

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-234



FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on December 2, 2014, and subsequently assigned it to staff member [REDACTED] to prepare the decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 25, 2015, 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 lieutenant commander (LCDR) on active duty, asked the Board to remove from her record an adverse ("general-negative") Administrative Remarks form (CG-3307 or "Page 7")¹ dated December 4, 2013, and to promote her to commander (CDR) with the date of rank she would have had had she been selected for promotion by the 2015 promotion year (PY15) CDR selection board. The Page 7 criticizes the applicant for her conduct during a traffic stop on June 19, 2013. The applicant alleged that the Page 7 contains factually incorrect information and erroneous conclusions, which were both an error and injustice.

04Dec2013: You are counseled this date for your actions on 19 June 2013 that I have determined did not meet the standards expected of Coast Guard officers and that have brought discredit on the Coast Guard. On that date, you were detained by civilian law enforcement officers in During this stop, you provided inaccurate information regarding the number of firearms located in the vehicle being operated by your husband. Additionally, a set of "brass knuckles" were found in your belongings. You have a Constitutional right to remain silent and as a citizen, you are entitled to the protections afforded by these rights. However, these rights do not extend so far as to permit you to provide misleading information to law enforcement officers performing their duties. Article 8-1-3 of

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.

United States Coast Guard Regulations 1992 (COMDTINST M5000.3B) states, in part, the following regarding the example to be set by officers: "Discipline depends in a large degree upon the example set by commanding and other officers in authority, and may be maintained in many cases by their own attention to duty and by their personal influence, tact, and discretion." By failing to attend to your personal affairs in a matter that demonstrates integrity tact and discretion, you have failed to meet the high standards expected at all times of commissioned officers.

The applicant explained that in June 2013, she traveled with friends to [REDACTED] by motorcycle but on the return trip, her motorcycle engine seized. Therefore, her husband picked her up in a borrowed truck. On June 19, 2013, she was sleeping in the passenger seat when they were stopped for speeding by a State Law Enforcement Officer. She alleged that the Officer asked if there were any firearms in the vehicle. The applicant told him that there was a concealed gun in the vehicle and produced her ID and concealed carry permit. After reviewing the documents and running a criminal check, the Officer discovered that the concealed carry permit had expired the day before and that the applicant's husband had been convicted of weapons charges thirteen years earlier. The Officer asked the applicant to step out of the car and called for reinforcements and a search warrant. As the vehicle was being searched, the applicant alleged, she told them the gun was under her seat. She then recalled that she had a second gun in her motorcycle bag and told them it was there. The weapons sweep of the vehicle turned up two loaded handguns: one wrapped in clothing under the passenger seat, and another in a saddlebag of a motorcycle in the bed of the truck. The Officer also found her brass knuckles. Both the applicant and her husband were placed under arrest. However, she alleged, the charges were later dropped, and the weapons were returned to her.

The applicant alleged that the Page 7 is erroneous and unjust because, due to illness and exhaustion from her motorcycle trip, she had forgotten about having a second firearm in the vehicle, so she unintentionally provided incorrect information to the Officer when initially asked whether there were any firearms in the vehicle. She pointed out that she had no reason to mislead the Officer about the number of guns in the truck. The applicant also argued that the Page 7 is unjust because it mentions her possession of brass knuckles, which implies that they are illegal, although only the concealed carry of brass knuckles is prohibited by State law.

As a result of the Page 7 in her record, the applicant argued, she was erroneously and unjustly non-selected for promotion by the PY15 CDR selection board. To support her claim that the Page 7 was factually incorrect and unjust, the applicant submitted the following:

- A statement dated January 8, 2014, of a friend and former Major in the U.S. Army Nurse Corps, who traveled by motorcycle to [REDACTED] with the applicant in the days leading up to the incident and wrote that the applicant "clearly had the beginnings of an upper respiratory infection" and borrowed cold medicine from her during their trip;
- Copies of medical records from Coast Guard Headquarters Primary Care, dated July 22, August 1, 13, and 14, September 9, and October 21, 2013, diagnosing a severe cough and referring the applicant to a pulmonary disease specialist;
- A medical record dated December 3, 2013, regarding the applicant's chronic cough, which was diagnosed as possibly pertussis (whooping cough);

- An email from a lieutenant colonel in the U.S. Army, dated January 24, 2014, stating that he observed the applicant having extreme difficulty breathing and appearing to have a high temperature while in [REDACTED] in June 2013;
- An email from the applicant to her division chief, dated June 24, 2013, in which she described the events leading up to her arrest, noted that she had been sleeping in the truck and “was not feeling very well due to allergies and a bladder infection” when they were stopped, and stated that she recalled having only one gun when initially asked “if we had any weapons,” but, after more officers arrived to search her vehicle, she remembered that she had more than one gun with her and advised the officers where they both were located;
- Page two of a court order dated October 1, 2013, which states that the applicant had “entered a Pretrial Diversion ... regarding the criminal charge of Carrying Concealed Weapon without License or Authorization,” and that the charges against her husband were dismissed (the first and third pages were not submitted);
- A search warrant obtained to search the applicant’s vehicle and motorcycle, dated June 19, 2013, which notes that the applicant was asked if they were carrying “weapons” in the vehicle;
- Receipts and statements establishing the applicant as the legal owner of the two guns; and
- Multiple Officer Evaluation Reports (OERs) and citations for medals.

SUMMARY OF THE RECORD

The applicant was commissioned to active duty as a [REDACTED]. She received excellent marks on her OERs at this unit and was strongly recommended for promotion.

On [REDACTED] the applicant was transferred to a large training center, where she served as a [REDACTED]. [REDACTED] the applicant was promoted to lieutenant commander. During her time at the training center, the applicant again received very good marks on her OERs and was “highly recommended for promotion.”

On [REDACTED] the applicant was transferred to a Coast Guard Headquarters unit. She received very good OERs at this unit in May 2012 and 2013. On December 4, 2013, her command entered the disputed Page 7 in her record.

On her OER for the period of May 1, 2013, to April 30, 2014, the applicant received six marks of 5 and twelve marks of 6 in the various performance categories² and a mark in the fifth³ spot on the comparison scale denoting the applicant as an “[e]xcellent performer; give toughest, most challenging leadership assignments.” She was also recommended for promotion “with peers.” The applicant received an above standard mark of 5 for “Responsibility” on this OER, and it makes no mention of the applicant’s arrest on June 13, 2013.

² In OERs, officers are evaluated in a variety of performance categories, such as “Professional Competence,” “Teamwork,” and “Judgment,” on a scale of 1 to 7, with 7 being best.

³ On an OER form for a lieutenant and lieutenant commander, a mark in the a mark in the fourth spot describes the officer as a “good performer,” ready for “challenging assignments,” whereas a mark in the fifth spot describes the officer as an “excellent performer,” ready for the “most challenging leadership assignments.”

The applicant sought relief from the Personnel Records Review Board (PRRB). The applicant alleged to the PRRB that the Page 7 contained factual errors; that the Page 7 was based solely on a Coast Guard Investigative Service report which was arguably incomplete because neither the applicant nor witnesses were given an opportunity to provide input; and that as a result of the reliance on the one-sided report, the Page 7 was fundamentally unjust and inaccurate.

While the PRRB was deliberating, on September 12, 2014, the applicant was non-selected for promotion by the PY15 CDR selection board. A total of 328 in- and above-zone lieutenant commanders were considered by the board. Just 160 were selected for promotion in 2015.⁴

On October 30, 2014, the PRRB issued its opinion and found the following:

- That the Senior Military Officer of the applicant's unit properly carried out his duties as CO of Military Personnel;
- The Page 7 was issued in accordance with established Coast Guard policy;
- The applicant failed to show, by a clear and convincing standard, that the Page 7 contained factual errors;
- The applicant's possession of brass knuckles was not a violation of law or policy and should not have been included in the Page 7; and
- The applicant failed to show, by a clear and convincing standard, that the Page 7 was fundamentally unjust.

The PRRB granted partial relief and ordered the language, "Additionally, a set of 'brass knuckles' were found in your belongings," be stricken from the Page 7. The PRRB granted no other relief.

VIEWS OF THE COAST GUARD

On April 15, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. In making this recommendation, he adopted the findings and analysis in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that the applicant's Commanding Officer (CO) determined that she did not meet the standards expected of Coast Guard officers and that she brought discredit on the Coast Guard through her actions by providing misleading information to law enforcement officers performing their duties. PSC stated that the PRRB reviewed the Page 7 and concluded that the remark was correctly signed by her CO and that her CO had authority to take action on any reports of misconduct. Further, PSC noted that the PRRB found the facts in the Page 7 were accurate, but that they removed the "brass knuckles" to rid any insinuation or inference of wrongdoing the statement may cause.

⁴ The Commander of Personnel Service Center issued ALCGPSC 125/14, on July 14, 2014, announcing the selection officers for promotion recommended by the PY15 commander selection board and approved by the Secretary of Homeland Defense.

PSC concluded that the applicant did not prove that her CO erred in producing the Page 7 or that the contents were factually inaccurate.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 20, 2015, the applicant responded to the views of the Coast Guard with the following arguments:

- The Coast Guard has failed to address the main issue, that the Page 7 cont[REDACTED] incorrect conclusions;
- The Coast Guard incorrectly focused on whether there were procedural inaccuracies, which she never alleged;
- Her application to the BCMR established by a preponderance of the evidence that the Page 7 contained factual errors; and
- The Coast Guard ignored her submitted evidence.

APPLICABLE REGULATIONS AND GUIDANCE

Coast Guard Officer Accessions, Evaluations, and Promotions (COMDTINST M1000.3)

Article 3.A.4.f.(1) states that an “officer eligible for consideration by a selection board may communicate with the board through the officer’s chain of command by letter arriving by the date the board convenes, inviting attention to any matter in his or her Coast Guard record that will be before the selection board. A letter sent under this paragraph may not criticize any officer or reflect on any officer’s character, conduct, or motive (14 U.S.C. 253(b)).”

Article 6.A.3.b states that the basic criteria for selecting officers for promotion are performance evaluations, education, leadership, and professionalism. Article 6.A.6.b states that selections boards shall select officers for promotion by making comparisons as follows:

In recommending, a board shall compare all officers submitted for consideration and base its recommendations on the extent to which they compare among themselves in accomplishing past assignments and potential for greater responsibility according to the overall criteria the board adopted; ...

1. Selection on a best-qualified basis embodies three elements; the board:

- a. *First*, considers all officers impartially and equally.
- b. *Second*, applies the same criteria to all.
- c. *Third*, evaluates by comparison with the most capable officers advancing to positions of higher responsibility. [REDACTED]

2. Best-qualified boards consider officers’ records, comparing past performance, their capacity to undertake successfully tasks of progressively greater difficulty involving broader responsibilities, their capability and inclination to study for further professional growth, and their potential to perform creditably those duties to which these officers might be assigned in the next higher grade.

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. The application was timely filed.⁵

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁶

3. The applicant alleged that the disputed Page 7 is erroneous and unjust and should be removed from her record. When considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed Page 7 is correct as it appears in her record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁷ Absent evidence to the contrary, the Board presumes that a member's military records have been prepared "correctly, lawfully, and in good faith."⁸

4. The applicant has established that she was tired and ill with a chronic cough on June 19, 2013. However, she has not proven that she did not "provide inaccurate information regarding the number of firearms located in the vehicle." The applicant admitted that she told the Officer that there was one gun in the vehicle when questioned even though she had apparently been traveling on her motorcycle with two guns. She argued that she did not intentionally mislead the Officer, but the Page 7 does not accuse her of intentional deceit. The Board finds that the applicant has failed to prove by a preponderance of the evidence that the Page 7 is erroneous or unjust.

5. When the PY15 CDR selection board reviewed the applicant's record, the Page 7 still contained the comment about the applicant's brass knuckles. The applicant alleged, and the PRRB agreed, that the reference to brass knuckles unjustly implied that the applicant engaged in some type of wrongdoing by possessing them although it is not illegal to possess them. Regardless of any possible implication, however, the applicant does not dispute that the statement is factually accurate. Moreover, brass knuckles are, in fact, a "weapon" that was found among the applicant's belongings and that she should have disclosed but did not, according to her own account, when asked whether she had any weapons.⁹

⁵ 10 U.S.C. § 1552(b) (providing three-year statute of limitations).

⁶ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁷ 33 C.F.R. § 52.24(b).

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁹ The Board notes that the applicant alleged that she was asked only about firearms, but the search warrant and the applicant's email to her division chief both state that she was asked if she had any "weapons," which would include brass knuckles.

6. When an officer asks the Board to remove a non-selection for promotion, the Board must determine whether the non-selection should be removed by answering two questions: “First, was [her] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [she] would have been promoted in any event?”¹⁰ To void a non-selection, the Board “need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded.”¹¹

7. The Board is not persuaded that the applicant’s record was prejudiced by error or injustice when it was reviewed by the PY15 CDR selection board. The Board finds that she has not proved by a preponderance of the evidence that the now-removed Page 7 comment about that brass knuckles was a material error or unjust. Nor has she shown that any other statement in the Page 7 is erroneous or unjust. Therefore, the first prong of the *Engels* test has not been met because her record was not prejudiced by error when it was reviewed by the selection board.

8. While the inclusion of the comment about brass knuckles in the Page 7 is not fully explained and could, theoretically, be misinterpreted by someone ignorant of the law, the comment was factually accurate. The mere possibility of a negative inference drawn from a factually accurate and presumably warranted comment does not justify voiding a decision by a selection board. In this regard, the Board notes that the applicant knew the content of the Page 7 before the selection board convened and was entitled, under Article 3.A.4.f.(1) of COMTINST M1000.3, to submit a communication to the promotion board to clarify any information in her record that she considered to be in error or misleading. The record before the Board does not reveal whether the applicant chose to submit a communication, but even if she did not, she had the opportunity to address what she believes to be a potential erroneous implication of a factually accurate comment.

9. The applicant argued that the Board should directly promote her to commander, in addition to removing the Page 7, because she would have likely been selected for promotion if not for the insertion of the Page 7 in her record. However, the Page 7 was not in error or unjust. Therefore, the Board finds that the applicant has not proved by the preponderance of the evidence that she should be promoted by this Board without consideration by a regularly constituted Coast Guard CDR selection board. The Board is not persuaded that a direct promotion recommendation is warranted and will not usurp the role of the Coast Guard’s selection board, which is tasked with the difficult job of determining, based on the guidance provided in the Personnel Manual and by the Commandant, which of the many excellent lieutenant commanders should be promoted to commander.

10. Accordingly, the applicant’s request should be denied.

¹⁰ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

¹¹ *Id.* at 175.

ORDER

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

June 25, 2015

[REDACTED]

[REDACTED]

[REDACTED]