

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-126

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX, CDR

FINAL DECISION

Author: Ulmer, D.

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 application was docketed on July 22, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated March 16, 2006, is 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 correct his military record by returning him to the promotion year (PY) 2004 Reserve Program Administrator (RPA) captain selection list. The Secretary of Homeland Security removed the applicant's name from the list on July 9, 2004.

APPLICANT'S ALLEGATIONS

The applicant alleged that the action taken to remove him from the list was unjust in three respects: "First, it is unfairly cumulative because [the applicant's] immediate commander already resolved the matter. Second, the effect of the removal from the promotion list operates to deprive [the applicant] of over \$256,000 in lost pay, which is grossly out of proportion to the conduct underlying the removal. Third, the removal is unfair to the Coast Guard because they lose a stellar candidate who has

shown before and after the incident that he is capable of performing at the grade of O-6."

The applicant offered the following account of events that led to his removal from the 2004 O-6 RPA promotion list:

While stationed at [a command in New Orleans, the applicant] received and forwarded an email entitled "Football" that contained a Power Point slide presentation. Without checking each slide, he forwarded the email to several fellow Coast Guardsmen. Unfortunately, the last slide in the presentation depicted a partially unclothed female. By the time [the applicant] discovered this, it was too late to retract the email. So he decided to do nothing to exacerbate the situation, instead choosing to "let the waters calm." Shortly thereafter, and due to the extremely high operational tempo of the unit [the applicant] forgot about the incident. No one who received or even saw the email was offended. However, two enlisted members driven by personal enmity against [the applicant] found out about it and decided to complain. The reason for their grudge stems from [the applicant] requiring them (as he did everyone) to strictly comply with Coast Guard regulations when they wanted to be excused from them. [The applicant] admitted to his commander . . . of his mistake in sending the mail without first checking all the slides. For this minor, one time lapse of judgment [the applicant] was issued a written reprimand by his commanding officer. After [the applicant] was selected for promotion to O-6, this matter was referred to a special board to determine whether he should be removed from the O-6 promotion list. The special board recommended he should be removed from the Promotion Year 2004 promotion list, whose recommendation was presumably approved.

With respect to the unfair cumulative effect of the removal from the promotion list, the applicant stated that his commanding officer (CO) took appropriate action by issuing the applicant a written letter of admonishment, a negative administrative remarks sheet (page 7), and two special OERs, and by transferring the applicant from the command. The applicant stated that the decision to remove him from the promotion list was not made by his CO, who considered the punishment he meted out to be appropriate, but by Coast Guard Personnel Command (CGPC) Officer Performance and Management (OPM) division. The applicant stated that although CGPC's action was technically authorized, it was unfairly cumulative, particularly since the applicant's CO had instituted punishment that he considered to be appropriate.

On the issue of whether the applicant's removal of his name from the list was disproportionate to the conduct, the applicant stated that the isolated minor incident

operates to deprive him of over two hundred fifty thousand dollars of active duty and retired pay. He stated that the administrative actions taken by his CO were more than sufficient.

On the third point, the applicant argued that his removal from the list deprives the Coast Guard of a stellar O-6 candidate in time of war and therefore is unjust to both the Coast Guard and himself. He stated that his OERs demonstrate that he was capable of performing as an O-6 before and after the incident. He stated that his then CO has always supported the applicant's promotion, as did the investigating officer.

The applicant submitted letters from his then CO, the former and current U.S. Ambassadors to Haiti and other Embassy personnel, six Coast Guard captains, and one Coast Guard Commander.

1. The CO praised the applicant's performance as executive officer and stated that "on one occasion and one only, [the applicant] unknowingly sent an email to a limited distribution list which later proved to be very inappropriate." He stated that certain members of the command who had malice against both the applicant and the command took advantage of the applicant's lapse in judgment by redistributing the email outside the command. The CO stated that he had no doubt that this lone incident was not indicative of a character flaw in the applicant; nor was it a pattern of behavior. He stated that he remained convinced that the applicant's potential future value to the Coast Guard as an O-6 far outweighed any potential risk of another occurrence of this type of lapse in judgment. He described the applicant as a proven performer, effective leader, consistent problem solver, innovative forward thinker, and consummate planner who can make substantial and lasting contributions to our Service and nation at the O-6 level.

2. A CDR wrote that he had been both a subordinate and peer of the applicant's at the unit in which the incident occurred. He stated that the applicant was a mentor who helped him refine his leadership skills and abilities. He stated that in his twenty-six years of active duty service, he has been a keen observer of many leaders and he placed the applicant with the best of them. "[The applicant] possesses a breadth and depth of knowledge that is truly amazing which the Coast Guard most certainly benefits from now and would in the future." The CDR stated that he is convinced that the applicant possesses the qualities of leadership and integrity essential to succeed as a captain.

3. Embassy personnel provided statements on behalf of the applicant. The Ambassador to Haiti, where the applicant was assigned as the senior military officer after the incident, strongly recommended the applicant for promotion to the rank of captain. He stated that the applicant was a strong and effective leader of the military personnel assigned there. He stated that the applicant performed his tasks in a highly

effective manner and has clearly demonstrated the ability to serve effectively as a United States Coast Guard captain. He recommended that the applicant be immediately promoted.

The current Ambassador also wrote a statement praising the applicant's performance. He stated that the applicant "has been a strong and effective leader for the military personnel assigned here." He concluded his letter on the applicant's behalf with the following: "Whenever we face a crisis here, [the applicant] is at the center of the action, contributing essential information, providing sound guidance and ultimately winning a successful outcome." He stated that the applicant has clearly demonstrated the ability to serve effectively as a United States captain and has his highest recommendation for immediate promotion.

A GS-15 who was also assigned to duty in Haiti wrote comments similar to those of the Ambassador. He stated that he has known and worked with many Coast Guard officers during the past three years, and in his experience the applicant ranks among the finest.

4. Six Coast Guard captains expressed their opinion and belief that the applicant has the necessary qualities of leadership and integrity essential to succeed as a captain. One captain noted that the applicant's performance as the senior military official at the Embassy had been exemplary. He recommended that the applicant be reinstated on the O-6 promotion list.

A second Coast Guard captain for whom the applicant had worked earlier stated that he "could not have been more pleased with his performance." He encouraged the Board to balance the applicant's long record of accomplishments and contributions to the Service in determining an appropriate resolution of his application. A third captain wrote that he had known the applicant for over twenty years and that during that time he never had any reason to question the applicant's honesty or integrity. He stated that the applicant is fully qualified to be an O-6 and should be promoted as soon as possible so that the Coast Guard can benefit from his talent.

A fourth captain stated that during his thirty-plus years in the Coast Guard, he has met many, many simply outstanding Officers, but then there are the special few who step forward and volunteer for the truly "hard to fill" billets, like the applicant. He stated that the applicant demonstrated the qualities of unselfish commitment, dedication and patriotism and that he brings credit and honor to the Coast Guard,

A fifth captain wrote that during the twenty years he has known and communicated with the applicant, he had never heard, read, or seen any personal or general derogatory comments directed toward any individual or group. He stated that

the applicant does not look the other way when it comes to enforcing good order and discipline. He recommended the applicant's reinstatement to the O-6 promotion list.

A sixth captain wrote that he has known the applicant for five years and that the applicant has routinely conducted himself in a professional manner. He stated that the applicant's conduct and demeanor have always been exemplary. He stated that the applicant is a competent officer who is qualified and ready to serve the Coast Guard in an O-6 assignment.

SUMMARY OF THE RECORD

The applicant is an RPA with over thirty years of Reserve and active service. He was serving as the executive officer of a command when he forwarded an email with an inappropriate attachment from his home computer to his Coast Guard office computer. On October 14, 2003, using his Coast Guard computer he sent inappropriate attachment to a limited number of Coast Guard officers some of whom were his subordinates. An allegedly disgruntled chief yeoman discovered the email and forwarded it to others in the Coast Guard, including two admirals.

On October 17, 2003, the applicant's CO directed that an informal investigation take place into the forwarding of the inappropriate email from the Coast Guard work computers of the applicant and the chief yeoman.

On November 22, 2003, the investigating officer (IO) concluded that the applicant had violated Coast Guard regulation¹ by emailing material with sexual content to coworkers from his Coast Guard computer. In recommending that the applicant be taken to admiral's mast, the IO offered the following opinion about the applicant's conduct:

[The applicant], the Executive Officer . . . by violating a general order, involving seven subordinates in the act, making false official statements to the [CO] and in his signed statement . . . with the intent to deceive, and doing nothing to explain his actions to the subordinates involved or the command until his actions were revealed, permanently and negatively affected his ability to ensure the good order and discipline of the command and should not be retained as the Executive Officer.

On December 19, 2003, the CO placed an adverse page 7 into the applicant's record to document his violation of the Commandant's policy by sending an email with an inappropriate attachment from his Coast Guard computer.

¹ Enclosure (2) to COMDTINST 5375.1 prohibits the use of Coast Guard equipment to create, download, view, store, copy, or transmit sexually oriented materials.

On February 10, 2004, a special OER for the period October 14, 2003, to February 2, 2004, was prepared documenting the inappropriate email incident. The applicant received observed marks of 3 in workplace climate, judgment, and responsibility. In the comments sections, the reporting officer indicated that the applicant used poor judgment by forwarding an email "without knowing the full contents of the attachment originating from an external source, albeit a trusted one." The reporting officer also stated that the applicant acted less than ethically when he failed to take prompt mitigating follow-up action upon learning the true attachment contents. Despite the lapses in judgment, the reporting officer believed the applicant's lapse in judgment was an isolated incident as opposed to a character flaw. In block 9² of the OER, the reporting officer marked the applicant as a good performer who should be given tough challenging assignments, the equivalent of a mark of 4. In block 10, with respect to the applicant's ability to assume greater leadership roles and responsibilities, the reporting officer wrote:

Previous to this incident, ROO [reported-on officer] had exhibited behavior consistent with a well-respected senior officer including some of the highest standards of integrity and personal conduct I have witnessed in my career. ROO is an extremely capable officer who can continue to add great value to our service particularly in his area of expertise. Not recommended for CO, although I still feel very strongly that he would excel in a Reserve Program Management or Joint Service Liaison billet. Based on his otherwise unblemished record and the valuable lesson learned from this incident, I recommend he be promoted with his peers and continue to serve.

The reviewer attached comments disagreeing with the reporting officer's belief that the applicant was not aware that the attachment to the email contained inappropriate material. The reviewer stated the following:

From the Coast Guard's thorough Administrative Investigation of this matter, it is clear to me that [the applicant] forwarded to subordinates -- at his own unit and at another unit -- an electronic mail that contained the picture of a partially nude woman, and that he was then untruthful when he provided official statements about his actions. I specifically reviewed [the applicant's] written statement about the incident and found his version of events to be unbelievable. Therefore, I do not concur with the comments in blocks 7 and 8 that imply that [the applicant] was not aware

² Block 9 of an OER is where the reporting officer compares the reported on officer with all other officers of that grade that he has known in his career. The seven evaluations blocks correspond to marks from a low of 1 to a high of 7.

of the contents of the attached photograph that he admittedly forwarded to those subordinates.

This Executive Officer's misconduct irrevocably negated the special trust and confidence required in a member of the unit's command cadre. I most strongly do not concur with the Reporting Officer's recommendation in Block 10 that [the applicant] should be promoted and continue to serve.

Reported On Officer should be reassigned immediately to another unit.

The applicant's record contains another special OER for the period April 1, 2003, to February 12, 2004, apparently prepared upon the applicant's transfer from his then current command. The OER is above average with mostly 5s and 6s and several marks of 7 and a single mark of 4 in evaluations. The comments supporting the marks were all positive and the reporting officer stated in the potential section of the OER that the applicant was "recently selected for O-6 & ready to capably serve in that grade." The reviewer attached a comment sheet to the OER in which he stated, "I do not concur with the comments that the reported on officer is ready to capably serve in the grade of captain. Reported-on officer was relieved of his duties as Executive Officer on 12 Feb 2004, and subsequently reassigned."

On April 13, 2004, CGPC informed the applicant that in light of the special OERs action had been initiated under Article 5.A.13.f. of the Personnel Manual to convene a board to recommend whether or not the applicant's name should be removed from the promotion year 2004 RPA captain selection board list. CGPC stated that the two special reports cast doubt on the applicant's qualification to serve as an O-6. The applicant was provided with an opportunity to submit comments to the board in his behalf. The applicant acknowledged in writing receipt of the proposed board action and indicated that he would submit a statement.

On May 19, 2004, the board convened to recommend whether the applicant's name should be removed from the RPA selection board list. The board considered the special OER dated February 2, 2004; the page 7 dated December 19, 2003; the IO report dated November 22, 2003; the applicant's headquarters' record; and the applicant's statement. In his statement, the applicant accepted full responsibility and expressed remorse for the incident. He noted that the magnitude of the incident was fueled by the malicious intent of one or two individuals who had an animus against him in his capacity as executive officer of the command.

In recommending that the applicant's name be removed from the promotion list the board stated the following:

[The applicant] . . . demonstrated poor judgment in sending an explicitly inappropriate power point program to 11 co-workers and friends via Coast Guard email. After becoming aware of the inappropriate nature of the Power Point program later that same day, [the applicant] failed to take quick and decisive steps to limit distribution of the email, did not immediately advise the CO, and failed to immediately notify the recipients of the objectionable program and request that they delete it. While there is strong evidence that malicious action was taken by a Chief Petty Officer at the Command to escalate the negative impact and scope of the mistake of [the applicant], [he] still bears responsibility for his failure to mitigate the situation. [The applicant's] actions demonstrate a lack of judgment essential for promotion to the grade of captain in the Coast Guard.

VIEWS OF THE COAST GUARD

On November 8, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG noted that the Secretary of Homeland Security acting on the recommendation of a board convened under Article 5.A.13. of the Personnel Manual removed the applicant's name from the 2004 RPA list of captain selectees because he sent an electronic mail photograph of a partially nude woman to coworkers using a Coast Guard Workstation and CG Data Network, in violation of Coast Guard policy. He noted that the applicant was considered for promotion the following year but was not selected.

The JAG noted the applicant's allegation of "an injustice by the Coast Guard in initiating the process to remove his name from the PY 04 RPA Captain Promotion List in that it represented unfairly cumulative and disproportionate punishment and deprives the Coast Guard of a stellar O-6 candidate in time of war." In response to the applicant's allegation, the JAG stated that there was no error in the proceedings leading to the applicant's removal from the selection list. In this regard, the JAG stated that a special board convened under the Personnel Manual reviewed the applicant's case and recommended his removal from the list, which was approved by the Secretary.

The JAG did not see a basis that warranted invalidating the Secretary's decision to remove the applicant's name from the PY04 RPA selection board list. In this regard, the JAG stated the following:

Removal of the applicant's name from the PY04 RPA Captain Promotion List did not represent unfairly cumulative and disproportionate punishment. Removal from the promotion list was an administrative action that was a result of the conduct breach documented in the

administrative remarks and the Special OER in February 2004. The process was implemented in accordance with Article 5.A.13(f) of [the Personnel Manual]. It is not a punitive action intended to supplement or replace action taken at Captain's Mast, court-martial or performance documentation.

Applicant could have faced non-judicial punishment (NJP) or even charges before a court-martial. Instead, this high-ranking officer was merely removed from a promotion list for violating a lawful general order. The Coast Guard's action was well within its authority. There is nothing manifestly unjust about the manner in which the applicant was treated. The applicant's actions clearly cast doubt on his moral and professional qualifications to serve at the rank of captain.

The JAG agreed that the applicant was otherwise qualified to be on the captain promotion list prior to the transmission of the inappropriate email. However, the JAG stated that the Coast Guard steadfastly maintained that the applicant's removal from the list was warranted and fully justified as a consequence of having violated a general lawful order. The JAG noted that the applicant has had an impressive career, except for the incident under review, and that he has been afforded the opportunity to transfer to a senior military officer billet at an American Embassy.

The JAG attached a memorandum from CGPC as Enclosure (1) to the advisory opinion and asked that the Board accept it as part of the Coast Guard comments. CGPC stated that although the applicant's CO did not recommend removal from the promotion list, the CO's superior did recommend special board action and CGPC was within its authority to convene a special board to determine whether the applicant's removal from the promotion list was warranted.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 9, 2005, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond. The BCMR did not receive a response from the applicant.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 5.A.6.J. of the Personnel Manual states that the promotion of any RPA may be delayed if he or she has disqualified him or herself under the conditions set forth in Article 5.A.13. Subsection 4. of this Article further states that the Commandant

may remove the name of any RPA from a promotion list subject to the Secretary's approval.

Article 5.A.13.f. of the Personnel Manual provides for the following:

"1. Each officer in the chain of command or Commander (CGPC-opm) is responsible for delaying a promotion if he or she knows the appointee had disqualified himself or herself after being placed on a promotion list. Disqualification here means any circumstance which casts doubt on the moral or professional qualifications of the officer concerned, including pending action by a board officers, courts-martial, or investigative proceedings (14 U.S.C. 271(f)).

"2. A complete report of the circumstances recommending removing the selectee from the promotion list under Article 5.A.4. shall be sent to Commander (CGPC-opm). If the promotion letter is used for notification, include it if received; a copy of the OPAL need not be included. The selectee shall be furnished a copy of the report and required to acknowledge receipt. Attach a signed copy of the acknowledgement as an enclosure to the report.

"3. If Commander (CGPC-opm) initiates delaying a promotion, he or she shall advise the officer concerned in writing of the reasons for so doing and require acknowledgment of receipt.

"4. The Commandant shall refer the case to a board of officers to recommend to the President whether to remove the selectee from the promotion list. The officer concerned will be afforded 21 days notice of the proceedings, and may communicate directly by letter to the board, in care of Commander (CGPC-opm-1), before the board convenes. Chain of command endorsements are optional. Enclosures or attachments are limited to copies of official records and materials allowed to be submitted with Officer evaluation Reports under Article 10.A.4.c.3. Letters from other officers shall not be solicited or submitted as enclosures . . .

"5. The President of the board will forward a report of the proceedings of the board containing a recommendation to the Commandant as to whether the officer should be promoted, along with reasons for the recommendation. If the Commandant finds removal from the promotion list appropriate, he or she will forward the report with endorsements to the Secretary of [Homeland Security] (acting as the alter ego of the President), who is the final reviewing authority. If the Commandant determines that removal is inappropriate the case is closed, and the delay of promotion is canceled."

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The Coast Guard did not commit an error in the proceedings to remove the applicant from the O-6 promotion list; nor did the applicant allege or prove the existence of an error.

3. However, the applicant alleged that the Coast Guard committed an injustice against him when it acted to remove him from the promotion list. In this regard, he argued that the removal from the list was unfairly cumulative because his CO had already resolved the matter. Injustice is defined as treatment by military authorities that "shocks the sense of justice." Sawyer v. United States, 18 Cl. Ct. 860, 868 (1989) (citing Reale v. United States, 208 Ct. CL 1010, 1011, cert. denied, 429 U.S. 854, 50 L. Ed. 2d 129, 97 S. Ct. 148 (1976)).

4. The Board finds that CGPC's initiation of a special board to recommend whether the applicant's name should be removed from the promotion list was appropriate and in accordance with regulation. The CO acted within the authority demanded of and granted to him under the Personnel Manual by preparing a special OER and negative page 7, respectively. However, the decision of whether the applicant's name should be removed from the promotion list due to his violation of Coast Guard policy did not belong solely to the CO. In fact, the Personnel Manual states, "each officer in the chain of command or Commander (CGPC-opm) is responsible for delaying a promotion if he or she knows the appointee had disqualified himself or herself after being placed on a promotion list."

5. The Board finds that the issuance of the special OER, the negative page 7, and the convening of a special board are not unfairly cumulative. Each action is provided for by regulation and they are not mutually exclusive. The applicant was, after all, a CDR holding the executive officer position at his command when he sent the inappropriate email. Prior to the special board the applicant received two special OERs, neither of which contained a mark of 1, which would have made them derogatory, although one clearly documented the misbehavior. However, the reviewer made clear on each report that in his judgment the applicant had disqualified himself for promotion. Accordingly, a legitimate question existed in the judgment of the reviewer and CGPC whether the applicant remained qualified for promotion to captain. The only avenue available to answer that question was to process the applicant under Article 5.A.13.f. of the Personnel Manual because it appears that he was selected for promotion to O-6 before the special OERs and negative page 7 were entered into his

record. The first special OER was entered into the military record on February 23, 2004 and the second was entered in the record on March 25, 2004. The selection board for promotion year 2004 would have met in calendar year 2003. Therefore, a special board was necessary, since no selection board had reviewed the applicant's qualification for promotion to O-6 subsequent to his misconduct at that time.

6. The special OER, the negative page 7, the investigation, the applicant's performance record, and his statement were available to the special board when it recommended the applicant's removal from the RPA captain promotion list. These documents were available to the Commandant when he reviewed the matter. Under the Personnel Manual, the Commandant had the discretion to close the investigation upon receiving the report from the board of officers. Instead, he referred it to the Secretary. The Secretary acted to remove the applicant's name from the promotion list. Apparently, the board of officers, the Commandant, and the Secretary found that despite the earlier actions taken by the CO, the applicant's misconduct disqualified him from promotion. We find that none of the actions in this case, whether taken separately or collectively, shock our sense of justice as being unfairly cumulative. While a disgruntled employee may have escalated the situation by sending the email to others, the applicant exercised poor judgment, not expected of a senior officer and particularly not expected of an executive officer, in sending the inappropriate material and in failing to act promptly to report and minimize its impact after becoming aware that he had sent it.

7. The applicant's other arguments that the removal from the list will result in his loss of pay and that the Service will lose a stellar officer in a time of war do not persuade the Board that he has suffered an injustice. The applicant is fortunate that he continues to serve on active duty. He could have faced much tougher punitive sanctions. That he did not is a testament to his prior stellar performance record.

8. The Board notes the many complimentary letters from senior Coast Guard officers, the former and current Haitian Ambassadors, and others on the applicant's behalf expressing their opinion that the applicant is capable of serving as an O-6, as well as the applicant's excellent performance record. However, the Board notes the heavy responsibility for managing the Coast Guard that belongs to the Commandant and the Secretary. We will not disturb their decision without a clear demonstration of error or injustice. We do not see such an error or injustice in this case.

9. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of CDR XXXXXXXXXXXXXXXX, USCGR, for correction of his military record is denied.

Charles P. Kielkopf

Donald A. Pedersen

Darren S. Wall