.

The applicant alleged that he was held to a higher standard regarding use of the XXXX account than were other xxxxxxs. He alleged that, for fiscal year xxxx, his office's total charges were well under the $100 annual limit, but only his charges to the account were singled out for investigation. He alleged that the allegations against him amounted to "[a]pplying arbitrary hyper-technical standards to a nebulous past."

The applicant alleged that on December 12, xxxx, his CO dismissed the charges against him but, the very next day, removed his name from the E-7 advancement list, even though he had done nothing wrong during his probationary period. He alleged that the administrative procedures followed by the Coast Guard in charging him and removing him from the list were "substantially flawed." He alleged that his CO's withdrawal of his recommendation for advancement "dissolved [his] opportunity for advancement for a period of at least 37 months. And as a practical matter – forever." He alleged that the denial of his advancement was a "draconian measure not called for in view of the totality of the underlying circumstances."

SUMMARY OF THE RECORD

The applicant served about nine years in the xxxxx before enlisting in the Coast Guard in 1992. He initially served on cutters, but in 1997, he became a xxxxxx. In March xxxx, he was assigned to the xxxxxxxx office where these issues arose.

On January 4, xxxx, the applicant was arrested and jailed for allegedly assaulting his wife. According to statements signed by the xxxxxxxx staff, he called his office the next day and stated that he could not come in because his wife had undergone emergency surgery. However, when his wife called a friend who worked at the xxxxxxxx office, the fact that he was in jail was discovered.

On January 6, xxxx, the applicant returned to work, and his supervisor confronted him. On the same day, the applicant wrote his CO a letter denying that he had assaulted his wife. He alleged that the altercation occurred because she was a drug addict. He admitted that he had grabbed her and that they struggled and fell down. He alleged that it happened only because she had thrown a candle holder at a door and

he had grabbed her to ask her what was wrong and to tell her she needed help for her addiction.

On February 17, xxxx, a Case Review Committee examined the applicant's family situation and police reports. It found that there was domestic violence and that he was the primary "aggressor" but that his wife "instigated" many incidents. He was ordered to attend a 13-week "compassion workshop."

On April 10, xxxx, the applicant's supervisor charged him with violating Articles 134, 86, and 121 of the Uniform Code of Military Justice (UCMJ). The Article 134 charge alleged that he had lied to his supervisor regarding his whereabouts and reason for being absent from work. The Article 86 charge alleged that he had been absent without leave since he had received authorization for time off based on a false premise. The Article 121 charge alleged that he had wrongfully forged his estranged wife's signature on her paycheck and cashed it without her consent.

On April 12, xxxx, the applicant's CO made an administrative entry ("page 7") in his record detailing the facts behind the forgery charge. It states that on April 5, 2002, the applicant's wife came to the office because she was missing a paycheck and thought her husband had it. The applicant claimed that he had mailed it back to the bank where his wife previously worked because he did not know her address. After his wife left to go to the bank, the applicant put cash totaling the amount of the check in an envelope and asked a supervisor to give it to his wife. He stated that his action was "in no way an admission of guilt." On April 7, xxxx, the bank reported that the check had been cashed on March 21st with the wife's purported signature endorsing it to the applicant.

On April 12, xxxx, the applicant was informed of his rights by the investigator, including his rights to remain silent, to consult counsel, to refuse non-judicial punishment (NJP or "mast"), and to submit a statement in his own behalf. He signed statements indicating that he wanted to consult an attorney before making any statements and that he wanted a "military lawyer" to represent him at mast.

On April 13, xxxx, the applicant submitted a written statement about the charges. It is unclear whether he waited to consult with an attorney before he submitted this statement. In it, he claimed in regards to the Article 121 charge that, after he received his wife's check in the mail, he wrote "return to sender" on it to return it to the bank, but the post office redelivered it to him. He claimed that his wife then called and asked him to deposit the check and give her the money when she returned to town, so he did. The applicant alleged that his wife just pretended she did not know where the check was to cause trouble for him. Regarding the charges under Articles 134 and 86, he alleged that he had been wrongfully accused of assault by his wife and was too embar-

rassed to admit that he was in jail. He alleged that he had been "vindicated" in court on this matter[2] and that his wife had actually been abusing him.

On April 28, xxxx, the applicant was informed that his CO had revised the charge sheet to include just one count of making a false official statement with intent to deceive in violation of Article 107 of the UCMJ. He signed a statement acknowledging his right to consult with an attorney before deciding whether to accept NJP, "waiv[ing] the opportunity" to consult with an attorney, and accepting NJP. He was assigned a non-attorney lieutenant as a representative to help him prepare for the mast, in accordance with Chapter 1.C.3. of the Military Justice Manual.

Prior to the mast, the applicant submitted another statement in which he admitted that he had lied about being in jail. He explained that he lied because he was embarrassed and "did not want [his] wife to be negatively viewed by the people in our office if they learned that she had made false accusations." He alleged that he had been covering up his wife's "inappropriate behavior" and was in therapy to understand why his wife had physically and mentally abused him.

In his statement, the applicant also admitted that on March 31, xxxx, he had not spent the day xxxxxxxx at a high school, as he had told his supervisor. He claimed that he had previously left a couple of phone messages for the career counselor about xxxxxxxx at the school and was surprised when he arrived and found the school closed. Because he knew that most of the office staff were attending a birthday party for a coworker, he spent the rest of the day at his mother's house. Later, he pretended that the school had been open because he "did not want to look like an idiot." He submitted a store receipt to prove that he was near the school that day.

Finally, the applicant claimed that if the CO awarded him NJP, he would have to retire at the E-6 rate, rather than the E-7 rate, which would be unfair because he had previously given up two pay grades (going from E-6 to E-4) when he left the Navy to join the Coast Guard. He pleaded that he was "desperate" to remain in his billet because he needed the emotional support of his family and could not leave his "fragile" mother. He alleged that if his supervisor had had more leadership experience, he could have avoided charging the applicant with the violations by having "heart to heart talks." He suggested that the CO place him on probation.

On May 5, xxxx, the applicant went to mast on the Article 107 charge. The investigator had concluded that the allegations against the applicant were true. However, the CO dismissed the charge with a warning and placed him on six months' probation.

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[2] Apparently, the city attorney decided not to prosecute him for assault.

On May 11, xxxx, the applicant's supervisor prepared an Enlisted Performance Evaluation Form (EPEF) for the evaluation period ending May 31, xxxx. He assigned the applicant marks of 2 (on a scale of 1 to 7, with 7 being best) for the performance categories "integrity" and "setting an example." However, the applicant received a satisfactory conduct mark and was recommended for advancement. The supervisor also prepared a page 7 to document the low performance marks. It recounts the lies the applicant told on January 4 and 5, xxxx, and relates the events regarding the allegedly forged check. It also states that on April 3, xxxx, the applicant told his xxxxxx in charge (xxx) that he had been xxxxxxxx in a high school on March 31, xxxx, when in fact the school was closed for spring break. Although the applicant blamed the school for making a scheduling mistake, school officials strongly denied ever having made an appointment with him. Neither the EPEF nor the page 7 were timely approved. Apparently, they were placed in a file concerning the applicant's conduct and forgotten until his next EPEF was being prepared. They were finally completed by the applicant's marking official and CO on December 13, xxxx.

On May 18, xxxx, the Personnel Command issued ALCGENL xxxxxx, listing the members who were eligible for advancement on June 1, xxxx. It stated that, "[i]f appropriate, CO's shall withhold or cancel advancements of ineligible personnel per Art. 5-C-25.c. … of [the Personnel Manual]" by sending a message to the Human Resources Services & Information Center (HRSIC). The applicant's name was on the list.

On May 22, xxxx, the applicant's CO asked the Personnel Command to withhold his advancement "until further notice" in accordance with Article 5.C.25.c. of the Personnel Manual. The Personnel Command forwarded his message to HRSIC, which withheld the advancement and notified the applicant's command that he could still be advanced if he regained his eligibility before December 16, xxxx.

On June 22, xxxx, the applicant's supervisor charged him with violating Article 92 of the UCMJ for using a Government calling card to place $58.63 worth of personal telephone calls. He explained that, before March xxxx, calling card bills were sent by the telephone company to the regional xxxxxxxx center, bypassing the local xxxxxxxx offices. When the first telephone bill came to the local office on June 12, xxxx, he saw that the applicant "had placed numerous questionable calls on his Government phone card," and that most of them were from his home phone to his mother's home or office.[3] He spoke with a chief petty officer, decided to discuss the bill with the applicant when he returned from leave, and put the bill in his day planner on his desk. However, early the next morning, June 13th, the applicant called to tell him that all of the calls charged to his phone card "were made in connection with CG mandated counseling." The applicant told him that "the CG had implicitly permitted him to use his phone card for personal use." The supervisor disagreed and suggested that he bring in a money order

[3] A copy of this phone bill appears in the report of the investigation.

for the amount he owed. The applicant did so promptly but on June 21, xxxx, filed a claim for reimbursement for the calls, which the supervisor forwarded. The supervisor stated that he did not believe that "out of the blue, while on leave, [the applicant] was struck with a sudden urge to call [him] and discuss his personal use of his Government phone card." He concluded that the applicant either searched his desk or heard about the bill from someone who overheard his conversation with the chief petty officer. He also provided a copy of the statement the applicant signed when he was given his new phone card on March 20, xxxx. The statement indicates that the card is "FOR OFFICIAL GOVERNMENT USE ONLY."

On July 21, xxxx, the applicant charged his supervisor with violating Article 134 of the UCMJ for falsely accusing him of "rifl[ing] through his desk" and for making "inappropriate comments" regarding his attendance at the compassion workshop. The applicant alleged that the supervisor had made comments about what he "should have learned (e.g. personal responsibility) at a recent 13-week compassion workshop." The investigator determined that the supervisor's conclusion that the applicant had searched his desk at night and his criticism of the applicant were both "reasonable." He concluded that the applicant's charge was "a retributative act." Months later, the CO dismissed the charge.

On July 28, xxxx, the applicant was informed of his rights regarding the Article 92 charge against him. He indicated that he did not want counsel but would submit a statement. He asked that the lieutenant who had represented him at his May 5th mast be appointed to represent him again if he were taken to mast. He asked that no one who worked at his command serve as the investigator, but this request was denied. In his statement, the applicant argued that the calls were made in relation to the compassion workshop. He stated that the only time he had previously been warned was in xxxx when he used $10 in postage to mail copies of Coast Guard Magazines to his family members. He argued that his use of the postage was justified as "cost-effective and efficient advertising." He argued that that first warning did not justify charging him over his misuse of the calling card. He argued that the charge "simply reopens old wounds and serves no constructive purpose" since he had repaid the money. He stated that being removed from xxxxxxxx "would be a crushing blow to my well-being" and pointed out that everyone in his office except him was being transferred and that, as the "most productive xxxxxx," he should be retained for the "mission."

The investigator for this charge concluded that the applicant had used his calling card for "numerous unofficial long-distance personal phone calls." She stated that he admitted to having made such calls on his previous calling card, but he felt that it should be ignored because "everybody does it." She concluded that the calling card misuse alone would not justify a mast, except that he had not "learned anything from this situation, as he firmly believes he has done nothing wrong." Apparently, no further action was taken on this charge until December 5, xxxx.

On October 30, xxxx, the applicant emailed his supervisor, asking to be advanced to E-7 on December 1, xxxx. He stated that the "six-month delay" on his advancement imposed at mast in May xxxx was expiring.

On October 31, xxxx, the Chief of Operations charged the applicant with violating Article 92 of the UCMJ for misusing the office's XXXX account for personal packages. An investigator found 21 charges on the XXXX account for personal packages shipped by the applicant between June xxxx and March xxxx.[4]

On November 15, xxxx, the applicant was informed of his rights. He signed a statement indicating that he did not want counsel but wanted to make a statement. He again asked that the lieutenant who had represented him at his May 5th mast be appointed to represent him if he were taken to mast. The investigator who questioned him about his use of the XXXX account reported that he admitted to having used the account to send several packages to his wife's address, to his mother, and to his bank. The applicant told the investigator that he should not be charged with anything that happened before his mast on May 5, xxxx, because his CO had said he was "drawing a line in the sand." He stated that he was being "persecuted" and would not accept NJP. The investigator recommended that his name be removed from the advancement list and that his security clearance be revoked. He also recommended that the applicant be taken to mast.

On November 27, xxxx, a new xxx wrote a letter in support of the applicant's advancement. He pointed out that the applicant had been the only xxxxxx in the city for the previous three months and was the region's most productive xxxxxx.

On November 29, xxxx, the applicant filed an Article 138 request for relief because of his CO's refusal to advance him to E-7. He alleged that his use of both the calling card and the XXXX account was related to his work and that the new charges arose because others in his command were angry that the charges in May xxxx had been dismissed. He insisted that "the past must be put to rest." He also alleged that the Coast Guard violated Chapter 1.C.3.b. of the Military Justice Manual by not appointing him a representative prior to questioning him about his use of the XXXX account.

On November 30, xxxx, the applicant's supervisor prepared another EPEF, assigning him an "unsatisfactory" conduct mark, a "not recommended for advancement" mark, and marks of 1 for "integrity" and "setting an example." He also prepared a page 7 to document the marks. It states that from November xxxx through July xxxx, the applicant had charged at least 26 unauthorized personal long-distance phone calls

[4] The report of the investigation contains 21 copies of shipping statements showing packages sent from the applicant to the addresses of his wife, mother, bank, and vehicle lien holder.

from his home on his calling card. It notes that he had previously been counseled regarding personal use of government accounts and yet, from June xxxx to March xxxx, used the office's XXXX account for personal packages "at least 21 times." The page 7 states that, despite counseling, the applicant was not adhering to "the core values of Honor, Respect, and Devotion to Duty" and had repeatedly lied to his superiors to try to cover up his misconduct. Another page 7 was prepared to inform the applicant that his period of eligibility for a good conduct award had ended because of the unsatisfactory conduct mark.

On December 5, xxxx, the applicant was notified that the CO was considering imposing NJP for his misuse of the two accounts. He was informed of his rights and asked to respond by December 7th. He responded the same day with a signed acknowledgment of his rights, including his right to consult with an attorney before deciding whether to accept NJP. He "waive[d] the opportunity" to consult with an attorney and rejected NJP. The CO chose not to court-martial him and dismissed the charges with a warning.

On December 12, xxxx, the CO signed a page 7 notifying the applicant of his removal from the advancement list because of "the compelling information" about his misuse of the calling card and XXXX account. The CO also noted that the charges would not be referred to a court-martial and that he would remain a xxxxxx.

On December 13, xxxx, the CO asked the Personnel Command to remove the applicant's name from the advancement list due to unsatisfactory conduct. The request was forwarded to HRSIC, which removed his name from the list. The CO and the marking official also completed the most recent EPEF and page 7s, as well as those for the marking period that had ended on May 31, xxxx.

On December 14, xxxx, the applicant's CO denied his request for relief under Article 138, stating that his actions portrayed a "pattern of unethical behavior" and cast "grave doubt" on his "leadership, personal integrity, adherence to core values, and potential to perform in the next higher pay grade," which are the criteria for advancement under Article 5.C.4.e.4. of the Personnel Manual. The CO alleged that the applicant was obviously reluctant to hold himself accountable for his actions. He stated that his decision to withhold the advancement was based on "irrefutable documentation" of his "significant misuse" of Government accounts. The CO also stated that the June xxxx charge regarding his misuse of the calling card had been "held in abeyance, pending the very complex investigation of … [his] improper use of the government XXXX account." He stated that he had dismissed the applicant's July xxxx Article 134 complaint against his supervisor because it was "specious, at best," and that he was only allowing the applicant to remain in his position because of the new xxx's request.

On December 18, xxxx, the applicant received copies of the EPEFs and page 7s and sent a message to the xxxxxxxx center. He stated that he would not to appeal them and that he would proceed directly to court. He stated that he was "looking forward to a trial. The game is afoot."

On December 19, xxxx, the applicant sent his request for relief under Article 138 to the Commander of the regional Maintenance and Logistics Command (MLC), who ordered an investigation of the matter. On February 2, xxxx, the applicant's CO signed a statement for the investigation. He stated that the applicant had acted as if it was all a "game" and showed no remorse. At mast in May xxxx, the CO "was convinced that [he] had committed grievous offenses … which called his integrity into question." However, the applicant was getting a divorce, undergoing counseling, and caring for his mother, and the CO "realized that any action [he] took against [the applicant] would likely result in a disruption of all of these activities" and cause him to be transferred. He also realized that if he imposed NJP, the applicant would never be promoted to E-7. Therefore, he "cut[] him a huge break" and dismissed the charges. He warned the applicant that his performance would be scrutinized over the next six months and that his recommendation for advancement would be withheld "for at least six months."

The CO further stated that he had dismissed the Article 92 charges in December for the same reasons that he had dismissed the charges in May. In addition, after the applicant refused mast, he decided that his staff "could not adequately support a trial by court-martial and still conduct the xxxxxxxx business of the Coast Guard." Therefore, he did not court-martial the applicant but removed his recommendation for advancement. To meet the needs of the Service, he retained him as a xxxxxx.

On February 9, xxxx, the applicant's supervisor signed a statement for the investigation indicating that, although he allowed the applicant to request reimbursement for the telephone calls, he did not endorse the request. He stated that he thought the applicant submitted the reimbursement request to "somehow officiate or legitimize his conduct relative to the personal use of the calling card. This was a tactic of his with which I became very familiar. Once caught in a lie or misconduct, he would immediately set about constructing an improbable yet plausible explanation."

On February 26, xxxx, the investigator reported that the allegations about the applicant's lying, forgery, and misuse of the calling card and XXXX account were true. He found that the applicant's supervisor, after catching the calling card misuse and getting him to repay the $58.63, should not have let him seek reimbursement for the calls. He also found that a supervisor at the applicant's previous office may have known about his personal use of a Government XXXX account. However, because the applicant was counseled about not using office accounts for personal business when he first came to the office, when he used $10 in postage for a personal package in xxxx, and when he was issued the calling card in March xxxx, the investigator found that his mis-

use of the accounts was not justified. He found that the CO had properly withheld and then removed the applicant's name from the advancement list. He also found that the unsatisfactory conduct mark was justified.

The investigator further found that the applicant had not been denied any due process regarding the charges against him. He found that the charge concerning the calling card was delayed first because of slow communications and then because of the investigation into the misuse of the XXXX account. He found that the delay was not unfair because the applicant was made aware of the charges in a timely manner and the statute of limitations for NJP is two years. He also found that, in light of his known misuse of the calling card, the command's scrutiny of his use of the XXXX account could not be considered unfair. In addition, he found no bias on the part of the officers who investigated these matters.

On March 5, xxxx, the Commander of MLC denied the applicant's request for relief, finding that his CO had "acted within his discretion" in removing his name from the advancement list and assigning him an unsatisfactory conduct mark. On March 14, xxxx, the Commander forwarded the applicant's request and associated documents to the Chief Counsel for review. On April 23, xxxx, the Chief of the Office of Military Justice determined that the Commander's denial was appropriate.

On August 14, xxxx, the applicant's new CO placed a page 7 in his record to document counseling for having misused Coast Guard stationery in his communications with a bankruptcy court. The CO warned him that further misconduct would lead to his removal from xxxxxx duty and "official action" to remedy the misconduct. On October 31, xxxx, the applicant was informed that he was ineligible to apply to any program leading to an officer's commission because of the unsatisfactory conduct mark on his November 30, xxxx, EPEF.

VIEWS OF THE COAST GUARD

On February 7, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He interpreted the applicant's request to include both advancement to E-7 and removal of the adverse performance evaluation and administrative entries from his record.

The Chief Counsel argued that the applicant has "failed to produce substantial evidence to support his allegations of error and injustice." He argued that "[a]bsent strong evidence to the contrary, Coast Guard officials, such as Applicant's Commanding Officer and immediate supervisor, are presumed to have executed their duties correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

The Chief Counsel alleged that the Coast Guard "followed established policy and procedure when it denied advancement to E-7." He alleged that the applicant's advancement on June 1, xxxx, depended upon his continuing to meet the eligibility criteria, including being recommended for advancement by his CO. He alleged that after the advancement list was issued on May 18, xxxx, the CO properly notified the Personnel Command that the applicant was no longer recommended for advancement and that his advancement should be withheld "until further notice," in accordance with Article 5.C.25.c. of the Personnel Manual.

The Chief Counsel alleged that after the applicant was again charged with UCMJ violations—for misusing his calling card and the office XXXX account—the CO properly asked the Personnel Command to remove the applicant's name from the advancement list "due to unsatisfactory conduct" in accordance with Article 5.C.4.e.4. of the Personnel Manual. The Chief Counsel alleged that the removal was proper, as a CO's recommendation for advancement is supposed to be based on the member's "qualities of leadership, personal integrity, adherence to core values and his or her potential to perform in the next higher pay grade." He alleged that the page 7 dated November 30, xxxx, in the applicant's record proves that the CO acted in accordance with the regulations.

The Chief Counsel further alleged that the CO properly found the applicant's performance to be unsatisfactory on the November 30, xxxx, EPEF, because he had failed to comply with civilian and military rules, regulations, and standards during the reporting period. He argued that the poor marks in the EPEF were properly supported by the comments in the page 7 prepared to document the marks. He alleged that the page 7 indicates the "pattern of unacceptable behavior" required to justify an unsatisfactory conduct mark on an EPEF.

Finally, the Chief Counsel alleged that the applicant's complaints against his supervisor and his CO were thoroughly investigated and found to be meritless.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On February 8, 2002, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond. He responded on February 16, 2002.

The applicant argued that under *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992), a member's record "may be corrected if it is judicially determined that the alleged error was unsupported by substantial evidence." He alleged that the evidence against him "is not only less than substantial, it is non-existent." He then discussed at length the court's decision to dismiss his case and repeated his previous allegations.

The applicant also alleged that the fact that his CO permitted him to remain in his xxxxxxxx position belies the allegations about his integrity upon which the decision to withhold his advancement was based. He alleged that it was "obviously inappropriate" for his CO to punish him administratively by withholding his advancement in lieu of awarding him NJP. He alleged that once the charges against him were dismissed, the allegations should not have been held against him. He further alleged that, other than the false allegations about his misuse of the accounts, he received no notice during his probation period that he was not meeting his CO's expectations. He pointed out that his new supervisor "wrote a glowing letter of support" for him to the CO and submitted a copy of the letter dated November 27, xxxx, to the Board.

The applicant also alleged that because on December 13, xxxx, his CO signed the EPEF for May xxxx with a recommendation for advancement, his decision the same day not to recommend the applicant for advancement on the November EPEF is clearly inconsistent and erroneous. He also alleged that it was unreasonable and erroneous for the CO to base his recommendation against advancement on allegations that he had already dismissed. In addition, he alleged that the recommendation against advancement in the November EPEF was based on his performance in a previous reporting period, which he alleged was contrary to the rules.

The applicant alleged that his CO's letter of December 14, xxxx, proved that the decision to remove him from the advancement list was inconsistent with his performance and with the alleged promise to advance him after the probationary period. He quoted one paragraph from that letter about his decision to retain the applicant as a xxxxxx and several sentences about the applicant's integrity from the CO's statement dated February 2, xxxx. He also submitted a copy of the latter statement.

APPLICABLE LAW

Enlisted Advancement

Under Article 5.C.4.b.1.l. of the Personnel Manual (PM), a member must be recommended for advancement by his or her CO to be eligible to take the servicewide examination (SWE) for advancement. PM Article 5.C.31. provides that, after the SWE is scored, HRSIC will prepare an advancement eligibility list and publish it in an advancement announcement. It also provides that COs may withhold an advancement or remove a member's name from the advancement list.

PM Article 5.C.4.e. states that members' COs "are responsible for execution of the advancement program." It further states the following:

> 4. Advancement Recommendation. The commanding officer's recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. A recommendation for advancement shall be based on the individual's

> qualities of leadership, personal integrity, adherence to core values and his or her potential to perform in the next higher pay grade. …
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> • • •
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> 9. Effecting Advancements. Upon notification through Headquarters Advancement Announcement (HAA) from Commander CGPC, commanding officers shall advance those personnel listed, or advise HRSIC (adv) to withhold their advancement or remove them from the eligibility list … .

PM Article 5.C.4.e.5.b. requires COs to notify members in a page 7 that their recommendations for advancement have been withdrawn.

Under PM Article 5.C.25.c., if a CO withholds an advancement, it "may be effected at a later date but not later than the expiration of the current eligibility list. When the commanding officer feels that an individual is deserving of an advancement that has been withheld, he or she shall advise [the Personnel Command] with their recommendation in order that the member may be advanced. No member whose advancement has been withheld may be carried over to the new eligibility list."

Under PM Article 5.C.25.d., "[i]f at any time prior to effecting an advancement, a commanding officer wishes to withdraw his or her recommendation because an individual has failed to remain eligible and it appears that eligibility will not be attained prior to expiration of the current eligibility list, the commanding officer shall advise [HRSIC] … to remove the individual's name from the eligibility list."

Under PM Article 5.C.5.b.3., members competing for advancement to E-7 may not have received NJP or an unsatisfactory conduct mark on an EPEF within 24 months of the "terminal eligibility date" before the servicewide examination for advancement. In addition, the eligibility period for a good conduct award restarts upon receipt of NJP or an unsatisfactory mark.

EPEFs

Article 10.B. of the Personnel Manual governs the preparation of EPEFs. Article 10.B.1.b. states that COs "must ensure all enlisted members under their command receive accurate, fair, objective, and timely evaluations." Each enlisted member is evaluated by a "rating chain" of three persons: a supervisor, a marking official, and an approving official. PM Article 10.B.6.a.1. states that the member is to be evaluated on his performance "since the last recorded evaluation."

Under PM Article 10.B.4.d., the supervisor assigns recommended marks for each performance category and for conduct by placing an "X" in the appropriate circles. Marks in the performance categories are assigned on a scale of 1 to 7, with 7 being best. For conduct, the supervisor must choose between unsatisfactory and satisfactory. PM Article 10.B.2.a. provides that a "one time, minor infraction … is insufficient" to justify

an unsatisfactory conduct mark. Instead, there should be "patterns of unacceptable behavior."

The supervisor also prepares any page 7s necessary to document poor or outstanding performance, unsatisfactory conduct, or failure to be recommended for advancement. Page 7s must be prepared for the approving official's signature when a member is "not recommended" for advancement, receives an unsatisfactory conduct mark, or receives a mark of 1, 2, or 7 in any performance category. PM, Articles 10.B.2.a., 10.B.6.b., and 10.B.7.

Under PM Article 10.B.4.d., the marking official reviews the recommended EPEF marks, discusses with the supervisor "any recommendations considered inaccurate or inconsistent with the member's actual performance," and assigns the final performance marks by filling in the appropriate circles. The approving official then reviews the EPEF to ensure "overall consistency between assigned marks and actual behavior and output" and to ensure that "evaluees are counseled and advised of appeal procedures." The approving official may return an EPEF for revision if he thinks any marks are inaccurate. Otherwise he signs the EPEF, concurring in the marks assigned.

In addition, each member of the rating chain indicates on the EPEF whether he or she recommends the member for advancement. PM Article 10.B.7. states that in making this decision, rating chain members must consider the member's past performance and ability to perform the duties of the next higher pay grade. When a member receives a mark of "not recommended," the approving official must sign a page 7 in accordance with PM Article 5.C.4.e.

Under PM Article 10.B.5.a., members in pay grade E-6 receive "regular" semiannual evaluations at the end of each May and November. Article 10.B.4.b. provides that EPEFs are to be completed within 21 days of the end of a reporting period.

Under PM Article 10.B.10., a member may appeal performance marks within 15 days of receiving a copy of an approved EPEF but may not appeal a negative recommendation for advancement on an EPEF.

Non-Judicial Punishment

Under Article 15 of the UCMJ, commanding officers, at their personal discretion, may consider imposing NJP for minor violations of the UCMJ when administrative corrective measures seem inadequate and court-martial seems excessive. Under Article 43 of the UCMJ, the statute of limitations for imposing NJP is two years from the date of the offense.

Chapter 1 of the Military Justice Manual (MJM) contains the regulations governing NJP, which is a non-adversarial, administrative procedure. The MJM establishes no limitation of the time between when a charge is preferred and the day of mast. Chapter 1.B.4. of the MJM provides that members must be given notice of the charges against them and informed of their rights prior to questioning by an investigator. If a member asks to consult an attorney, he cannot be questioned further until he has an opportunity to consult one.

Chapter 1.C.3.c. of the MJM provides that the accused member's XO should appoint a mast representative "to assist the member in preparing for and presenting his or her side of the matter and to speak for the member, if the member desires." Under Chapter 1.C.3.b., the member may request a particular person to represent him, who should be appointed if he is appropriate and "reasonably available." Under Chapters 1.C.3.a. and 1.B.3.b., the XO should appoint the representative either at the time he initiates the investigation of the charges or after the investigation, when he forwards the matter to the CO with a recommendation to take the member to mast, to dismiss the charges, or to take some other action.

Under Chapter 1.B.5.e. of the MJM, if a CO decides that taking the member to mast is appropriate, the member has a right to refuse NJP and demand trial by court-martial. In making this decision, the member is allowed to consult counsel. MJM, Chap. 1.C.2.a. If the member accepts NJP, he is entitled to have a representative or a spokesperson of his own choosing at mast, but he does not have a right to be represented by an attorney. MJM, Chaps. 1.C.1. and 1.C.3. If a member refuses NJP, the CO may decide not to convene a court-martial. MJM, Chap. 1.B.5.g. Under Chapter 1.A.7.a., COs should attempt to try all known, related offenses together at the same mast.

Under Chapter 1.D.17. of the MJM, once a member is charged, the CO may "decide not to punish a member by dismissing the matter with a warning. Such a decision may be based on either a lack of proof or a determination that punishment is not appropriate even though the member committed an offense(s)." A dismissal with warning is not considered NJP, and no entry is made in the member's record.

Page 7s

Commandant Instruction 1000.14A, "Preparation and Submission of Administrative Remarks (CG-3307)," authorizes COs to prepare negative page 7 entries for the military records of members who commit acts that are contrary to Coast Guard rules and policies.

Article 138 Complaints

Under Chapter 7.A.1. of the MJM, any member who believes himself wronged by his CO, and who is refused redress by the CO, may send a complaint to the officer exercising general court-martial jurisdiction (OEGCMJ) over the CO. *See* UCMJ Art. 138, 10 U.S.C. § 938. Upon receipt of an Article 138 complaint, the OEGCMJ initiates "either a formal or an informal inquiry into all facts material to the complaint." MJM, Chap. 7.A.2.g. The OEGCMJ is responsible for determining what relief, if any, is warranted. MJM, Chap. 7.A.7. After granting or denying relief, the OEGCMJ forwards the complaint and all pertinent documents to the Chief Counsel for review. MJM, Chaps. 7.A.8. and 7.A.9.

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. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, 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 his CO wrongfully withheld his advancement to E-7 and asked the Board to correct his record by advancing him as of June 1, xxxx, Absent strong evidence to the contrary, the Board must presume that the applicant's command and other Coast Guard officials involved in the denial of his advancement executed their duties "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. After the applicant's name appeared on the advancement announcement issued on May 18, xxxx, his CO notified HRSIC, in accordance with PM Article 5.C.4.e.9., that his advancement should be withheld "until further notice" because the CO no longer recommended him for advancement. The record indicates that the applicant was orally informed of the reasons his advancement would be withheld at his mast on May 5, xxxx. It also indicates that he was fully aware of the allegations against him—as described on the charge sheets and documented on the page 7 dated April 12, xxxx. In addition, he had ample opportunity to respond to the allegations both in written statements and at mast. The fact that the charges were dismissed at mast with warning does not prove that his CO found them to be untrue or unjust. MJM, Chapter 1.D.17.

5. In the record before the Board, there is no page 7 dated in May xxxx notifying the applicant of the CO's decision to withhold the advancement, as required under PM Article 5.C.4.e.5.b. However, the Board finds that the lack of the page 7 was harmless because, in April and May xxxx, the applicant was made fully and timely aware of the allegations against him and clearly knew that his CO was withholding his recommendation for advancement. The preparation of a page 7 in accordance with Article 5.C.4.e.5.b. would not have informed the applicant of anything he did not already know. Moreover, the fact that he was never found guilty of the charges against him at mast or court-martial is irrelevant since no such conviction is required to withhold a recommendation for advancement, which is a discretionary decision for the CO to make based on the criteria listed in PM Article 5.C.4.e.4.

6. Under PM Article 5.C.4.e.4., a "recommendation for advancement shall be based on the individual's qualities of leadership, personal integrity, adherence to core values and his or her potential to perform in the next higher pay grade." The record contains ample evidence that reflects poorly on the applicant's integrity and ability to adhere to the core values of honor, respect, and devotion to duty and supports the decision of his CO in May xxxx to withdraw his recommendation for advancement and cause it to be withheld by HRSIC. Although after the EPEF for the period ending May 31, xxxx, was completed in December xxxx, the applicant received a mark of "recommended" for advancement, the mark does not prove that his CO erred or committed any injustice in withholding his recommendation for advancement after the advancement list was issued on May 18, xxxx. Moreover, because the EPEF was not completed and presented to him until December 18, xxxx, the "recommended" mark could not have confused the applicant about his actual status in May xxxx or during his probationary period. The Board concludes that the applicant has not proved by a preponderance of the evidence that his CO or the Coast Guard committed any material error or injustice in withholding his advancement on June 1, xxxx.

7. The applicant alleged that he should have been advanced at the end of his six-month probationary period because he met all of his CO's goals. However, the record indicates that during the probationary period, the applicant's command discovered that he had been regularly misusing his Government calling card and the office XXXX account for personal purposes. Under PM Articles 5.C.4.e. and 10.B.7., the fact that most of his misuse of the accounts occurred before the evaluation period did not prohibit his CO from considering that misconduct in deciding whether to allow his advancement. Moreover, during the evaluation period, the applicant refused to hold himself accountable for his actions and persisted in making misleading and unconvincing arguments that his use of the accounts was proper. Therefore, the Board finds that the evidence in the record fully supports the CO's decision not to allow the applicant's advancement at the end of his probation. As with the charges in April and May xxxx, the fact that the later charges were dismissed with warning does not prove that

his CO found them to be untrue or unjust. MJM, Chapter 1.D.17. Nor does it prove that his CO's decision to remove his name from the advancement list was improper.

8. The record indicates that the CO properly informed the applicant about his removal from the advancement list in a page 7 dated December 12, xxxx, and asked HRSIC to remove his name from the advancement list on December 13, xxxx, in accordance with the provisions of PM Article 5.C.4.e. The applicant has not proved by a preponderance of the evidence that these actions were in error or unjust.

9. Although the applicant did not expressly ask the Board to remove any EPEFs from his record, he submitted a copy of a complaint in which he disputed their accuracy and the propriety of the procedure by which the EPEF for the period ending May 31, xxxx, was completed. Therefore, the Board will consider whether they should be removed from his record.

10. In the EPEF for the period ending May 31, xxxx, the applicant received marks of 2 for the performance categories "integrity" and "setting an example." He did not submit any evidence to refute the marks, and the record indicates that his rating chain had ample evidence on which to conclude that his integrity was impaired and that he was setting a poor example for others. The record indicates that his supervisor timely prepared the EPEF and a page 7 to document the low marks in accordance with PM Article 10.B.6.b. The record also indicates that neither the EPEF nor the page 7 was signed by the marking and approving officials until December 13, xxxx.

11. Although the EPEF and the page 7 for the period ending May 31, xxxx, were not timely completed and approved by the marking and approving officials, the Board finds no reason to remove them from his record. The applicant has not proved that they contain any error or that he was harmed in any way by the delay in their completion. Despite the delay, he was entitled to appeal them under PM Article 10.B.10. but chose not to do so. Untimeliness *per se* is insufficient to justify removal of an otherwise valid performance evaluation. The Board finds that the applicant has not proved by a preponderance of the evidence that the EPEF or the page 7 are erroneous or unjust.

12. The record indicates that the applicant's EPEF for the period ending November 30, xxxx, was timely completed in accordance with the provisions of the Personnel Manual. In addition, the applicant's marks of 1 in "integrity" and "setting an example," unsatisfactory conduct mark, "not recommended" for advancement mark, and loss of eligibility for a good conduct award were properly and timely documented on page 7s in accordance with PM Articles 10.B.2.a., 10.B.6.b., and 10.B.7. Moreover, the record contains ample evidence to support his rating chain's decision to award those marks. While most of the applicant's misuse of the accounts occurred before the evaluation period, his failure to hold himself accountable for his misuse of the accounts provided a sufficient basis for the rating chain's low performance and "not recommended"

marks, as well as for the unsatisfactory conduct mark, under PM Article 10.B.2.a. In addition, he chose not to appeal this EPEF. The Board finds that the applicant has not proved by a preponderance of the evidence that this EPEF or the page 7s documenting the marks are erroneous or unjust.

13. The applicant made many allegations regarding the charges against him and how they were handled. With respect to the charges that led to his mast on May 5, xxxx, he did not prove that they were made in bad faith or that he was denied due process in any way. The record indicates that on April 12, xxxx, he was informed of the charges against him, of his right to remain silent and to consult counsel, and of his right to submit a statement in his own behalf. He asked to consult counsel, and the next day submitted a written statement.[5] When the charges were revised on April 28, xxxx, he was informed of the revision, was again informed of his rights, waived his right to consult an attorney before making a decision about whether to accept NJP, and accepted NJP. The record also indicates that the applicant asked that a military attorney be assigned to represent him at mast. However, under Chapter 1.C.3. of the MJM, he had no right to an attorney at mast; he was only entitled to a "mast representative," and one was appointed. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that he was denied due process in any way with respect to the charges against him in the spring of xxxx or his mast on May 5, xxxx. Moreover, even if he had proved some procedural error under the MJM, it would not prove that his CO erred in withholding his recommendation for advancement, which was a separate, discretionary, administrative decision. Furthermore, because the charges were dismissed with warning, he is not considered to have received NJP, and no court memorandum about the mast appears in his record. MJM, Chapter 1.D.17.

14. With respect to the charges regarding the applicant's use of the calling card and XXXX account, the Board finds that he has not proved any bias or bad faith on the part of the persons who charged him with the offenses, the persons who investigated the charges, or his CO. The lieutenant's opinion as expressed in the email message dated November 27, xxxx, and the fact that one of the investigators had been xxxxxed by his supervisor are insufficient to overcome the presumption of correctness accorded Coast Guard officers under *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992). In light of his use of the calling card, it was perfectly reasonable for his command to scrutinize his use of other Government accounts. Under Chapter 1.A.7.a. of the MJM, it was proper for the CO to try to handle the similar charges at one mast, and there is no evidence in the record that the CO intended at the May 5th mast to absolve him of then-unknown wrongdoing when he dismissed the charges for the known offenses. Moreover, the applicant has not proved that he was harmed in any

[5] It is unclear from the record whether the applicant actually consulted an attorney between April 12th, when he asked for one, and April 13th, when he submitted his statement. However, if he submitted his written statement before the Coast Guard assigned him counsel, this was not the fault of the Coast Guard.

way by his CO's delay in acting on the first charge, even if he might have been hoping it would disappear.

15. The record indicates that the applicant was properly informed of his rights when he was questioned about his calling card use on July 28, xxxx, and when he was questioned about his use of the XXXX account on November 15, xxxx. In both instances, he indicated that he did not want to consult counsel but would make a statement in his own behalf. For both Article 92 charges, he asked that the lieutenant who had represented him for the May 5th mast be reappointed if he were taken to mast. Under MJM Chapters 1.C.3.a. and 1.B.3.b., he was not entitled to have a mast representative appointed until his XO forwarded the charges with his recommendation to the CO. It is unclear from the record exactly what day that happened, and the lieutenant apparently was not reappointed. The applicant has presented no evidence to prove that any significant amount of time passed between when his XO forwarded the charges to the CO and December 5, xxxx—the day he was advised that his CO was considering taking him to mast, was informed of his rights, and waived his right to consult an attorney before making the decision about whether to accept NJP. Moreover, since under MJM Chapter 1.C.3.c., the purpose of a mast representative is to help the member prepare for mast and to speak for him at mast, the Board fails to see how the applicant could have been prejudiced by not having a mast representative appointed before he had decided whether or not to accept mast. Furthermore, because the charges were dismissed with warning, no court memorandum about the charges appears in his record. MJM, Chapter 1.D.17. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence the existence of any material error or injustice in his record with respect to the Article 92 charges.

16. In his complaint to the court, which he submitted as part of his application, the applicant also asked that all derogatory page 7s and other notations be removed from his record. However, he has not proved that any of the page 7s in his record are erroneous or unjust. Under Chapter 1.D.17. of the MJM, the fact that all of the charges against him were dismissed with warning does not mean that they were found to be false. Commandant Instruction 1000.14A does not require that allegations be proved at a mast or court-martial before a CO can document unacceptable behavior in an administrative entry in the member's record.

17. The applicant alleged that his Article 134 complaint against his supervisor was not properly processed. He has not alleged or proved the existence of any error or injustice in his military record as a result of how the Coast Guard handled his complaint.

18. The record indicates that the applicant's November 29, xxxx, request for relief under Article 138 was properly addressed by his CO, forwarded to the Commander of MLC, investigated, and denied. In addition, it was reviewed by the Chief of

the Office of Military Justice, who found that the denial was "appropriate." The Board finds that the applicant has not proved any material error or injustice with respect to the handling and denial of his Article 138 request for relief.

19. The applicant made numerous allegations with respect to the actions and attitudes of his supervisor, his CO, and others at his command. Those allegations not specifically addressed above are considered by the Board to be without merit and/or not dispositive of the issues involved in this case.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

*recused

[redacted]

[redacted]

[redacted]

* Member recused to avoid any appearance of impropriety. While he divorces himself from any involvement in personnel matters potentially involving the BCMR, he nonetheless is employed as an attorney in the Coast Guard's Office of Claims and Litigation, which represented the Coast Guard in an earlier legal proceeding brought by the applicant.