

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 81-96

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on February 23, 1996, upon the Board's receipt of the applicant's application for correction.

This final decision, dated February 28, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a lieutenant junior grade (LTJG) on active duty, asked the Board to correct his record by removing an administrative remarks (page 7) entry (disputed page 7 entry) dated November 26, 1991. He also requested the removal of his 1995 failure of selection for promotion to lieutenant (LT).

The applicant informed the Board by letter, dated November 19, 1996, that he had failed of selection for promotion to LT for the second time. He also advised the Board that he was no longer seeking the removal of his failure(s) of selection for promotion to LT.

On July 11, 1996, the Board received the views of the Coast Guard recommending that the applicant's request for relief be denied.

On July 26, 1996, the Board received the applicant's rebuttal to the views of the Coast Guard. He disagreed with them.

On August 21, 1996, the Coast Guard submitted supplemental views.

On August 28, 1996, the applicant submitted a reply to the supplemental views of the Coast Guard.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant contended that the disputed page 7 entry was improper, and that it was wrongfully included in his military record when he was considered and passed over for promotion to LT.


The disputed page 7 entry, which was acknowledged by the applicant on the same date as its entry into his record, contained the following:

You are hereby counseled by the Executive Officer regarding your repeated tardiness for work. This is not the first time you have been counseled by the Executive Officer regarding reporting to work in a timely manner. Today's tardiness, however, resulted not only in a violation of Article 86, UCMJ (Uniform Code of Military Justice) absence without Authority, but also a violation of Article 87 UCMJ, Missing Movement through Neglect. This is a serious offense by any crew member, especially an officer.

As an officer and department head, you must hold yourself above reproach. If you do not, you place yourself in a position where enforcement of the rules and regulations of this unit and the Coast Guard become hypocritical.

You are required to take all necessary steps to ensure that further transgressions of this manner do not occur. Any future violations of either Article 86 or 87 of the UCMJ will result in you being placed on report and punished.

The applicant stated that he was late for work on a few occasions. He stated that "[o]n one of these occasions, the matter was aggravated by the fact that the cutter sailed in the interim, thus causing him to have missed the movement of the ship. The movement was a short buoy operation; the ship returned to the pier by late afternoon of the same day. [The applicant] had arrived at the pier shortly after the ship got underway. After conferring with the ship, it was decided that instead of meeting the ship by small boat, [the applicant] would accompany the Operations Officer to a



The applicant admitted that the commanding officer (CO) had a right to be angry with him, but he suggested that instead of the page 7 entry, the CO could have "chewed him out" orally, could have denied the applicant various privileges, or could have required the applicant to live aboard the ship.

The applicant also suggested that the CO could have taken him to captain's mast, where the punishment could have been a punitive letter of reprimand or he could have

been given a non-punitive letter of censure. A punitive letter of reprimand is included in the officer's personnel record and is appealable, while a non-punitive letter of censure is not included in the service record. The applicant cited Article 1-F-1d of the Military Justice Manual which states:

Nonpunitive censure. This measure is not punishment and may be administered either orally or in writing. Nonpunitive letters of censure are private in nature and, other than administrative letters of censure issued by the Commandant, shall not be forwarded to the Chief of Personnel, quoted in or appended to performance reports, or included as enclosures to investigative reports, or otherwise included in the official Coast Guard record of the recipient. See Section 8-0 PERSMAN [Personnel manual].

The applicant argued that there was no provision for issuance of a nonpunitive letter of censure to a commissioned officer by means of a page 7 entry. The applicant also asserted that by placing the page 7 entry in his record, it carried the same weight and penalties as a punitive letter of reprimand, without any of the safeguard's, i.e., the applicant's ability to appeal it. He stated that use of the page 7 entry effectively turned what, at worst, would have been a short-lived and private counseling tool into a matter of official record.

The applicant argued that based on Commandant Instruction (COMDTINST) 1000.14, page 7 entries are for enlisted personnel only. He stated that this instruction covers literally scores of circumstances, but none of them mentions officer personnel. Similarly, the applicant argued that the Personnel Manual expressly provides that it is inappropriate to issue an administrative letter to enlisted personnel. Article 8-D-6, Personnel Manual.

The applicant argued that Article 20-B of the Personnel Manual, which deals with the Coast Guard's alcohol program, supports his contention that page 7s are for enlisted members only. He stated that this portion of the Manual distinguishes between officer and enlisted personnel. It requires page 7s for enlisted members and letters for officers.

The applicant argued that even if the disputed entry was permissible for a commissioned officer, it must be signed by the CO and not the executive officer as was done in this case. The applicant asserted the executive officer is not a proper issuer, even if he is signing "by direction." "See generally Military Justice Manual art. 1-C-5b." (This section of the Military Justice Manual states "that the executive officer has no power to impose non-judicial punishment for offenses. . . . However, the executive officer may administratively rebuke, censure, criticize, or warn a suspected offender.")

Views of the Coast Guard

The Coast Guard recommended that the applicant's request be denied. The Service noted that in addition to the disputed page 7 entry, the applicant's record contained another page 7 entry praising certain aspects of the applicant's performance.

Concerning the applicant's contention that the Coast Guard is prohibited from making page 7 entries in an officer's military record, the Service stated:

Applicant cannot identify any such prohibition in any applicable statute, regulation, or policy. To the contrary, . . . express provisions of the PMIS/JUMPS [Personnel Management Information System/Joint Uniform Military Pay System Manual, COMDTINST M1080.9] Manual authorize the [page 7] entry. The fact that other procedures may also have been appropriate, or even that they may have been more appropriate, does not establish error before the Board.

The Coast Guard argued that the applicant received the most appropriate action under the circumstances. The Service noted that the applicant did not contest the offense documented by the page 7 entry. The Coast Guard stated that the applicant's command could have taken the applicant to nonjudicial punishment (NJP) or referred him to court-martial. The command chose instead to record the incident on a page 7 entry. The Service stated that the page 7 was an appropriate vehicle for accomplishing the command's purpose.

The Coast Guard contended that the page 7 entry was not prepared in error because it was signed by the executive officer "by direction" rather than by the applicant's CO. In this regard, the Service stated that "the applicant's arguments rested on the premise that the Page 7 [entry] is the equivalent of a punitive letter. The Page 7 entry has a different effect and is treated different from [a] NJP. While imposition of NJP is limited to a Commanding Officer, . . . [the] issuance of a Page 7 is not." Also, the Service stated that Coast Guard regulations provide that "[t]he executive officer shall be primarily responsible for the organization, coordination of effort, performance of duty, and good order and discipline of the entire command. See COMDTINST M5000.3B." The Coast Guard stated that the duties of the executive officer included functioning as the personnel officer for the unit and maintaining the unit's personnel records. As the direct representative of the CO, the executive officer's actions have the same force and effect as the commanding officer.

The Coast Guard stated that Chapter 5 of COMDTINST M1020.8c, Allowable Weight Standards for the Health and Well-Being of Coast Guard Military Personnel, provides an example of a page 7 entry that may be completed on both officer and enlisted personnel. Other examples cited by the Service include those entries made to memorialize screening for overseas assignment, unit awards, shipboard qualifications, and exemplary performance.

The Coast Guard stated that the applicant has not overcome the strong presumption that the military superiors involved in his case discharged their duties correctly, lawfully, and in good faith. Arens v. U.S., 969 F.2d 1034, 1037 (1991).

Applicant's Response to the Views of the Coast Guard

The applicant disagreed with the Coast Guard that the PMIS/JUMPS Manual authorized the use of page 7 entries in an officer's record. The applicant argued that page 7s are only permissible for officers when such entries relate to the Coast Guard's allowable weight program.

The applicant argued that a page 7 entry is not an authorized avenue for addressing an officer's performance. He stated that officer performance is to be addressed in the officer evaluation report (OER), or in administrative correspondence which cannot be made a matter of record. The applicant contended that the command's use of the page 7 as a supplement to the regular OER deprived the applicant of the procedural protections provided by Article 10-A of the Personnel Manual, such as a separate review by a Reporting Officer and Reviewer, administrative review at Coast Guard Headquarters, and the right to file an OER reply.

The applicant argued that reducing this case to its essence, the page 7 entry is a de facto administrative letter of censure (non-punitive) that has been inserted into applicant's PDR in violation of the Military Justice Manual. The applicant argued that the page 7 entry not only recorded the fact that he missed ship's movement, but expressly found that the applicant violated two punitive articles of the UCMJ. The applicant stated that the disputed page 7 entry was not a mere administrative note, but it was a finding of criminal conduct that should have been made a matter of record only if the applicant had been punished at a NJP or tried by court-martial. The applicant stated that even the Coast Guard commented that the page 7 entry referred to a serious offense. The applicant argued that:

The page 7 is an official, highly stigmatizing assertion that [the applicant] was **guilty** of a criminal offense, and that assertion has been permitted to be part of his official record in direct contravention of the Military Justice Manual and without observance of the procedures mandated by Congress in the UCMJ, or by the President in the Manual for Courts-martial. This is the antithesis of due process of law.

The applicant argued that the Coast Guard's comments on the punishment he could receive if he had been taken to mast or referred to a court-martial are irrelevant since the command chose to do neither of these. The applicant further asserted that even if he had gone to mast or court-martial, it is sheer speculation to conclude that

some permanent stain would have been injected into his PDR (personal data record) as a result.

Supplemental Views of the Coast Guard

The Service maintained the position stated in its earlier comments. The Coast Guard, however, did state that the Military Justice Manual has nothing to say about a page 7 entry such as that presently in dispute. The Service stated that the applicant's argument that the disputed page 7 entry is the equivalent of a punitive letter of reprimand does not make it so. The Coast Guard asserted that the applicant was simply at a loss to point to any law or regulation that prohibits a commanding officer from placing fact based administrative remarks in an officer's record when the CO deems such administrative remarks to be appropriate.

Applicant's Rebuttal to the Supplemental Views of the Coast Guard

In a letter dated, August 26, 1996, the applicant stated that there was nothing in the Coast Guard's supplemental views that would caused him to modify or recede from the position already expressed.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was timely.
2. The applicant requested an oral hearing. The Chairman, under section 52.31 of tile 33, Code of Federal Regulations, recommended disposition on the merits without a hearing. The Board concurred in that recommendation.
3. The applicant has not established that it was error for the disputed page 7 entry to be included in his record. His argument that a page 7 entry is only to be used for enlisted members has not been proven. The applicant's evidence suggest that a page 7 entry is most often used to record events in the records of enlisted servicemembers, but that evidence does not establish that the Coast Guard is precluded from entering page 7 entries in the records of its officer personnel. While the regulations cited by the applicant offered examples of page 7 entries that pertain mostly to enlisted members, none of the regulations cited by the applicant stated that page 7 entries could not be used in officer records. Chapter 2.K.1 of COMDTINST 1080.9 states that the purpose of the page 7 entry is to provide a means of recording miscellaneous entries which are not recorded elsewhere in a personnel data record. Although this instruction cites examples geared mostly to enlisted members, section 2.k.2.a. states that the sample entries contained in the instruction are not be construed as a complete listing but rather as

typical examples of the frequently recorded entries which could be applicable to any individual. The counseling of an officer on a page 7 entry is not in violation of any law or regulation.

4. The filing of a page 7 entry into an officer's record who is not in compliance with the Service's allowable weight program is further evidence that page 7 entries are permissible for officers. The applicant's record also contains another page 7 entry, in addition to the disputed page 7 entry, which is complimentary of the applicant. This again is evidence which supports the Board's finding that page 7 entries are permissible for officer personnel.

5. The applicant contended that a page 7 entry is not an available method for addressing deficiencies in an officer's performance, and that performance deficiencies may only be addressed through the OER or administrative correspondence that does not become apart of the officer's military record. The applicant has presented insufficient evidence to show that using a page 7 entry to counsel an officer on performance deficiencies is in violation of Coast Guard regulations. Neither has the applicant presented sufficient evidence to establish that the OER and the administrative letter are the only two avenues available for addressing deficiencies in an officer's performance.

6. It is unclear whether the applicant is arguing that the disputed page 7 is tantamount to a punitive letter of reprimand or an administrative letter of censure. However, the Board finds that it is neither, but rather it is a counseling entry. This is made clear by the first sentence of the disputed page 7 entry, which reads "[y]ou are hereby counseled by the Executive Officer regarding your repeated tardiness for work."

7. The applicant's argument that, pursuant to Article 1-C-5b. of the Military Justice Manual, the Executive Officer could not sign the page 7 entry is without merit. This provision deals with the inability of the Executive Officer to impose NJP. This provision is not applicable in this case because the applicant did not receive NJP.

8. The Board notes that the applicant did not show that the disputed page 7 entry, **regarding** tardiness for work, was in error or unjust. In fact, the applicant admitted **that he** was late for work on this occasion. Accordingly, the applicant's request **should be denied**.

9. The Board also notes that on November 19, 1996, the applicant withdrew his request for removal of his failure(s) of selection for promotion to LT.

ORDER

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

