

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-178

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on June 25, 2009, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 11, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to remove an Administrative Remarks form CG-3307 ("Page 7") dated November 19, 2007, from his record and to order the Coast Guard to appoint him to chief warrant officer (CWO) on June 1, 2010, as if he had been selected for appointment to CWO2 by the CWO appointment board that convened in April 2009.

APPLICANT'S ALLEGATIONS AND EVIDENCE

The applicant alleged that on October 24, 2007, a colleague, YN2 X, placed him on report on a charge of having an inappropriate relationship with YN2 X's wife. Because YN2 X also broke into his house twice, the applicant got a civil restraining order against YN2 X on November 13, 2007. After the command investigated YN2 X's allegations and misconduct, the District Chief of Staff gave the applicant an order not to contact YN2 X's wife and gave YN2 X an order not to contact the applicant. The applicant alleged that the no-contact order is not evidence that he had an inappropriate relationship with YN2 X's wife; it was only intended to "diffus[e] a rapidly escalating situation and avoid[] further aggressions by YN2 [X]." The no-contact order, dated November 14, 2007, states that it concerns the applicant's

association and contact with [YN2 X's wife]. The nature and consequences of your association with [her] to date reflects poorly on you and has the potential to bring discredit upon the Coast Guard. I am issuing this administrative order for the following reasons:

- a. To avoid a breach of the peace and respect the wishes of [YN2 X] that you not have any contact whatsoever with his lawful wife.;
- b. To protect the reputation of the Coast Guard and to maintain good relations between our armed service and the xxxxx community; [and]
- c. To protect you from further allegations of adultery and misconduct.

The no-contact order stated that it would “remain in effect until July 31, 2010 unless sooner canceled by me or by higher authority or until a formal decree of divorce is issued by a court of competent jurisdiction to [YN2 X and his wife].”

In addition, on November 19, 2007, both the applicant and YN2 X received negative Page 7s. YN2 X’s Page 7 documented his involvement in an “alcohol incident.” The Page 7 that was issued to the applicant but is no longer in his record stated the following:

Entry Type: Performance and Discipline (P&D-7)
Reference: 10 USC 934, Article 134, Uniform Code of Military Justice [¹]
Responsible Level: Unit
Entry: (General—Negative)

19 NOV 2007: You were formally counseled on 15 NOV 07 as a result of a standard investigation into allegations that you engaged in an inappropriate relationship with the spouse of another Coast Guard member. I have determined that your association with the spouse of that co-worker was prejudicial to good order and discipline and has had a measurably divisive effect on the morale and cohesion of this command.

I issued you a no contact order on 15 NOV 07 in which I ordered you not to have any further contact with the spouse of the Coast Guard member that was the subject of the investigation. This order will remain in place for the remainder of your tour of duty on the Xth CG District staff, or unless sooner rescinded by me. Any further contact or association with the spouse of this Coast Guard member could result in non-judicial punishment and/or other adverse administrative action.

The applicant stated that on November 26, 2007, he requested a mast with the District Chief of Staff to protest this Page 7. He gave the Chief of Staff his own oral and written descriptions of the facts and informed the Chief of Staff that he had called the police twice “to report breaking and entering” by YN2 X. The applicant stated that he later received a restraining order against YN2 X through the xxxxxn Circuit Court. The applicant argued that these actions show that he “was not attempting to engage in or conceal an alleged affair.”

Applicant’s Written Statements to the Chief of Staff

The applicant submitted two unsigned statements, which he apparently submitted to the Chief of Staff after receiving the original Page 7 dated November 19, 2007. The first contains his allegations about his experiences with YN2 X and his wife. In it, the applicant wrote that he and YN2 X worked together closely, often traveled together for work, and were very close friends who babysat and dog-sat for each other. About six months previously, YN2 X had told him that his wife had filed for divorce. Thereafter, the applicant “had several separate

¹ Article 134 of the Uniform Code of Military Justice (UCMJ), codified at 10 U.S.C. § 934. prohibits “all disorders and neglects to the prejudice of good order and discipline” and “all conduct of a nature to bring discredit upon the armed forces,” including adultery.

conversations with [YN2 X] and with [his wife]. Both had confided in me with details of their separation and the events that led up to it. [The wife] had confided in me to a greater extent than [YN2 X].” When YN2 X’s wife asked him how his own ex-wife and children had returned home from xxxxx after his divorce, he “told her about the Early Return of Dependents policy.” He also told YN2 X about the policy and discussed likely asset reallocation with him.

The applicant wrote that he “tried to remain a neutral party” but sometimes he “would share information from each other’s conversations with the other.” In early September, [the wife] came to the applicant’s house “distraught and in tears” so he invited her in. When [the wife] complained to him that YN2 X was only paying for their son’s daycare, the applicant informed them both that YN2 X was legally required to pay a portion of his basic pay, COLA, and BAH to her while they were separated.” In addition, the wife asked if she could rent his spare room because she could not afford an apartment. He refused because she was still married to YN2 X. The applicant alleged that, as soon as she left, he called YN2 X and told him what had happened. The applicant told YN2 X that he needed to support his dependents and that his wife’s visit and questions had made him feel awkward because he “did not want to be in the middle of their mess.” He advised YN2 X to get help from the Employee Assistance Program.

On October 12, 2007, the applicant stated, YN2 X’s wife came to his house and woke him up sometime between 0200 and 0230. She appeared intoxicated and distraught. She told him that YN2 X had been sending her hundreds of “very disturbing text messages and phone messages” and asked him if he thought YN2 X had been acting rationally. He spoke with her for 15 to 20 minutes, promised to speak to YN2 X, and let her sleep in his spare room, where he set up a makeshift bed for her with a pillow and comforters, because she was not fit to drive. Then he went back to sleep. However, at about 0430, he awoke to find YN2 X screaming at his wife in Russian in the bathroom. YN2 X saw the applicant and grabbed him. The applicant pushed him away and went downstairs, where he found his front door and door jamb destroyed. Therefore, he called the police to report the crime. YN2 X came downstairs, accused him of sleeping with his wife, and fled. The police came and told him they had apprehended YN2 X, but he refused to press charges because the wife asked him not to.

The applicant alleged that YN2 X’s wife was never in his bedroom and was never unclothed in his home. He alleged that YN2 X saw the makeshift bed that the applicant had created for his wife on the night of October 12, 2007. The next day, YN2 X called him and apologized. The applicant “chewed him a new one”; told him he was not welcome at the applicant’s house any more; told him that he would have gone to jail if his wife had not begged the applicant not to press charges; and told him he “needed serious help.” The applicant “ordered him to report to Worklife first thing Monday morning and get enrolled in EAP.” On Tuesday, the applicant told him that he had spoken to CAPT C, who had said that “we could work it out.”

On Friday, October 19, 2007, the applicant alleged, YN2 X came to his house ostensibly to hang out and make peace. However, he actually borrowed the applicant’s computer on a pretense and installed a “subsystem monitoring spyware program.” The applicant assumed that YN2 X was hoping to find evidence that the applicant was having an affair with his wife.

On Sunday, the applicant wrote, he came home from a short trip to xxxxxxx and cleaned out his garage so that he could park his car inside for the first time. Later that night, he awoke when his dog started barking. Downstairs, he found YN2 X looking through his papers and talking on the telephone. YN2 X, who smelled of alcohol, dropped the phone and ran out of the house, and the applicant called the police. While he was on the phone with the police, YN2 X came back into the house and told him that it was a joke. The applicant told him to leave, and YN2 X left. The applicant stated that he believes that YN2 X thought he was not home because his car was not parked in the driveway as usual. The applicant called the command and told CAPT C that YN2 X had broken into his house for a second time. He learned that YN2 X had never spoken to CAPT C about the first incident, as he had claimed. When the police arrived, the applicant agreed to press charges. YN2 X was also charged with driving while intoxicated as his blood alcohol content measured 0.13.

The applicant wrote that his relationship with YN2 X's wife "has always been a conciliatory one where I would share my advice and experiences whenever she would ask me. It was also an emphatic [empathetic?] one where we have both been down the same road and gone through the same situation and shared these experiences with each other." He concluded that YN2 X was likely alcohol dependent and bipolar and needed psychological evaluation and counseling. He suggested that YN2 X had brought his trouble on himself by refusing to sign an uncontested divorce decree as his wife had requested because, if he had, his wife and son would no longer be living in XXX.

In his second statement, which is a request for a "request mast"² with the Chief of Staff to discuss the original Page 7 dated November 19, 2007, the applicant alleged that the Page 7 had "inflicted massive damage to my credibility and integrity and caused severe doubts about my loyalty among my co-workers and superiors." He argued that the Page 7 had assigned guilt and punishment without due process because he had never been taken to mast (non-judicial punishment under Article 15 of the UCMJ) where he would have had the opportunity to defend himself. He admitted, however, that he did not actually want to go to mast. He wrote that his "silence in and during the investigation was by no means an admission of guilt, but rather reflected my introvert personality and reclusive private life," and that he had abided by the no-contact order "to the detriment of my friendships." He asked the CO to expunge the Page 7 his record.

Final Action on the Administrative Investigation

On December 31, 2007, CAPT N took final action on the investigation. The summary of the facts states that in October 2007, YN2 X began to suspect that his wife was having an affair with the applicant because of a "lack of marital consortium" and her "growing interest in provocative lingerie." In addition, his wife "had begun to use amorous euphemisms for [the applicant] as her computer password and 'logons.'" On the night of Friday, October 12, 2007, YN2 X's wife told him she would be spending the night at a girlfriend's house. Late that night, after consuming alcohol, YN2 X left his son with a friend and went looking for his wife. She was not at the girlfriend's house; instead, he found her car in front of the applicant's house. At about 0330, he kicked in the applicant's front door and found his wife in an upstairs bathroom trying to

² Under Article 9-2-3 of Coast Guard Regulations and Article 14.B.2.a. of the Personnel Manual, members may seek a "request mast" with their CO to appeal receipt of a Page 7.

arrange her hair while the applicant was making the bed in the master bedroom.. His wife had a discoloration on her upper lip. She denied doing anything wrong, but YN2 X began shouting at both of them. The applicant called the police, and YN2 X left. The applicant did not file a complaint. YN2 X was stopped by police who spoke with him about his suspicions that his wife and the applicant were having an affair. The police let him go with a warning not to drink and drive.

On Sunday night, October 21, 2007, YN2 X again drank alcohol and drove to the applicant's home. He entered the house through an unlocked door, but the applicant found him and told him to leave. The applicant called the police. When the police interviewed the applicant, they "found him evasive" and were convinced that the applicant "was lying to him." The police believed that the incidents resulted from a "love triangle gone bad." YN2 X admitted to the police that he had been at the applicant's house and was intoxicated. YN2 X claimed that he had gone into the house to play a joke, but he was charged with criminal trespass and DUI. On December 18, 2007, the trespass charge was dismissed but he pled guilty to DUI.

CAPT N found that "each of the subjects and witnesses interviewed during the course of the investigation were less than forthcoming." He concluded that YN2 X had shown very poor judgment and incurred an "alcohol incident" and that the applicant had an "unduly familiar relationship" with YN2 X's wife, which was "of a nature to bring discredit upon the Coast Guard and was a significant contributing factor in triggering [YN2 X's] misconduct." Among other actions, CAPT N stated that the applicant should be given an order to cease contact with YN2 X's wife and be issued a Page 7 "documenting his counseling regarding the inappropriate relationship with [the wife]." He also found that the charge against the applicant should be dismissed.

Disputed Page 7

On January 3, 2008, CAPT N sent the applicant an email stating that he had considered their discussions and was willing to revise the Page 7 dated November 19, 2007. On January 16, 2008, CAPT N sent the Personnel Command a memorandum asking that the Page 7 be replaced with another. He noted that the "overall basic content and intent is essentially the same between the two CG-3307s; however, the entry type is different and updated." The replacement Page 7, which the applicant wants the Board to remove, appears in his record as follows:

Entry Type: Performance and Discipline (P&D-12)
Reference: Article 8-H-6c, Personnel Manual COMDTINST M1000.6 (SERIES) [³]
Responsibility Level: Unit
Entry:

19 NOV : You were formally counseled on 15 NOV 07 as a result of a standard investigation into allegations that you engaged in an inappropriate relationship with the spouse of another Coast Guard member. As a result of that investigation, I have issued you a no contact order in which I ordered you not to have any further contact with the spouse of the Coast Guard member who was the primary subject of the investigation. This order will remain in place for the remainder of your tour of duty on the Xth CG District Staff, or until a formal decree of divorce is issued by a court of competent jurisdiction, or unless sooner rescinded by me. Any further contact or association with

³ Article 8.H.6.c. of the Personnel Manual authorizes formal or informal counseling about relationships of concern and documentation of such counseling on a Page 7 or an Administrative Letter of Censure.

the spouse of this Coast Guard member could result in disciplinary action under the UCMJ and/or other adverse administrative action.

CWO Appointment Boards ⁴

On March 7, 2008, CAPT N signed an evaluation report endorsing the applicant's bid for appointment to CWO. The report contains many highly laudatory comments about the applicant's performance and strongly recommends him for selection. The applicant was selected for appointment by the 2008 CWO appointment board, and his name appears as #27 out of the 40 yeomen found to be fully qualified for appointment to CWO in the Personnel Administration specialty. However, his name is not "above the cut" for a guaranteed appointment. This list is in effect from June 1, 2009, through May 31, 2010, and the cutoff for advancement is #19.

On March 6, 2009, CAPT N signed another highly laudatory draft report to support the applicant in his bid for appointment to CWO. However, on April 28, 2009, the Acting Commander of the Coast Guard Personnel Service Center (CGPSC) informed the applicant in a memorandum that the CWO appointment board that convened on April 14, 2009,

did not include your name as one of the candidates recommended for appointment. The Board elected to remove you from consideration under the provision of [Article 1.D.8.e. of the Personnel Manual]. The following excerpt from the Board Report sets forth the specific reason:

"[The applicant] was found not fully qualified for appointment to CWO2 due to documentation in the record regarding an inappropriate relationship which the board by at least two-thirds majority determined to be inconsistent with the definition of a chief warrant officer found in Section 1.D.1.a. of the Coast Guard Personnel Manual ... [and the board's own precept]."

The applicant alleged that the 2009 CWO appointment board clearly misinterpreted the Page 7 as evidence of an inappropriate relationship when, in fact, it only refers to allegations of one and he was "proven innocent" of the charge. The CWO appointment eligibility list resulting

⁴ Article 1.D.1.a. of the Personnel Manual states that "CWOs are mature individuals with appropriate education and specialty experience who have shown through demonstrated initiative and past performance they have the potential to assume positions of greater responsibility requiring broader conceptual, management and leadership skills." The procedures of a CWO appointment board appear in Article 1.D.8. of the Personnel Manual. Each board consists of at least five officers, who review the candidates' records. Under Article 1.D.8.e.,

1. The Board must first determine, by specialty, if all primary candidates are fully qualified to become chief warrant officers based on the information furnished in subparagraph d. above and the professional judgment of the Board members. After making this determination, the Board must then rank order the primary candidates on a best-qualified basis.
2. The Board shall not recommend candidates for appointment whose personal conduct and associations are such that reasonable grounds exist for rejection on the basis of loyalty. Although a candidate may have been considered as meeting the minimum requirements, the Board may find trends or patterns of conduct, indebtedness, performance, or behavior which it considers disqualifying and therefore may find the candidate not fully qualified for appointment.
3. The Board will submit a report of those recommended for appointment in each specialty to the Secretary of Transportation [sic] (the Secretary) for appointment authority.

Article 1.D.8.f.1. states that the Board's report shall include the list of those selected and, "[i]f the Board does not recommend a candidate for appointment, the reasons therefore shall be indicated in the Board Report."

from the April 2009 board will be in effect from June 1, 2010, through May 31, 2011. The applicant's name is not on this list.

On May 14, 2009, a senior chief petty officer contacted the Personnel Service Center (PSC) on the applicant's behalf. He stated that the Page 7 was generated on an allegation of an inappropriate relationship, which was investigated and dismissed. Therefore, the letter came as a shock to the member. He noted that the applicant was #27 on the prior CWO list and asked if the applicant would be removed from that list.

On May 17, 2009, the Chief of the Boards Section at PSC responded and stated that anyone applying for appointment to CWO is responsible for the content of his record. He stated that the applicant's name would not be removed from the prior list and that he could reapply for appointment the following year. He also stated that "each Board, comprised of different members each year, is charged with best meeting the needs of the service as defined by the current year Commandant's Guidance to Boards and Panels, the Precept, and the PERSMAN."

VIEWS OF THE COAST GUARD

On November 26, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG stated that the applicant has "failed to prove his Supervisor/Commanding Officer acted contrary to CG policy in his decision to issue the applicant an administrative Page 7 entry based on the findings of an administrative investigation." The JAG noted that absent evidence to the contrary, the applicant's command is presumed to have prepared the disputed Page 7 correctly and that the applicant bears the burden of proving that it is erroneous or unjust. The JAG stated that CAPT N, the District Chief of Staff, prepared the Page 7 to document counseling about an inappropriate relationship and slightly modified the Page 7 on January 16, 2008, following the completion of the administrative investigation. The JAG stated that the disputed Page 7 "was issued to accurately document the applicant's involvement in an inappropriate relationship IAW Article 8.H.6.c." of the Personnel Manual, and that the applicant has not proved that the Page 7 is legally or factually erroneous.

The JAG argued that the applicant has failed to prove that the action of the 2009 CWO appointment board in finding him not qualified for appointment was erroneous or unjust under Article 1.D.8.e.2. of the Personnel Manual.⁵ The JAG alleged that the board acted pursuant to policy and noted that such action requires a determination by two-thirds of the membership of the board that he was not fully qualified for appointment to CWO. The applicant "is in no position to 'second guess' the findings and actions of appointment boards" and "is not entitled to circumvent the CG's appointment procedures by alleging the board misinterpreted a Page 7 entry." The JAG stated that the applicant "failed to provide any evidence which would expose the applicant's chain of command's actions or the appointment board's action as unjust or unwarranted."

The JAG attached to the advisory opinion memorandum on the case prepared by the Personnel Service Center (PSC), which recommended that the Board deny relief. PSC stated that

⁵ See footnote 3, above.

CAPT N's final action on the investigation shows that he concluded that the applicant should be counseled on a Page 7 regarding his inappropriate relationship with YN2 X's wife. PSC complied with CAPT N's request dated January 16, 2008, to replace the original Page 7 with the disputed Page 7 was followed. PSC stated that the applicant's claim that the Page 7 should be removed because CAPT N dismissed the UCMJ charge against him is incorrect because the Page 7 is accurate and properly documents the applicant's counseling.

PSC further stated that a board's selection of candidates for appointment to CWO "is both an objective investigation as well as a subjective determination regarding the applicant's suitability. The dynamics of one board compared to the dynamics of another board are historically and purposefully different. The Coast Guard cannot speculate as to why one board considered the applicant despite the subject Page 7 while another board immediately ruled against the applicant. This, in essence, is the application process."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 30, 2009, the applicant responded to the views of the Coast Guard. He stated that the allegation that he was counseled about an inappropriate relationship "could not be further from the truth." He stated that the Page 7 shows that he was counseled about mere allegations of an inappropriate relationship; that the investigation found that the allegations were false; and that CAPT N therefore dismissed the charge and endorsed his candidacy for CWO.

The applicant argued that the misinterpretation of the Page 7 by PSC and the JAG proves his claim that the 2009 CWO appointment board misinterpreted the Page 7. He alleged that CAPT N's actions in dismissing the charge, modifying the Page 7 to remove punitive language, and strongly endorsing him for appointment to CWO show that CAPT N did not draw the conclusions assumed by the appointment board, the JAG, and PSC. He alleged that he had been "proven innocent." Therefore, the Page 7 should be expunged because its repeated misinterpretation and harm to his career shock the sense of justice, and he should be appointed to CWO as if he had been above the cut for guaranteed appointment on the appointment eligibility list resulting from the CWO appointment board that convened in April 2009.

APPLICABLE REGULATIONS

Article 8 of the Personnel Manual concerns military discipline and 8.H. concerns fraternization and unacceptable and inappropriate relationships among Coast Guard members. Article 8.H.6.c. authorizes documentation of formal counseling about relationships as follows:

Early counseling often can resolve potential concerns about the characteristics of a relationship and appropriate actions to ensure the relationship develops in a manner consistent with Service custom. Counseling may be informal or more formal, including written documentation by Administrative Remarks, Form CG-3307 or an Administrative Letter of Censure ([see] Article 8.E.4.). Counseling may include a direct order to terminate a relationship.

Enclosure (6) to the Pay and Personnel Procedures Manual (PPPM) provides instructions for preparing Page 7 and states that they "are broken down into the following 'types'":

- a. Accession (ACC-#)
- b. Assignment and Transfer (A&T-#)
- c. Advancement and Reduction (A&R-#)
- d. Performance and Discipline (P&D-#)
 - Note: Includes indebtedness, non-support of dependents, general (positive/negative), evaluations, good conduct eligibility, and weight
- e. Separation (SEP-#)
- f. Selective Reenlistment Bonus (SRB-#)
- g. Selective Reserve (SELRES) Enlisted Bonus Programs (BON-#)

Enclosure (6) also provides examples for each type of Page 7, including those used by CAPT N in creating Page 7s for the applicant's record:

Entry-Type: Performance and Discipline (P&D-7)
 Reference: None
 Responsible Level: Unit
 Entry: (General - negative)

(DATE): Petty Officer Jones was counseled for

(NOTE: Entry must be member specific and describe who, what, when, where, why and how. Blanket entries describing generalities, which are photocopied for inclusion in many members' PDRs, are not authorized.)

A. B. SEA, CAPT, USCG
 Commanding Officer

(DATE): I acknowledge the above entry.

J. P. JONES

Entry Type: Performance and Discipline (P&D-12)
 Reference: Article 8-H-5b(2), Personnel Manual, COMDTINST M1000.6 (series)
 Responsible Level: Unit
 Entry:

(DATE): **(document formal counseling pertaining to improper relationships)**

A. B. SEA, CAPT, USCG
 Commanding Officer

(DATE): I acknowledge the above entry.

J. P. JONES

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 10 U.S.C. § 1552. The application was timely.

2. The applicant asked to be appointed to CWO on June 1, 2010, because the 2009 CWO appointment board found him unqualified for appointment because, he alleged, they misinterpreted the Page 7 in his record dated November 19, 2007. He further alleged that the Page 7 is unjust because it is easily misinterpreted, and he asked the Board to remove it from his record. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁷

3. The disputed Page 7 was placed in the applicant's record by the District Chief of Staff in accordance with Article 8.H.6.c. of the Personnel Manual. That article authorizes preparation of a Page 7 to document counseling needed to "resolve potential concerns about the characteristics of a relationship and appropriate actions to ensure the relationship develops in a manner consistent with Service custom." Enclosure (6) of the Personnel Manual also expressly authorizes Page 7s denoted as "P&D-12" to "document formal counseling pertaining to improper relationships." The Board concludes that the disputed Page 7 was authorized by regulation, and the applicant has not proved that it contains any factual error.

4. The text of the original Page 7 dated November 19, 2007, proves that the applicant was in fact counseled about an inappropriate relationship on November 15, 2007, as a result of the findings of the investigation. In taking final action on the investigation on December 31, 2007, CAPT N stated that the applicant had an "unduly familiar relationship" with YN2 X's wife, which was "of a nature to bring discredit upon the Coast Guard and was a significant contributing factor in triggering [YN2 X's] misconduct." The fact that CAPT N chose to dismiss YN2 X's charges against the applicant does not negate the finding in the investigation that the applicant had engaged in an inappropriate relationship with a fellow yeoman's wife. CAPT N and the investigator apparently found some of YN2 X's admissions to the investigator to be more credible than the applicant's later claims. In this regard, the Board notes that while the applicant claimed that at about 0430 on the night of October 12, 2007, he awoke to the sound of YN2 X in his bathroom screaming at his wife, who had been sleeping in a spare room, and later found his

⁶ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

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

front door kicked in and the jamb destroyed, YN2 X admitted that after becoming suspicious when his wife said she was staying at a girlfriend's house, he found his wife's car parked outside the applicant's house, kicked in the applicant's front door, went upstairs, and found his wife in the bathroom fixing her appearance while the applicant was in the bedroom making the bed.

5. CAPT N responded to the applicant's request to expunge the original Page 7 by revising it. The disputed, replacement Page 7 is re-categorized as an entry under Article 8.H.6.c. of the Personnel Manual, rather than a more negative entry referencing the UCMJ. In addition, CAPT N omitted the following derogatory sentence from the original Page 7: "I have determined that your association with the spouse of that co-worker was prejudicial to good order and discipline and has had a measurably divisive effect on the morale and cohesion of this command." The fact that CAPT N revised the Page 7 to be less derogatory, however, does not negate his finding on December 31, 2007, that the applicant had actually engaged in an "unduly familiar relationship" with YN2 X's wife, which was "of a nature to bring discredit upon the Coast Guard and was a significant contributing factor in triggering [YN2 X's] misconduct."

6. The disputed Page 7 was in the applicant's record when he was considered for appointment to CWO in 2008. The 2008 CWO appointment board did not disqualify him, and his name appeared as #27 out of 40 yeomen on the appointment eligibility list but not above the cutoff for appointment.

7. In the professional judgment of at least two-thirds of the 2009 CWO appointment Board, however, the information in the disputed Page 7 disqualified the applicant for appointment to CWO under Article 1.D.8.e. of the Personnel Manual. The applicant alleges, therefore, that CWO selection board members are misinterpreting the disputed Page 7 and drawing an erroneous conclusion that he had engaged in an inappropriate relationship. He alleges that this interpretation is erroneous because the Page 7 states only that he was counseled about *allegations* of an inappropriate relationship. The 2009 CWO appointment board's report shows that at least two-thirds of the board members interpreted the disputed Page 7 and no-contact order to mean that the applicant had had an inappropriate relationship with the spouse of a Coast Guard member. Therefore, the Board finds that, as the applicant alleged, some CWO appointment board members have interpreted the text of the disputed Page 7 as evidence of an inappropriate relationship. However, the applicant has not proved that this interpretation is actually erroneous. CAPT N's final action on the investigation clearly shows that he found that the applicant had engaged in an inappropriate relationship with another member's wife. Therefore, while the 2009 CWO appointment board members may be assuming that the allegations about which the applicant was counseled are true, the preponderance of the evidence in the record shows that their assumption is accurate.

8. The applicant alleged that CAPT N's revision of the Page 7 and strong endorsement of his candidacy for appointment to CWO show that CAPT N did not intend for the disputed Page 7 to hinder his career by revealing CAPT N's finding that he had engaged in an inappropriate relationship. He alleged that it is therefore unjust for the Page 7 to cause the CWO appointment board to reject him as a fully qualified candidate. However, CAPT N had the authority to withdraw the Page 7 altogether and chose not to do so.⁸ Therefore, the Board cannot

⁸ Under Article 14.B.2.a. of the Personnel Manual, a member may appeal a Page 7 to his command.

conclude that CAPT N thought that the applicant's conduct should not be known to and considered by CWO appointment boards. The preponderance of the evidence shows that the disputed Page 7 is factually accurate and is not causing CWO appointment board members to draw erroneous conclusions. Those board members are required to use their best professional judgment in assessing each candidate, not to assess a candidate's record as the candidate or even his CO want it to be assessed. The applicant has not proved by a preponderance of the evidence that the 2009 CWO appointment board members failed in their duty or were mistaken about his conduct.

9. Accordingly, the applicant's requests should be denied because the Board finds no grounds for removing the disputed Page 7 from his record or for second-guessing the 2009 CWO appointment board's determination that he was not fully qualified for appointment to CWO.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of YN1 xxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

