

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-198

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 September 30, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 21, 2017, 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 lieutenant who was discharged on June 30, 2010, asked the Board to correct his record by removing two CG-3307s ("Page 7"),¹ dated July 10 and 17, 2008. The applicant claimed that the Page 7s contained false and slanderous information and were ultimately the cause of his non-selection for promotion to lieutenant commander in 2008 and 2009. He was discharged in 2010 for being twice non-selected for promotion. The applicant claimed that his discharge was an error and an injustice because the promotion boards viewed the disputed Page 7s. He alleged that he should not have been discharged and would have continued his military career and been promoted to O-4 lieutenant commander (LCDR) but for the Page 7s. He therefore asked the Board to remove the Page 7s from his record, promote him to LCDR, and give him a chance to return to active duty. He also requested that his DD Form 214² be amended as to the nature of his separation.³

¹ An Administrative Remarks record entry, form CG-3307, better known as a "Page 7," is used to document a member's notification of important information, achievements, or counseling about positive or negative aspects of a member's performance in the member's military record.

² A DD 214 is prepared to document a member's release or discharge from a period of active duty.

³ Specifically, the applicant requested that blocks 25-28 on his DD 214 be amended, which include the separation authority, separation code, reentry code, and narrative reason for separation. The applicant did not, however, specify what he wanted the blocks to be amended to.

The applicant, through counsel, asserted that he was never counseled on the Page 7s and that he did not learn about them until the day of his first LCDR promotion board on August 18, 2008. Due to his learning about the negative Page 7s so late, he was unable to rebut them or to present additional information to the 2008 promotion board for consideration. He argued that the Pages 7s were the reason he was non-selected for promotion in 2008 and 2009 and thereafter separated from the Coast Guard. Regarding the delay in his application, he stated, "It took me several years to develop myself before I was ready to address this case. I was not formally aware of the deadline until after I was ready to address it. It would be a further injustice if you deny a review of what happened." He later added that he did not feel "strong enough to face the injustice that happened" to him until recently.

The applicant's counsel prepared a memorandum for the Board concerning the application. The applicant also provided a sworn declaration. Both documents largely provide the same facts and arguments, and so will be summarized together here. By way of background, the applicant stated that he attended the Coast Guard Academy from 1995 until 1999 and accepted a commission as an ensign on May 19, 1999. He served at a Sector Command Center as a Command Duty Officer leading a watch section from July 5, 2004, to July 6, 2008, and reported for duty at a new command on July 7, 2008. The applicant explained that on August 18, 2008, the day of his first LCDR promotion board, he received a faxed copy of the two disputed Pages 7s from his previous command. He alleged that his new supervisor at his new command also received the Page 7s and told him that they had been provided to the promotion board. His new supervisor "expressed concern that it would hurt his promotion chances." The applicant also spoke with his new second-line supervisor, who likewise expressed concern that "things had not been handled properly."

The applicant reiterated that this was the first time the Page 7s had been made available to him. Captain S, who had signed them as the commanding officer (CO) of the applicant's previous command, had never counseled him regarding the contents or given him an opportunity to review and sign the Page 7s. He argued that this was not in line with Coast Guard policy, as he should have had the opportunity to review and sign them per COMDTINST 1000.14C, the manual on preparing Page 7s. He claimed that his signature was required, and that he was not unavailable, nor did the command give a reason for not obtaining his signature. The Page 7s were created on July 10 and 18, 2008, respectively, which was just a few weeks before the LCDR promotion board. The applicant argued that it was therefore unlikely that the Page 7s were entered into his electronic personnel record, but were more likely "inappropriately provided" to the promotion board.

Regarding the contents of the Page 7s, the applicant's foremost complaint is the inclusion of the sentence: "On 04MAR08, you were notified that the...Commander submitted a referral for you to receive a mental health evaluation." The applicant argued that this comment about his "medical condition, or references to [his] medical condition, should not have been included." He alleged that, according to COMDTINST 1000.14C, remarks may not "be used to document the diagnosis or treatment of medical conditions." The applicant argued that the command violated this provision when it included these remarks and supplied the Page 7s directly to the promotion board. In addition, he stated that he was ordered by a supervisor to obtain an evaluation because he had "made controversial allegations" against his peers. He claimed that his command forced him to have a mental health evaluation to make him look unstable and to discredit him.

The applicant stated that the Page 7s, and in particular the one dated July 17, 2008, contain many falsehoods. He claimed that he did not exhibit inappropriate behavior and believes that this reference was “retaliation from the officer that [he] was relieving,” the outgoing Command Center Supervisor, Lieutenant (LT) B. The applicant stated that she found out he wanted to make changes to the Command Center, and she became defensive and alleged inappropriate behaviors “to cast doubt on [his] ability to act as the command center supervisor.” He stated that he had also been in an “e-mail argument” in January 2007 and that astrology was a hobby that he occasionally discussed. He claimed that neither of these had been an issue until he asked LT B to “conduct a relief of duties” in December 2006. The applicant stated that he was given another chance to take over from LT B as the Command Center Supervisor in April 2007 but “was denied the position due to office politics.” He claimed that LT B had recommended to LCDR M, the Chief of the Command Center, that the applicant be designated as the new Command Center Supervisor, but LCDR M was “under tremendous social pressure” to not select the applicant because it would have been costly to LCDR M’s friendships with co-workers. The applicant stated that he believed LCDR M felt badly about his choice, which is why the accusations in the Page 7 are not in his Officer Evaluation Report (OER) dated May 31, 2008, but were instead created after the fact.

The applicant stated that he did not have an unhealthy relationship with anyone in the Coast Guard. He explained:

I believe that one of the female pilots at the air station became infatuated with me. In an attempt to understand my feelings, she encouraged two of my co-workers to keep an eye on me. When I confronted her about this, she became angry and said she would go out of her way to ruin my reputation. She then created false rumors about me to her air station chain of command, and then they contacted my boss [LCDR M]. Once I told my side of the story, the air station conducted an investigation and found out that she lied. Instead of notifying me of their findings, I was kept out of the loop. Shamefully, I was banned from the air station so that her career would not be affected. I respectfully state that I did nothing to her that should have affected her personal life.

The Page 7 also states that the applicant was removed from his position at the command due to an inappropriate relationship with a female subordinate. He claimed that in reality he was given the option to remain at the command by LCDR M, but he was voluntarily reassigned to the Logistics Department. He stated that the “inappropriate conversation” mentioned in the Page 7 is in reference to comments he made that were taken out of context.

On the July 10, 2008, Page 7, Captain S outlines circumstances that were associated with the applicant’s OER dated May 31, 2008. The applicant stated that because he was preparing to transfer to a new unit, he conducted his final checkout. At that time, he noticed that the OER bullets that he previously had provided to LCDR M were not complete. On the way to his final command, he learned that his OER supporting paperwork had been provided to the Deputy Sector Commander and the Sector Commander, Captain S. He was concerned about this, so he contacted the Sector Command Center to verify whether all of his paperwork had been provided. He asked the watch stander to check the status of the paperwork, but the Deputy Sector Commander’s office was locked. The applicant thanked the watch stander and asked him not to tell anyone because the applicant had “a major issue of trust with the watch stander in charge (due to previous allegations).” He stated that his sole intention was to verify that the Deputy Sector Commander had received all of his paperwork.

Due to his concern over the paperwork, the applicant called the Deputy Sector Commander around 7 a.m. on July 4, 2008, and left a voice mail. He then attempted to contact Captain S. “In hindsight, [he] acknowledge[d] that it was early in the morning.” However, he stated, as part of his duties, he had a history of contacting Captain S early in the morning. The applicant stated that he and Captain S spoke for about twenty seconds and Captain S confirmed that he was uncertain regarding the status of the applicant’s OER. The Deputy Sector Commander later called the applicant, and she confirmed that all of the paperwork had been received. The applicant claimed that at this time he informed the Deputy Sector Commander that he had asked a watch stander to try to check in her office for the paperwork, but the door was locked. The applicant alleged that if there had been a problem with this, she would have told him then.

The applicant also argued that he was “concerned about the authenticity” of Captain S’s signature because he believes that someone else at the command “may have unlawfully prepared the Page 7” for Captain S to sign. He claimed that when he first saw the Page 7s on August 18, 2008, neither one contained Captain S’s signature. He alleged that he ordered a copy of his military record in September 2008 and in 2011, and both times there was no signature on the Page 7s.⁴ The applicant stated that in May 2015, he spoke with Captain S and “raised concerns about the inappropriate actions.” He ordered his military record again in July 2015, and he then noticed that the Page 7s were signed by Captain S. He stated he cannot fully explain what happened, but he believes that the Deputy Sector Commander “inappropriately influenced Captain [S] throughout the Page 7 process, and then wrongfully tampered with [his] military records by adding his [Captain S’s forged] signature.” He later stated that he “was even told that [Captain S] did not write the Page 7.” The applicant argued that the Deputy Sector Commander wrote them and “then purposely held on to it until the day of [the] promotion board.”

The applicant argued that the inclusion of the “erroneous and prejudicial” Page 7s in his record was an error and an injustice. He claimed that he had never been counseled on the contents, contrary to Coast Guard policy. He stated that Coast Guard regulations require commanders to allow members to review and sign Page 7s. In addition, the sentence regarding the mental health evaluation should not have been included because it was “prejudicial medical information.” The applicant argued that according to the manual, remarks may not “be used to document the diagnosis or treatment of medical conditions.” He argued that this provision was violated when the command included the sentence regarding a mental health evaluation. The applicant stated that this alone constituted an error that resulted in an injustice which led to the applicant’s discharge from the Coast Guard. Other than the negative Page 7s disputed here, the applicant alleged, he “had a good service record.”

In support of his application, the applicant provided many documents also contained in his military record. They are summarized below.

SUMMARY OF THE RECORD

After attending the Coast Guard Academy, the applicant entered the Coast Guard on May 19, 1999. Other than the two Page 7s disputed here, he has no negative Page 7s in his record, and all of his Page 7s are acknowledged and signed by the applicant.

⁴ The applicant did not provide a copy of the Page 7s without signatures.

Below is an overview of each of the Officer Evaluation Reports (OERs) the applicant received. An OER evaluates an officer's performance in eighteen competencies on a scale of one to seven, with seven being the best. There is also a Comparison Scale grade, on which the Reporting Officer compares the Reported-on Officer "with others of the same grade" on a scale of one to seven, with one being unsatisfactory, three through five being "one of the many competent professionals who form the majority of this grade," and seven being "a distinguished officer."

- OER for the period of May 19, 1999, to September 30, 1999: The applicant received fifteen marks of 4 and three marks of 5. He received a mark in the fourth spot on the comparison scale.
- OER for the period of October 1, 1999, to March 31, 2000: The applicant received a 3 in professional competence, eleven 4s, and six 5s. He received a mark in the fourth spot on the comparison scale.
- OER for the period of April 1, 2000, to September 30, 2000: The applicant received four 4s, thirteen 5s, and one 6. He received a mark in the fifth spot on the comparison scale.
- OER for the period of October 1, 2000, to June 30, 2001: The applicant received a 3 in professional competence and judgment, four 4s, seven 5s, and five 6s. He received a mark in the third spot on the comparison scale. The comments under "Potential" state: "Unfortunately, [the applicant] completed an otherwise successful initial DWO/JO tour w/ 2 major EKMS security infractions that resulted primarily fm inattention to detail & an inability to ask for assistance. I believe [the applicant] has learned fm these mistakes and can still serve successfully as a CG officer."
- OER for the period of July 1, 2001, to January 31, 2002: The applicant received ten 4s and eight 5s. He received a mark in the fourth spot on the comparison scale.
- OER for the period of February 1, 2002, to June 30, 2002: The applicant received one 4, fourteen 5s, and three 6s. He received a mark in the fourth spot on the comparison scale.
- OER for the period of July 1, 2002, to January 31, 2003: The applicant received two 4s, twelve 5s, and four 6s. He received a mark in the fifth spot on the comparison scale.
- OER for the period of February 1, 2003, to June 30, 2003: The applicant received eleven 5s and seven 6s. He received a mark in the fifth spot on the comparison scale.
- OER for the period of July 1, 2003, to May 31, 2004: The applicant received two 4s, nine 5s, six 6s, and one 7. He received a mark in the fifth spot on the comparison scale.
- OER for the period of June 1, 2004, to May 31, 2005: The applicant received six 5s, ten 6s, and two 7s. He received a mark in the fifth spot on the comparison scale. This is the first OER he received from the Sector command.
- OER for the period of June 1, 2005, to May 20, 2006: The applicant received three 5s, twelve 6s, and three 7s. He received a mark in the fifth spot on the comparison scale.
- OER for the period of May 21, 2006, to May 31, 2007: The applicant received three 5s, eleven 6s, and four 7s. He received a mark in the sixth spot on the comparison scale.

On his OER for the period June 1, 2007, to May 31, 2008 (his last OER prior to his first LCDR promotion board), the applicant received some lower and some higher marks than before: three 4s, four 5s, four 6s, and seven 7s. He received a five on the comparison scale. One of the OER comments states, "Sensitive to behavior/reactions of others made peers/subords uncomfortable w/inapprop discussions; resulted in temp transfer to Logistics Dept." Other comments include phrases such as "superb performer;" "provided vital oversight;" "expertly led 21 person planning staff;" "demo'd unparalleled initiative;" and "unsurpassed work ethic & consistent top notch results largely contributed to SCCs continued success."

One of the Page 7s disputed here is dated July 10, 2008. It contains Captain S's name and a signature above his name. The applicant's name appears at the bottom, but his signature is not included. It states the following:

On 04JUL08 at 0713 you called the Sector Commander at his residence. Besides waking the Sector Commander on a Federal Holiday you disregarded his desire to call you back later in the day to talk. During the phone conversation you sought the whereabouts of 1 page of bullets of 32 pages submitted for your Officer Evaluation Report (OER). In your fervor to locate the alleged missing page you bypassed the chain of command by not waiting to speak with the Deputy Sector Commander first. Also during the phone conversation you sought the answer to the same question twice and received the same answer twice. These actions demonstrate lack of control, insubordination, and lack of judgment.

Also early the same morning (~0200) you called the Sector Command Center and asked the watchstander to enter the Deputy Sector Commander's office and retrieve your OER package. You asked the watchstander to keep it a secret 'as part of the circle of trust.' The watchstander refused and notified the Command Duty Officer who then locked the Deputy Sector Commander's office. Your actions demonstrate a serious lack of judgment.

The Page 7 dated July 17, 2008, also contains Captain S's name and a signature above his name, but does not include the applicant's signature. It states the following:

On 09JAN07 at approximately 1600, you were counseled by the...Command Center (SCC) Chief regarding various reports of inappropriate interpersonal behavior. You were told that SCC personnel (enlisted and officer) recently informed the SCC Supervisor that you were using astrology as a means of initiating discussions with peers and subordinates in an attempt to verbalize your perceived feelings and aspirations of those around you, which made many SCC personnel uncomfortable. You were also told that an inappropriate e-mail chain, which was initiated and carried out by you on your CGDN account, with a civilian female was just shy of being considered "prohibited" behavior as per D8 Legal and in accordance with COMDTINST 5375 1B (paragraph 9 a 2). As a consequence of your actions, it was evident that you did not have the full trust and confidence of the personnel working in the SCC. Therefore, you were no longer slated to fleet up to the SCC Supervisor position as had been previously planned. However, your operational judgment and performance was exceptional and you were given a second chance to improve your interpersonal behavior prior to the end of your marking period. You complied and demonstrated a remarkable improvement in your interpersonal skills. As a result, your Officer Evaluation Report (OER), covering the period from 21MAY06 to 31MAY07, did not reflect the issues outlined in this paragraph.

On 25FEB08 at approximately 1530, the SCC Chief received a phone call and subsequent e-mail from a LCDR at AIRSTA...and was told that the AIRSTA Command had serious concerns about an unhealthy relationship between you and a female LT assigned to the AIRSTA. It was alleged that your interactions with this particular LT had made her feel extremely uncomfortable to the point that it was affecting her work and her personal life. As a result, the AIRSTA Command issued a direct order that you were not to step foot on AIRSTA property and the...Command issued a written Cease and Desist order to you prohibiting any form of contact between you and the AIRSTA LT.

On 04MAR08, you were notified that the...Commander submitted a referral for you to receive a mental health evaluation at [the] Medical Center.

On 05MAR08, at the direction of the...Deputy Commander, you were removed from the SCC and directed to report to the...Logistics Department Chief for work. This decision was made after learning that you harbored sincere feelings of distrust toward [sic] many of your co-workers and you had recently initiated an inappropriate conversation with a female LTJG who was serving as your subordinate.

Although your operational judgment and performance remained impeccable while assigned to the SCC, you demonstrated, on several occasions, a serious lack of judgment in your interpersonal relationships.

The applicant was not selected for promotion to LCDR in August 2008. On his OER for the period of June 1, 2008, to May 31, 2009, from his new command, the applicant received seventeen 5s and one 6. He received a four on the comparison scale. However, he was again non-selected for promotion in August 2009.

On his final OER, for the period of June 1, 2009, to June 30, 2010, the applicant received eight 4s and ten 5s. He received a four on the comparison scale. The applicant was discharged on June 30, 2010. His character of service is Honorable, the separation code is JGB, and the narrative reason for separation is "non-selection, permanent promotion."

VIEWS OF THE COAST GUARD

On March 28, 2017, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief.

The JAG first argued that the application is untimely and therefore should not be considered beyond a cursory review by the Board. If the Board waived the untimeliness and considered the case in the interest of justice, the JAG argued that the claim should be barred by the doctrine of laches.⁵ The first prong of the doctrine of laches requires that the delay in bringing the claim be unreasonable and unexcused.⁶ The JAG argued that the applicant offered no reasonable explanation as to why he waited six years after his discharge to submit his application. The applicant stated that he became aware of the Page 7s on August 18, 2008, but "did nothing to bring the alleged error to the attention of the [2008] Selection Board." After the applicant was non-selected for promotion, he again did nothing to address the alleged error prior to the selection board that met in 2009. "Even after the applicant was discharged in June 2010, he still waited another six years before taking any action." The JAG argued that the applicant's only explanation, that he was not "strong enough to face the injustice," does not excuse the significant delay in bringing his claim to the Board.

⁵ "The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions have become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence." *Mackall v. Casilear*, 137 U.S. 556, 566 (1890).

⁶ *Cornetta v. United States*, 851, F.2d 1372, 1377-1378 (Fed. Cr. 1988).

The second prong of the doctrine of laches requires a showing of prejudice.⁷ Prejudice may be shown through a “loss of records, destruction of evidence, fading memories, or unavailability of witnesses.”⁸ The JAG argued that the Coast Guard is prejudiced by the unreasonable and unexcused delay because the signing authority on the Page 7s and other members who were involved in this matter have since retired or separated from the Coast Guard. The Coast Guard is therefore unable to gather witness statements or other evidence that would shed light on the circumstances in this case.

If the Board were to consider the merits of the case, the JAG argued there is no error in the applicant’s record that would warrant relief. Absent strong evidence to the contrary, Coast Guard officials are presumed to have carried out their duties lawfully, correctly, and in good faith.⁹ The burden is on the applicant to prove by a preponderance of the evidence that an error exists in his record, which the JAG argued, he has not done.

Regarding the applicant’s argument that the Page 7s contained prejudicial information in violation of COMDTINST 1000.14C, the JAG stated that Section 8.e. of this manual states that a Page 7 should not be used to document the diagnosis or treatment of a medical condition. The same section goes on to state that if there is a need to refer to a medical condition in a Page 7, then the specific medical condition may not be referenced. The JAG claimed that mentioning that the applicant was referred for a mental health evaluation does not document a treatment or condition, and therefore complies with the manual.

Regarding the applicant’s argument that he was not afforded the opportunity to review or sign the Page 7s in violation of Coast Guard policy, the JAG argued that the guidance document the applicant provided on the preparation of Page 7s is just that – it is merely guidance and is not Coast Guard policy. The guidance actually references COMDTINST 1000.14 as the policy on the topic. The JAG argued that the document relied on by the applicant even states that the only required components of a Page 7 are the entry type and number, the entry, and a responsible party for completing the entry. A member’s acknowledgment is excluded from this list, and therefore the JAG argued, is not required by Coast Guard policy. COMDTINST 1000.14, Section 8.1., states that the words “member refused to sign” must be entered into the signature block if the member refuses to sign a Page 7 after being counseled about it. However, the JAG claimed, the manual does not expressly require counseling or a signature from the member.

The JAG also argued that, despite the applicant’s lack of signature, there is nothing in the record to indicate that he was not counseled on the Page 7 earlier than he claimed. The JAG stated that there was “no evidence presented by the applicant that would lead us to question the contents of the [Page 7] or the integrity of the Captain who signed it.” Under the presumption of regularity, the Page 7 was properly issued to the applicant and was aware of its existence in enough time to at least challenge it prior to the promotion board that met in 2009.

Regarding the applicant’s assertion that the Page 7s were unsigned by the Captain S, the JAG stated that this claim is completely unsubstantiated by any evidence. According to the

⁷ *Id.* at 1378.

⁸ *Id.*

⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

applicant's electronically imaged personnel data record, the Page 7s were imaged into his record on August 18, 2008, and both Page 7s uploaded at that time contained the Captain's signature. Therefore, the JAG concludes, the Page 7s were not "inappropriately provided" to the promotion board as the applicant claims.

Finally, the JAG stated, the performance documented on the Page 7s was reflected in the applicant's OER for the period of June 1, 2007, to May 31, 2008, because he received marks of 4 for judgment, teamwork, and workplace climate—categories for which he had previously received high marks. The JAG also noted that the OER comments state that the applicant "made peers/subords feel uncomfortable w/inapprop discussions resulted in temp transfer to Logistics Dept." Therefore, even if the Page 7s had not been included in his record, the JAG argued, the promotion board would have reviewed at least some of the content referenced therein. For these reasons, the JAG recommended that the Board deny all of the applicant's requests.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 31, 2017, the Chair sent a copy of the views of the Coast Guard to the applicant and invited a response within 30 days. After an extension, the applicant through counsel replied on May 22, 2017, and disagreed with the advisory opinion.

The applicant requested that the Board disregard the Coast Guard's advisory opinion, and instead find in favor of the applicant. The applicant first argued that the Board should excuse the untimeliness of the application because it is in the interest of justice to do so. He stated that his claim has merit, and he has a compelling reason for his delay. After spending fifteen years of his life with the Coast Guard,¹⁰ he was "placed in an extremely vulnerable position by Coast Guard leadership who inappropriately affected his promotion by submitting derogatory information behind his back that included referrals for mental health treatment." He argued that his claim is not stale because he is still a young man and has potential for continued service in the United States military. He further argued that the doctrine of laches should not apply because the Coast Guard's advisory opinion relied exclusively on the applicant's record and regulations. He claimed there is no evidence missing, as it is all in his record in "black and white, and speaks for itself." He therefore stated that all evidence required to decide this case is before the Board, and the Coast Guard has not been prejudiced by the passage of time.

The applicant stated the Coast Guard's argument that there is no policy that requires a member to review and sign a Page 7 is "intellectually dishonest and contrary to common sense." He argued that officers should be notified and given the opportunity to respond to adverse Page 7s in writing. The applicant had signed and acknowledged every other Page 7 in his record. It is contrary to reason to think that only positive or neutral Page 7s, as all of the others in his record are, must be acknowledged but negative ones may be slipped into a member's record unnoticed. The applicant also argued that there is evidence in the record that he was not previously made aware of the Page 7s – his sworn declaration. He asked that the Board review it and "give it weight."

¹⁰ The applicant was referencing his four years at the Coast Guard Academy and his eleven years in the service.

Regarding the mental health referral statement, the applicant stated that it is “contrary to common sense and reason to argue that this commentary was not prejudicial because it did not include a ‘diagnosis’ or ‘treatment.’” He argued that putting this information in the Page 7 was strictly prohibited, and his previous command ensured that the promotion board received this information “behind his back.” Allegations associated with mental health are private in nature, and are the exact type of thing meant to be covered by the prohibition in the manual. The applicant again asserted that the inclusion of the mental health referral led to him being non-selected for LCDR in 2008 and 2009. He also argued, without further explanation, that this inclusion violated the Health and Insurance Portability and Accountability Act of 1996.

Lastly, the applicant reiterated that he had a good service record prior to the inclusion of these two Page 7s. But for their entry, he would have been promoted to LCDR in 2008 and would still be honorably serving in the Coast Guard. He acknowledged that with hindsight, he “may have benefited by immediately arguing about the injustices included in his officer evaluation and subsequent Page 7.” However, he stated that responsible officers focus on their duties and cannot be distracted by “quixotic attempts to fix the prejudices of senior officers.” He stated that he wishes to continue his military career, which he can only do if this Board resolves the errors and injustices that have been committed against him.

APPLICABLE POLICIES

The manual on Administrative Remarks, Form CG-3307, COMDTINST 1000.14C, referenced by the applicant and the JAG came into effect on June 4, 2015. The previous version, COMDTINST 1000.14B, went into effect on April 17, 2000, and is therefore the applicable manual for this case. This version is only two pages long, and contains none of the provisions the applicant or the Coast Guard relied on in their opinions. Regarding what is required in a Page 7, the manual merely states: “All header entries shall contain Entry Type, Reference, and Responsible Level, and then entry of CG-3307 text.”

The newer manual, COMDTINST 1000.14C, states that Page 7s “will not be used to document the diagnosis or treatment of medical conditions. If there is a need to refer to a member’s medical condition in [a Page 7], the specific medical condition shall not be referenced.” It further states that the manual “is intended to provide requirements for Coast Guard personnel when issuing [Page 7s]. Failure to follow the procedures established therein is not intended to limit the admissibility of such documents at judicial or administrative proceedings.” Nowhere does this manual list what must be included in a Page 7. However, the manual also states, “If a member refuses to sign [a Page 7] after being counseled regarding its content, the words ‘member refused to sign’ must be entered in the member’s signature block along with the date counseled.”

Both versions of the manual refer to the Personnel Pay and Procedures Manual, PPCINST M1000.2 (series). The version of this manual in effect at the time states that a Page 7 is a “means of recording miscellaneous entries, which are not recorded elsewhere” in a member’s record. Under “Policies and Procedures” it states that the only authorized Page 7 entries are those listed in Enclosure (6). Enclosure (6) has a section entitled Preparation, which states that Page 7s are to be completed with the entry type, reference, responsible level, the entry, signature, and member’s

acknowledgment if required. A sample Page 7 is also included with the manual. Underneath of the Commanding Officer's name and signature it states:

DDMMYYYY: I acknowledge the above entry.

FIRST MI LAST

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.¹¹ The Page 7s were prepared in July 2008. The applicant asserts that he received them on August 18, 2008. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error in his record in 2008, and his application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.¹² In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"¹³ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."¹⁴
4. Regarding the delay of his application, the applicant explained that he was not "strong enough to face the injustice" earlier and that he needed "several years to develop [himself]." The Board finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.
5. A cursory review of the merits of this case indicates that the applicant cannot prevail on the merits. The record contains no evidence that substantiates the applicant's allegations of error or injustice in his official military record, which is presumptively correct.¹⁵ The only evidence the applicant submitted is his own sworn statement with his allegations. The applicant's own claims regarding the circumstances surrounding the Page 7s are insufficient to overcome the

¹¹ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

¹² 10 U.S.C. § 1552(b).

¹³ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

¹⁴ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

¹⁵ 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

presumption of regularity afforded to the Coast Guard.¹⁶ Based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

6. The Coast Guard has noted that the doctrine of laches should bar the applicant's claim because his long delay in filing his application has prejudiced the Coast Guard's ability to submit evidence because relevant records are no longer available, memories have faded, and members with knowledge of the events have separated from the Service. The doctrine of laches applies when an applicant's delay in applying to the Board has prejudiced the Coast Guard's ability to produce evidence to show that the disputed military record is correct and just.¹⁷ Even if the Board's statute of limitations is tolled or waived, "the doctrine of laches remains available to the government to protect itself from stale claims."¹⁸ "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them."¹⁹ Therefore, even if the Board decided to waive the statute of limitations and consider the case on the merits, the doctrine of laches would bar the applicant's claim because his excessive delay in filing his application has prejudiced the Coast Guard's ability to produce important evidence that would have been available had the applicant submitted his application promptly upon his discovery of the alleged error or injustice. Had the applicant submitted his claim promptly, the Coast Guard (and possibly the applicant) would have been able to obtain statements from those involved in this matter while their memories were fresh. Captain S, who signed the disputed Page 7s, has retired, and most of the other members the applicant named in his application have since separated from the Coast Guard.

7. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁶ 33 C.F.R. § 52.24(b)

¹⁷ See *Lebrun v. England*, 212 F. Supp. 2d 5, 13 (D.D.C. 2002).

¹⁸ *Detweiler v. Pena*, 38 F.3d 591, 595 (D.C. Cir. 1994), citing *Deering v. United States*, 223 Ct. Cl. 342 (1980)).

¹⁹ *Bliss v. Bliss*, 50 F.2d 1002, 1004-05 (D.C. Cir. 1931), citing *Speidel v. Henrici*, 120 U.S. 377, 387 (1887).

ORDER

The application of former [REDACTED], USCG, for correction of his military record is denied.

July 21, 2017

