DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-081

xxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxx

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on February 2, 2007, upon receipt of the completed application, and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 25, 2007, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a former [redacted], third class ([redacted] pay grade E-4), asked the Board to set aside non-judicial punishment (NJP) he received at mast under Article 15 of the Uniform Code of Military Justice (UCMJ) on September 17, 2001, by removing documentation of the mast from his record, including his September 17, 2001, performance evaluation and attached comments on forms CG-3307 ("Page 7s").

The applicant stated that he received the NJP for "allegedly communicating a bomb threat to gate guards as he was leaving the base. The misunderstood remark was reported and in the days following September 11th was taken seriously." After a short investigation, he was taken to mast and awarded 45 days of extra duty and reduction to E-3, which was suspended and never enforced.

The applicant claimed that the gate guard reported that he had "stated in a joking voice 'I just planted the bombs.'" The guard's supervisor reported overhearing him say "I planted bombs all over the base." The applicant told his commanding officer (CO) that what he actually said was, "You guys be careful for bombs and all that stuff."

The applicant submitted the results of a polygraph test administered on August 17, 2006, by a licensed polygrapher trained at the Department of Defense Polygraph Institute. The results, he alleged, confirmed that he "did not use the term 'planted bombs' in his remark." He alleged

that the polygraph test is the most reliable evidence of his actual statement to the guards, who either misunderstood him or did not accurately remember his words when they testified at his mast. Citing *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 255 (1980), the applicant stated that polygraph evidence is admissible in administrative proceedings even though Rule 707 of the Military Rules of Evidence state that "[n]otwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." He pointed out that polygraph evidence is admissible at Administrative Discharge Boards and in Article 32 investigations. He argued that the Supreme Court's decision in *United States v. Scheffer*, 523 U.S. 303 (1998), addressed the constitutionality of this rule and not the admissibility of polygraphs *per se*. Moreover, as the dissent in *Scheffer* noted, "there are a host of studies that place the reliability of polygraph test at 85% to 90%" and some studies have found accuracy rates to be 90% or better. *Id.* at 333 (Stevens, J., dissenting). In addition, he argued that when polygraph tests err, they are more likely to find the innocent guilty than the guilty innocent, citing Honts & Perry, *Polygraph Admissibility: Changes and Challenges*, 16 LAW AND HUMAN BEHAVIOR 357, 362 (1992). The applicant further argued that polygraph evidence is "gain[ing] increasingly wide acceptance as a useful and reliable scientific tool," citing *United States v. Piccinonna*, 885 F.2d 1529, 1535 (11th Cir. 1989), and *United States v. Posado*, 57 F.3d 428, 434 (5th Cir. 1995). In fact, he alleged, some scientists have found that "polygraph evidence may be more trustworthy than handwriting analysis, eyewitness testimony and, in some cases, even fingerprint identifications," citing Widacki and Horvath, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification*, 23 JOURNAL OF FORENSIC SCIENCES 596, 596-600 (1978).

The applicant argued that because the allegations of the guard conflicted with the allegations of the guard's supervisor and both contradicted his own statement, the CO erred in finding that the preponderance of the evidence showed that he had communicated a bomb threat. He argued that his CO "placed excessive emphasis on the nature of the alleged offense," failed to consider the joking manner with which he was speaking to the guard, and refused to give him the benefit of the doubt because of the tense climate that existed just six days after the attacks on September 11, 2001. The applicant also alleged that the accusations against him were also inconsistent with his exemplary record and that his CO should have dismissed the charges against him. He argued that balancing his reliable polygraph evidence against the inconsistent evidence against him about a statement made in a "joking context," as well as his exemplary reputation and record, the Board should find that the NJP was wrongfully administered.

The applicant stated that he was recently denied an internship by the Federal Bureau of Investigation and "fears that in this heightened national security environment, a simple misunderstood remark may foreclose him from responsible positions in the security field." The applicant argued that the NJP should be removed because it is having unintended negative consequences on his civilian employment and because removing the NJP is "just the right thing to do" under the Board's "general equity powers." The applicant averred that he was innocent of the charge against him and that his punishment at NJP should "shock the sense of justice," as provided in *Sawyer v. United States*, 18 Cl. Ct. 860 (1989). He alleged that had the incident occurred now or before September 11, 2001, he might have been reprimanded but would not

have received NJP, and that his career in the law enforcement and security field should not be hindered by an "accident of timing."

In support of his allegations, the applicant submitted a copy of a polygraph examination report dated August 17, 2006. The examiner reported that he conducted an examination of the applicant

> concerning allegations that on 09-13-06 [sic], as he was leaving AIRSTA Xxxxxx, he made a bomb threat to the gate guard. The case facts and other information surrounding the allegation were provided to me in conversation with [the applicant's attorney] prior to the examination.
>
> During the pretest interview, [the applicant] stated he was not completely sure what he said that evening. He agreed that he used the word "bombs," but he stated he was certain he did not use the phrase "planted bombs." He stated he had not withheld any information about the language used when he was questioned about the matter.
>
> After discussing and reviewing all questions to be asked, charts were collected using the Comparison Question Technique (CQT). The relevant questions and answers on all charts were as follows:
>
> R5. When you spoke to the gate guard, did you use the phrase "planted bombs"? Answer: no
>
> R7. Did you say to the gate guard that you had planted bombs? Answer: no
>
> R10. Did you use the phrase "planted bombs" when you exited AIRSTA Xxxxxx that evening in 2001. Answer: no
>
> It is my opinion, based on my scoring of the charts, that [the applicant] did not exhibit reactions consistent with deception to any relevant question and that he did answer truthfully about this matter.

The examiner further noted that there was "no deception indicated—probability of deception is less than .01."

The applicant also submitted a statement dated August 9, 2006, from the CO of the TACLET who signed the NJP, performance evaluation, and Page 7s in the applicant's record. He wrote that "[a]part from the unfortunate incident 13 September 2001, which resulted in NJP, I do not recall [the applicant] specifically due to the nature of TACLET Xxxxxx's frequent deployments of law enforcement/security personnel." However, because he never vacated the suspension of the applicant's reduction in grade, the CO concluded that the applicant must have "conducted himself with the same high standards and performance of duties which would have been expected of any member of my command."

In addition, the applicant submitted a statement from the subsequent CO of the TACLET dated August 14, 2006. CDR G wrote that the applicant had served under his command at TACLET Xxxxxx "with great distinction." He also wrote that he remembers the incident for which the applicant was awarded NJP and that he counseled the applicant about the seriousness of the comment. He stated that the applicant responded positively to his guidance, performed all required duties to his standards, and showed no evidence of a lack of judgment. CDR G wrote that "had the incident involving [the applicant] happened on my watch, I would have done the same thing. I would have counseled [him], verbally reprimanded him; or at the most, provided

him with a letter of caution. I probably would not have utilized NJP as a means of punishment for what was in my opinion, a momentary lapse of judgment."

The applicant also submitted a general letter of reference from his congressman, who praised the applicant's work as an intern helping constituents, as well as his compassion, work ethic, and interest in public service.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on June 11, 1998. The applicant advanced to BM3 and was eventually assigned to Tactical Law Enforcement Team (TACLET) Xxxxxx, a deployable law enforcement team based at Air Station Xxxxxx. The log of the station's Operations Duty Officer (ODO) for Thursday, September 13, 2001, notes that at 5:11 that afternoon, "front gate called in bomb threat. CDR [S] took call and briefed XO [the executive officer]. CDR [S] advised he will brief TACLET CO. Apparently it was one of his personnel. Presumed to be a joke." The log contains no further entries until more than three hours later when some barracks were evacuated because of a "suspicious package" that proved to be a member's toolbox.

On Friday, September 14, 2001, the XO of the TACLET ordered a chief yeoman to serve as a preliminary inquiry officer (PIO) to investigate the alleged bomb threat. On September 17, 2001, the PIO reported to the CO that the applicant "knowingly communicated a bomb threat to BM1 [A]," who "related the information to the CGAS ODO on duty (CDR [S])." The PIO stated that the applicant "demonstrated poor judgment and verbiage during a volatile situation" and recommended that the charge be disposed of at mast. The PIO's report included the following statements, although SK3 L's statement was not mentioned in the narrative of the report or even listed as an attachment:

- SK3 L, to whom the applicant spoke as he drove past the gate on September 13, 2001, wrote that while he was standing guard that day the following occurred:

  > As one of the TACLET Xxxxxx members was crossing the gate on his way out of the AIRSTA I remember him saying, "I just planted the bombs." He said this in a manner and voice that I took as joking and he also had both hands moving around in a playful way. Two other details also led me to believe that he was initially joking. Two XX TACLET members were with me at the gate and I thought he might have known them and was making the comment to them. I had also earlier seen the member and his team come off watch in Ft. Lauderdale as they entered the gate, so I figured he knew the high base security that was in effect. My watch was run by BM1 [A]; he also heard the comments and immediately questioned the statements made by the TACLET Xxxxxx member; he also confirmed that he did not know the member. He proceeded to inform XX TACLET's command as well as contact the AIRSTA OOD.

- BM1 A, who was the supervisor at the gate, wrote that while he was "on security detail … a black car exiting the front gate stopped and said 'I planted bombs all over the base' and then began to laugh. I was not certain of which unit he was attached to. I went over to the ODO building on the first level and reported the statement this individual made, also reported this to my OINC."

- CDR S, who was working in the ODO's office on September 13, 2001, stated that she answered the call from BM1 A that afternoon. BM1 A told her that a man in a black Honda Accord, who had entered the gate minutes before in a government van carrying TACLET Xxxxxx personnel, had just passed out of the gate and, before leaving, told BM1 A "that he had just planted a bomb." BM1 A confirmed that he "was absolutely sure" that the person in the Accord was a member of TACLET Xxxxxx. CDR S called the XO of the air station, who advised her to inform the CO of the TACLET and "let him deal with the member." Therefore, she called the TACLET offices but "everyone was gone for the day."

- After being advised of his right to remain silent and to consult an attorney, the applicant waived those rights and signed the following statement:

> On Friday, September 14, my team was returning from STA xxxxxxxxxxx to TACLET offices. While in route, we stopped at the gate and had our ID's checked by XX personnel who were parts of security. We said "hey" and asked if anything was going on or was it all quiet. After brief conversation and salutations we were on our way to the office. I was in the office for about 5 minutes before starting my trip home. On my way out I decided to say good bye to the gate guards. I came to a stop in front of the gate shack, put my passenger window down and said, "You guys be careful for bombs and all that stuff." I smiled at the guard, he returned the smile; we waved hands and I drove off. The gate guard that I spoke to was a third class petty officer. There were other petty officers sitting on a golf car about 10 feet behind me directly in front of the shack, but I don't know if I was heard by them. What I said to the guard was meant as a way to break the ice with some sense of comical relief at the most, and in no way a threat or hoax that would endanger the lives of my fellow guardsmen.

Also on September 17, 2001, the XO informed the applicant that he was being charged with two offenses under Article 134 of the UCMJ: (1) committing an offense against a sentinel or lookout and (2) communicating a bomb threat or hoax. The applicant was advised of his rights and accepted NJP instead of demanding trial by court-martial. A chief petty officer was assigned to serve as his representative at mast.

The applicant was taken to mast the same day, September 17, 2001, and awarded NJP for communicating a "bomb threat." As a result of the NJP, his record contains the following documents:

- A Court Memorandum of NJP states that the applicant made "a threatening statement toward the guards at the front gate of AIRSTA Xxxxxx. As [he] departed AIRSTA Xxxxxx on 13 SEP, he communicated a bomb threat to the base." The memorandum shows that the CO awarded him 45 days of extra duty and a reduction to pay grade E-3, which were suspended.

- A special performance evaluation dated September 17, 2001, contains significant lower marks than those on his prior and subsequent evaluations, including two low marks of 2 one low mark of 3 in the performance categories (a mark of 7 is best), an "unsatisfactory" conduct mark, and a mark of "not recommended" for advancement.

- A Page 7 documents his receipt of the unsatisfactory conduct mark because of the NJP.

- A second Page 7 documents the termination of his eligibility for a Good Conduct Award and also notes his receipt of low marks of 2 in the categories "Communicating" and "Setting an Example" on the special performance evaluation.

- A third Page 7 contains written comments supporting the lowest evaluation marks. The CO wrote in support of the mark of 2 for "Communicating" that the applicant "demonstrated poor communication skills and poor judgment by stating that he had left 'bombs throughout the base.' The Coast Guard was in threatcon condition when he relayed the statement to the sentinel on duty. [His] actions were immature and unbecoming of a petty officer." In support of the mark of 2 for "Setting an Example," the CO wrote that the applicant's "actions during a high security threatcon was irresponsible and intolerable. [His] behavior affected AIRSTA watchstanders and reflected negatively upon TACLET Xxxxxx."

The applicant was informed of his right to appeal the mast but did not do so. The applicant's CO never vacated the suspension, so the extra work and reduction in pay grade were not actually enforced.

The applicant continued to serve on active duty until May 10, 2004, when he was honorably discharged upon completion of his required active duty service. He was recommended for reenlistment but elected not to reenlist. During his service, he earned one Good Conduct Medal and various unit commendations and other commendations and medals. Aside from the documentation concerning the NJP and special evaluation, there are no other negative entries in his record.

VIEWS OF THE COAST GUARD

On June 25, 2007, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case.

The JAG argued that the Board could deny relief based upon the applicant's failure to appeal the NJP. The JAG argued that the failure to appeal constituted a failure to exhaust his administrative remedies before applying to the Board, and such exhaustion is required under the Board's rules at 33 C.F.R. § 52.13.

Citing 33 C.F.R. § 52.24 and *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992), the JAG further argued that the applicant failed to overcome the presumption that in awarding him NJP, his CO acted "correctly, lawfully, and in good faith." The JAG argued that the Board should "recognize that the commanding officer is the official responsible under statute and regulation for conducting the proceedings and determining an appropriate punishment" and that conducting such masts when members commit minor offenses is how COs preserve discipline within their units and maintain an effective armed force.

The JAG alleged that the applicant failed to prove a clear legal or factual error and failed to prove that the CO abused his discretion in awarding the NJP. The JAG pointed out that at most, the polygraph examination results show that the applicant himself is certain that he did not use the phrase "planted bombs" when he spoke to the sentinel on September 13, 2001. The JAG

noted that the examiner's report shows only how the applicant responded to three questions and "is not enough to remove the NJP from [his] record." The JAG alleged that without the complete report "it is impossible to determine how much weight the Board should lend the results."

The JAG further alleged that it "is undisputed that on 13 September 2001, the applicant made some sort of statement regarding bombs on the base, only two days after the terrorist attacks of 11 September 2001" and that the guards who heard the statement believed they had a duty to report the statement as a bomb threat. The JAG argued that the preponderance of the evidence "supports the finding by the NJP authority."

The JAG stated that because the applicant's sentence was suspended and the suspension was never vacated, he received no punishment for his conduct except the entry of the documents in his record. Moreover, he alleged, the "punishment was entirely proportional to the conduct for which it was awarded."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 22, 2007, the applicant responded to the views of the Coast Guard. The applicant stated that he did not appeal the NJP but instead accepted it as a loyal member and professional without questioning authority. He "had no idea that punishment under Article 15 would limit his future career opportunities." Therefore, he argued his failure to appeal the NJP should be excused. Moreover, the applicant pointed out that the time for appealing the NJP has long since run out and it is no longer available to him.

Regarding the polygraph test, the applicant submitted a chart showing his rate of respiration and pulse in response to several questions. In addition to the three questions discussed in the examiner's report (R5, R7, and R10), the chart shows that the following questions were asked, though the questions are not shown in their entirety and the applicant's answers are not shown:

- Do you remember exactly what you said [missing end of question]?
- Have you tried to unduly influence the [missing end of question]?
- Have you ever used a telephone to call a [missing end of question]?
- Have you ever threatened a friend or [missing end of question]?
- Have you ever taken a polygram?
- Re: the exact words you spoke to the [missing end of question]?
- Do you understand and agree that the [missing end of question]?

The applicant argued that the polygraph test is new evidence that his CO did not have and so the Board is "able to do a *de novo* review of the case." Because of the new evidence, he argued, a grant of relief by the Board "would not be a rebuke to the Commanding Officer."

The applicant argued that the NJP was arbitrary and capricious in light of his outstanding record and an overreaction on the part of the CO. He argued that CDR G's recent statement proves that "there was at least a difference in opinion as to how the incident should have been handled." The applicant also pointed out that only one guard—the supervisor of the guard who

actually spoke with the applicant—felt that a report was necessary as the guard who spoke with the applicant clearly took his words as a joke.

Moreover, the applicant argued, even if there was sufficient evidence to impose NJP in 2001, the Board has broad equitable powers to consider the NJP in light of the new evidence from the polygraph test. He argued that it was wrong for the JAG to ignore the impact of the NJP on his career. The applicant argued that his rejection as an intern for the FBI is a clear injustice "that cannot be undone unless this NJP is set aside." He argued that the unintended repercussions of the NJP "shock the sense of justice" as his ability to serve his country in the field of law enforcement and security has been severely limited.

APPLICABLE LAW

Part V-1 of the Manual for Courts-Martial (MCM) states that NJP under Article 15 of the UCMJ "is a disciplinary measure more serious than the administrative corrective measures … but less serious than trial by court-martial," which "provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction." Each CO exercises personal discretion in considering cases for disposition under Article 15 and in determining sentences. NJP is normally reserved for minor offenses, but the "decision whether an offense is 'minor' is a matter of discretion for the commander." MCM, Part V-1; *see* Coast Guard Military Justice Manual (MJM), Chap. 1.A.5. Unless the accused is attached to or embarked on a vessel, he or she may refuse NJP. MCM, Part V-2; MJM, Chap. 1.B.5.

At mast, the member is entitled to representation by a spokesperson and to present evidence and witnesses. MJM, Chap. 1.C. The standard of proof is the preponderance of the evidence. MJM, Chap. 1.D.1.f. The maximum NJP a CO may impose at mast includes correctional custody for not more than 30 days; forfeiture of not more than one-half of one month's pay per month for two months; reduction in grade; extra duties for not more than 45 consecutive days; and restriction to specified limits (geographical) for not more than 60 consecutive days. MCM, Part V-5; MJM, Chap. 1.E.1.c. Any member may appeal his NJP to a superior authority within five days of the mast, and the superior authority must refer the case to a judge advocate for consideration and advice before acting on the appeal. MCM, Part V-8; MJM, Chap. 1.F.

Military Rule of Evidence 707 provides that "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." However, the Military Rules of Evidence do not apply during mast proceedings. MJM, Chap. 1.D.1.g.

Under Article 134 of the UCMJ, it is an offense to communicate a bomb threat or hoax. Part IV-121 of the MCM lists the elements of a "bomb threat" as follows:

(a) That the accused communicated certain language;
(b) That the language communicated amounted to a threat;
(c) That the harm threatened was to be done by means of an explosive;
(d) That the communication was wrongful; and
(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Part IV-121 of the MCM lists the elements of a "bomb hoax" as follows:

(a) That the accused communicated or conveyed certain information;
(b) That the language or information concerned an attempt being made or to be made by means of an explosive to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy certain property;
(c) That the information communicated by the accused was false and that the accused then knew it was false;
(d) That the communication of the information by the accused was malicious; and
(e) That, under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The explanatory notes in paragraph 109 at Part IV-121 of the MCM state that for these offenses:

> A "threat" is an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage, or destroy is not required. *See also* paragraph 110.
>
> A communication is "malicious" if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons.

Paragraph 110 at Part IV-122 of the MCM, which concerns the offense of communicating a threat (which does not involve an explosive), states that the following regarding threats:

> To establish the threat it is not necessary that the accused actually intended to do the injury threatened. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another. *See also* paragraph 109 concerning bomb threat.

FINDINGS AND CONCLUSIONS

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

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

2. The JAG argued that the Board should consider the matter waived and deny relief because the applicant did not appeal his NJP. The Board's rules at 33 C.F.R. § 52.13 do require applicants to exhaust available administrative and legal remedies prior to applying. However, as the right to appeal NJP is limited to five days, the remedy is no longer available to the applicant. Under 10 U.S.C. § 1552(b), Congress provided a three-year statute of limitations for members to seek correction of their military records, including records of NJP, and the Board's policy in

---

[1] *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 "tolls the BCMR's limitations period during a servicemember's period of active duty").

such cases is to consider an applicant's failure to avail himself of an expired right to appeal not as a waiver of the right to seek correction of the record but as evidence of his state of mind with respect to the action taken against him at that time.

3. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

4. The applicant alleged that at mast his CO erroneously found that the preponderance of the evidence showed that he had communicated a bomb threat. He argued that his own testimony and his exemplary performance record were sufficient to outweigh the guards' statements that he had indicated to them that he had put bombs in or around the base. He argued that the statements of the guards should be considered unreliable because one, BM1 A, accused him of saying, "I planted bombs all over the base," while the other, SK3 L, wrote that he said, "I just planted the bombs." The Board finds that despite the difference in the guards' reports about the applicant's words at the gate, there was sufficient evidence for his CO to find that the preponderance of the evidence indicated that the applicant had told the guards that he had planted or in some other fashion placed bombs in or around the base.

5. The applicant alleged that his CO erred in finding that he had communicated a "bomb threat" in violation of Article 134 of the UCMJ because he was joking and the guards knew he was joking. SK3 L wrote that he understood the applicant's statement to be a joke because of his manner, tone of voice, and playful gestures; because SK3 L knew he was a TACLET member and thought he was talking to two other TACLET members who were standing nearby; and because the applicant had just entered the gate a few minutes before with other TACLET members and knew the level of security in effect. BM1 A stated that the applicant began laughing after he spoke, but BM1 A reported his words to the ODO anyway. The ODO's log shows that that office did not react to BM1 A's report as if there were any potential danger, and the log states that the applicant's statement was "presumed to be a joke." It is not clear from the report of the investigation whether BM1 A reported the applicant's conduct because he actually felt that there might be a threat or because he felt it was his duty to inform his superiors of the applicant's irresponsible joke.

6. The applicant was originally charged with communicating a bomb threat or bomb hoax. Because there were no bombs and the applicant was clearly joking, communicating a bomb hoax would seem to be the most apt charge since the lack of any explosive device is an element of that offense. However, maliciousness is an element of a bomb hoax,[2] and there is no evidence of malicious intent in the record.[3] Instead, the CO found that the applicant's conduct met the elements of a "bomb threat," and so one question before the Board is whether a statement about having planted bombs that is intended and understood by at least one witness to be a joke meets the elements of a "bomb threat" under Article 134 of the UCMJ. Those elements are

---

[2] MCM, Part IV-121, para. 109.

[3] *But see United States v. Pugh*, 28 M.J. 71 (C.M.A. 1989) (holding that a practical joke involving a fake bomb on the window ledge of the guard booth met the requirement of "maliciousness" because the security guard became concerned and pressed a "duress button," even though the fake bomb was pointed out to him by a servicemember whom he knew to be a practical joker).

(a) that the accused communicated certain language; (b) that the language communicated amounted to a threat; (c) that the harm threatened was to be done by means of an explosive; (d) that the communication was wrongful; and (e) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

7. The explanatory note for the offense of "bomb threat" under paragraph 109 at Part IV-121 in the MCM states that the Government need not show that the accused actually intended to destroy anything but also directs one to the explanatory note for a "threat" under paragraph 110, which states that "[t]o establish the threat it is not necessary that the accused actually intended to do the injury threatened. However, a declaration made under circumstances which reveal it to be in jest … or which contradict the expressed intent to commit the act, does not constitute this offense." Both military and civilian courts have long held that whether a threat is communicated depends not only upon the accused's intent but also on the surrounding circumstances and the understanding of and effect on whoever hears the alleged threat, assuming the hearer is an ordinary and reasonable person.[4] A jest may be a threat if the hearer's reaction is foreseeable given particularly sensitive circumstances.[5] A jest may be a threat even if the joker states that he is joking, especially if the joker is not personally known to the hearer.[6]

---

[4] *United States v. Schnable*, 65 M.J. 566, 571 (2006) (noting that a "comment made under circumstances which indicate it was made in jest or for an innocent or legitimate purpose, or which contradicts the express intent to commit the act is not an offense. … In evaluating whether a threat exists, we view the evidence from the viewpoint of a reasonable man"); *United States v. Gilluly*, 32 C.M.R. 458, 461 (1963) (noting that a "statement may declare an intention to injure and thereby ostensibly establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter"); *United States v. Whiffen*, 121 F.3d 18, 20-21 (1st Cir. 1997) (noting that under "a general intent standard, whether a communication is a 'true threat' is determined objectively from all the surrounding facts and circumstances, rather than from the defendant's subjective purpose. … In determining what constitutes a 'true threat,' the *Fulmer* panel found the governing standard to be 'whether [the defendant] should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made. [*United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997).] This test takes into consideration the context in which the remark was made and avoids the risk that an otherwise innocuous statement might become a threat if directed at an unusually sensitive listener"); *United States v. Cothran*, 286 F.3d 173, 176 (3rd Cir. 2002) (noting that the "question is whether an ordinary, reasonable person would view the language as a threat. [*United States v. Malik*, 16 F.3d 45, 49 (2nd Cir. 1994).] Another way of looking at this test is asking whether Cothran should have reasonably foreseen that the airline industry is highly sensitive to bomb threats and that his statement would be taken as a threat by the U.S. Air reservationist. [Citation omitted.] In determining whether something is a threat, 'proof of the effect of the alleged threat upon the addressee is highly relevant.'" [*Malik*, at 49.]).

[5] *See Cothran,* at 176; *see also United States v. Silver*, 196 F. Supp. 677, 678 (E.D. Pa. 1961) (noting that "[t]here is no doubt that the statement that he had a bomb in his brief case was made in jest, but the peculiar sense of humor attributable to this defendant does not lessen the seriousness of the legal consequences of his acts").

[6] *See Cothran*, at 176; *Roy v. United States*, 416 F.2d 874, 878 (9th Cir. 1969) (holding that the "allegation that the threat was made as a joke is therefore relevant to the issue of whether a threat was knowingly and willfully made, and it is to be considered by the trier of fact in light of all the circumstances. Here there was a conflict in the testimony as to whether Roy later told the telephone operator that the threat was a joke. But even if we assume for the purpose of argument that Roy later told the operator that the threat was a joke, one could not reasonably expect that this would eradicate the apprehension created by the first call. The telephone operator was not acquainted with the anonymous caller and she was not talking to him face to face; she had no reliable way to determine whether the anonymous caller was joking. The later statement that the threat was a joke would therefore not necessarily eliminate the mischief created").

8. The applicant is in essence asking the Board to second-guess his CO, who was the designated trier of fact under Article 15 of the UCMJ. Presumably, the CO had before him all of the statements in the report of the investigation,[7] as well as the oral testimony of the applicant and witnesses at mast. On the basis of this evidence, the CO concluded that the applicant had communicated a bomb threat under Article 134. The record before the Board shows that SK3 L thought the applicant's statement was a joke, that BM1 A heard the applicant laughing after he spoke, and that the ODO presumed it was a joke and took no action. On the other hand, the applicant was not personally known to the guards to whom he spoke, and they were in a "high security threatcon" status. The guards were able to report only that they thought he was a member of the TACLET team that had recently entered the gate in a Government van and that he was driving a black Honda Accord when he said he had planted bombs at the base. Moreover, the applicant did not stay and tell them that he was joking or introduce himself but drove away, so they could not quickly confirm his joking intent. BM1 A felt obligated to report the applicant's statement. Under these circumstances and realizing that the CO may have heard testimony that is not available to the Board, the Board cannot conclude that the CO erred in determining that the applicant had communicated a "bomb threat" within the meaning of Article 134 of the UCMJ just because at least one guard and the ODO presumed his statement to be a joke. The CO could reasonably have concluded that it was or should have been foreseeable to the applicant that in the immediate aftermath of September 11th, an ordinary, reasonable gate guard who did not know him personally would feel some concern and report his statement about placing bombs around the base as a bomb threat.

9. The applicant argued that he is not asking the Board to second-guess the CO because he is presenting evidence of a polygraph test to which the CO did not have access. He argued that the results of the polygraph test cast sufficient doubt on the statements of the guards to tip the balance of evidence so that the preponderance of the evidence shows that he did not communicate a bomb threat. In *United States v. Scheffer*, 523 U.S. 303 (1998), the Supreme Court found that "there is simply no consensus that polygraph evidence is reliable."[8] However, even assuming that the applicant's polygraph test is reliable, the test questions were so narrowly focused that at best the results can be considered proof that the applicant does not remember using the phrase "planted bombs" or did not use that exact phrase when speaking to the gate guards on September 13, 2001. Although SK3 L and BM1 A used that phrase when describing his statement to the PIO, the Board finds that the test results fail to prove that he did not tell the guards that he had in some fashion put a bomb or bombs in or around the military base. The Board notes that the applicant could have, but did not, use the polygraph test to try to prove that his statement to the PIO that he said "You guys be careful for bombs and all that stuff" was more true to his actual words. Nor did he use the test to try to prove that his words to the guards did

---

[7] Although SK3 L's statement was not mentioned by the PIO in his report, it was apparently included in the report with the other witnesses' statements.

[8] *United States v. Scheffer*, 523 U.S. 303, 309 (1998). The Court explained that "[t]o this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. [Citation omitted.] Some studies have concluded that polygraph tests overall are accurate and reliable. [Citation omitted.] Others have found that polygraph tests assess truthfulness significantly less accurately -- that scientific field studies suggest the accuracy rate of the 'control question technique' polygraph is 'little better than could be obtained by the toss of a coin,' that is, 50 percent. [Citation omitted.]" *Id.* at 309-10.

not communicate that he had put bombs in or around the base. The Board finds that the results of the polygraph test do not affect the preponderance of the evidence in this case and so do not prove that the applicant did not communicate a bomb threat to the gate guards on September 13, 2001.

10. The applicant argued that his joke would not have been considered a bomb threat if he had made it at a different time and that he received NJP only because of an "accident of timing." However, the timing of the applicant's joke on September 13, 2001, was no accident. The terrorism of September 11th and the Coast Guard's "high security threatcon" status apparently evoked his joke and presumably affected BM1 A's reaction to the joke. The timing made the offense more egregious, and the fact that the subsequent CO of the TACLET stated in 2006 that he "probably would not have utilized NJP as a means of punishment for what was in my opinion, a momentary lapse of judgment" does not persuade the Board that the NJP was an unjust overreaction. Congress authorized NJP under Article 15 to empower COs to enforce "good order and discipline" within their units,[9] and the applicant has not proved that his CO abused his discretion in finding that his conduct merited the NJP and the supporting documentation he received even though that conduct was the result of a "momentary lapse of judgment."

11. The applicant alleged that the NJP should be removed from his record because his joke is now hampering his civilian career. He argued that this long-term, unintended impact of the NJP "shocks the sense of justice."[10] The applicant alleged but failed to prove that the NJP caused his application for an internship with the FBI to be rejected. The Board notes that although the guards' statements in the report of the investigation indicate that the applicant was joking, neither the court memorandum nor the Page 7s documenting the NJP show that the applicant was joking and that his "bomb threat" was understood to be a joke. Because he received NJP, which is for minor offenses, and was not discharged or court-martialed, a knowledgeable reader of the record may infer that the applicant was joking.[11] However, the applicant is in possession of the report of the investigation and, if he believes a potential employer may learn of the NJP, may show the employer that his "bomb threat" was understood to be a joke.

12. Accordingly, the applicant's request should be denied because he has not proved by a preponderance of the evidence that the NJP and corresponding performance evaluation and Page 7s in his record are erroneous or unjust.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

---

[9] *See generally* MCM Part V-1, para. 1.

[10] According to *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577, and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice."

[11] The maximum punishment for a bomb threat under Article 134 of the UCMJ is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. MCM, Part IV-121, para. 109.

ORDER

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