

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-005

XXXXXXX, XXXX X.
XXX XX XXXX, XXX

FINAL DECISION

GARMON, Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on November 7, 2001, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated August 15, 2002, 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 redact portions of a negative page 7 (CG-3307 Administrative Remarks) and a Court Memorandum (CG-3304) from his military service record, documented in October 1995. He stated that this correction would afford him "a fair opportunity to compete for appointment to Chief Warrant Officer [CWO]."

APPLICANT'S ALLEGATIONS

The applicant alleged that the continued presence of narrative entries in his military service record, associated with a non-judicial punishment (NJP) received in 1995, is an injustice. He contended that the presence of these entries, which refer to a single incident of adulterous conduct, have affected his career by unfair, prejudicial treatment that likely would endure in the future.

In support, the applicant argued that the 2001 Chief Warrant Officer Appointment Board's findings show that the narrative entries constitute a continuing punishment because they caused his disqualification from CWO consideration. He urged the Board to find that the 2001 CWO Appointment Board abused its discretion by considering a single incident to be a "pattern of disqualifying conduct." He argued that the 2001 CWO Appointment Board's interpretation is not contemplated under Article 1.D.8.e.2. of the Coast Guard Personnel Manual in that it exceeded the scope of and purpose served by NJP.

The applicant stated that after receiving NJP in 1995, he worked diligently to regain his rank and be promoted further. He contended that notwithstanding his single act of indiscretion in 1995, he believes that he was a highly competitive candidate for CWO consideration in 2001, who closely abided by the Coast Guard's core values.

SUMMARY OF THE APPLICANT'S RECORD

The applicant enlisted in the Coast Guard for four years on October 12, 1982. He joined a rate and was advanced to petty officer first class (paygrade E-6) in 1989.

On October 30, 1995, the applicant received NJP from his commanding officer for having engaged in adulterous conduct with a married woman who was not his wife, a violation of Article 134 of the Uniform Code of Military Justice (UCMJ). He received the following punishment: (1) forfeiture of \$806.00 of pay per month for two months, (2) reduction in pay grade to E-5, and (3) extra duties for 15 days. A Court Memorandum was also entered in the applicant's service record documenting the receipt of NJP.

Also on October 30, 1995, a page 7 entry was made in the applicant's service record documenting the violation and assigning him a mark of "2" on a scale of "7" in the "Responsibility," "Setting an Example," "Customs and Courtesies," "Integrity," "Loyalty," and "Respecting Others" dimensions of an Enlisted Performance Evaluation Form (CG-3788) dated October 30, 1995, as a result of the NJP. The applicant's period of eligibility for a good conduct award was terminated and he was assigned a mark of "not recommended" for advancement as of this date, as well.

In 1996, the applicant regained his rank. He was subsequently advanced to chief petty officer. In 2001, the applicant submitted an application for appointment to CWO to the 2001 CWO Appointment Board, which convened on June 18, 2001. By memorandum dated August 27, 2001, the applicant was advised that the Board found him not fully qualified and therefore, removed him from consideration and did not rank him among those applicants found fully qualified for appointment. The stated reasons for the Board's decision was as follows:

“[Applicant] was found not fully qualified for appointment to CWO2. Review of the member’s record revealed an adulterous offense, which called into question the member’s adherence to Core Values. The incident was disruptive to good order and discipline at the commands and brought discredit to the Service. The board determined the incident was egregious enough to find the member not fully qualified for promotion to Chief Warrant Officer.”

To date, the applicant continues to serve on active duty as a chief petty officer.

VIEWS OF THE COAST GUARD

On March 26, 2002, the Chief Counsel provided the Coast Guard’s comments to the Board. He attached to his advisory opinion a memorandum on the case prepared by Coast Guard Personnel Command (CGPC). In concurring with CGPC’s analysis, the Chief Counsel recommended that the Board deny the applicant’s request.

The Chief Counsel argued that the page 7 and Court Memorandum, specifically identifying the applicant’s offense, were properly filed in the applicant’s military service record. He stated that in documenting a violation by express reference to the type of misconduct, there are no restrictions placed on the amount of specific detail that may be recorded to document an offense. The Chief Counsel asserted that Article 10.B.6.b. of the Personnel Manual mandates that the rater preparing a page 7 cite specific examples of performance or behavior that clearly demonstrates how the member failed to meet the published standard. The Chief Counsel stated that, once forms documenting an offense are filed in a member’s service record, they remain for the duration of the member’s career. Personnel Manual, Article 10.B.6.b.3.

The Chief Counsel stated that by congressional delegation, selection boards have inherent and indisputable discretion in the selection and promotion of officers. *See generally* U.S. Constitution; *see also*, United States v. Caceres, 440 U.S. 741 (1979); Cort v. Ash, 422 U.S. 66, 78 (1975). He went on to state that as part of their discretion, selection boards may “consider the nature of the offense, the time that has elapsed since the offense, the service member’s performance since the offense, and any other pertinent issues.”

The Chief Counsel asserted that the 2001 CWO Appointment Board was charged with developing criteria per the Precept dated June 5, 2001, and subsequently followed the instructions in the Precept and the Personnel Manual. The Chief Counsel stated that as a result of the applicant’s applying for appointment to CWO, his service record in its entirety went before the 2001 CWO Appointment Board, as part of the selection process.

He noted that, although the applicant had the option to address past offenses in his application, he chose not to do so. The Chief Counsel asserted that in making selection decisions based on its own developed criteria, established regulations, and the information available to them, the 2001 CWO Appointment Board did not abuse its discretion in finding that the applicant was not fully qualified for appointment to CWO.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 29, 2002, the Chairman sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. The applicant responded on April 18, 2002, informing the Board that he generally objected to the Coast Guard's advisory opinion. He stated that he had no further rebuttal or additional evidence to submit.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 10.B.2.a., titled "Adverse Administrative Remarks Entry, CG-3307," states that "[t]his entry is required to document an unsatisfactory conduct mark or low factor marks as defined in Article 10.B.9.a. for ... a. Non-judicial punishment."

Article 10.B.6.b.2. states that "[r]aters must document certain marks. For a mark of 1, 2, or 7 in any performance dimension or an unsatisfactory in conduct, the rater shall use the following procedure.

- a. Prepare an Administrative Remarks, CG-3307, entry containing specific examples of performance or behavior that clearly demonstrate how the member exceeded, met, or failed to meet the published standard. Paraphrasing the written standard does not meet this requirement; the rater must cite specific examples of performance or behavior. Administrative Remarks documenting an unsatisfactory conduct mark must also contain a Good Conduct termination statement. ...
- b. Counsel the member, who must acknowledge the CG-3307 entry on the same day as the counseling. ... "

Article 10.B.6.b.3. provides that "[t]hese remarks are made on an Administrative Remarks, CG-3307, form, so they become part of the member's official record; therefore, the rater should write them for an audience outside the member's command."

Article 1.D.8.c., titled "Oath of Board Members," provides that "[m]embers of the Board [which recommend eligible candidates for appointment to warrant grade] shall swear or affirm that they will, without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard, perform the duties imposed upon them."

Article 1.D.8.e. provides for the method of selection, as follows:

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

Military Justice Manual, COMDTINST M5810.1D

Article 1.G.3.a., titled "Court Memorandum (Form CG-3304), provides that "the court memorandum provides input to the service records of officer and enlisted personnel for all masts resulting in the imposition of punishment. If mast was held, but no punishment as described under Article 15, UCMJ, was awarded, then Article 15 punishment (or NJP) was not awarded. No Court Memoranda shall be prepared if, instead of imposing punishment, the matter is dismissed, dismissed with a warning, dismissed with administrative action taken, referred to court-martial, or results in recommendation for general court-martial because these actions are not considered the imposition of punishment."

FINDINGS AND CONCLUSIONS

¹ Article 1.D.8.d., titled "Information to be Furnished to the Board" states that "Commander, CGCP shall furnish the appointment Board with:

1. A listing, by specialty, of all primary candidates for appointment to warrant grade.
2. The OER and resume of all eligible primary candidates. ...
3. The Headquarters PDR of all primary candidates."

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.

2. The applicant requested the removal of adverse information, associated with an NJP awarded in 1995, from his military service records; however, the request is unsupported by evidence which shows that the continued retention of such entries is unjust. Because the applicant was awarded NJP, a court memorandum was prepared in accordance with Article 1.G.3.a. of the Personnel Manual and placed in his service record. Under Article 10.B.2.a., a page 7 entry was required to document a low factor mark that he received as a result of the NJP. Moreover, because the applicant received a low factor mark of "2" in at least one performance dimension, under Articles 10.B.6.b.2. and 10.B.6.b.3, the page 7 entry contained detailed facts of the unsatisfactory conduct and was incorporated into his permanent records.

3. The Board may exercise its equitable power to correct injustice if it finds that a member's "treatment by military authorities shocks the sense of justice."² However, the Board finds that the 1995 NJP narrative entries, though adverse in nature, were properly recorded in the applicant's file, in compliance with applicable regulations and policies. Consequently, the applicant has not presented persuasive evidence that the Coast Guard acted toward him in a way that "shocks the sense of justice" in maintaining the subject narrative entries in his service record.

4. The applicant alleged that if the narrative entries were to remain in his record, he would be subjected to enduring obstacles to promotions in the future. However, the fact that documentation of past misconduct might prevent his appointment to CWO does not render that documentation erroneous or unjust. Moreover, it has not otherwise deterred his advancement. Since the NJP in 1995, his record shows that in October of 1998, he received a Letter of Commendation for his "outstanding performance of duty," and marks of "7s" on his performance evaluations for the periods ending May 31, 1999, and November 30, 1999. Moreover, his record displays other favorable career developments which include, as stated by the applicant, that he "regained [his] rank almost immediately and ... advanced to the rank of xxxxxx xxxxxxxx." The Board finds that the applicant has failed to show why the narrative entries associated with his 1995 NJP should not remain in his military record.

² *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (Fed. Cir. 1991); *see also Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Deputy General Counsel has also ruled that in the absence of legal error, an applicant's treatment by military authorities must "shock the sense of justice" to justify correction by the Board. BCMR Docket No. 346-89.

5. The applicant alleged that the 2001 CWO Appointment Board abused its discretion by judging his adultery to be “a pattern of disqualifying conduct.” There is a presumption that in the absence of evidence to the contrary, members of a selection board performed their duties in a fair and impartial manner and in accordance with law, and that in so doing, give an applicant due and proper consideration, along with all of the other candidates for promotion. Brenner v. United States, 202 Ct. Cl. 678, 692 (1973), *cert. denied*, 419 U.S. 831, 95 S. Ct. 54 (1974); *see also* Article 1.D.8.c. of the Personnel Manual.

6. In accordance with Article 1.D.8.e., the CWO Appointment Board found the applicant not fully qualified, and he was subsequently not recommended for appointment. However, contrary to the applicant’s allegation, the excerpt from the appointment board’s report fails to indicate that it identified a “trend or pattern of conduct,” pursuant to Article 1.D.8.e.2. In fact, the 2001 CWO Appointment Board stated in its excerpt that “the incident was egregious enough to find the member not fully qualified for promotion...” (emphasis added). The applicant has not rebutted the presumption that the 2001 CWO Appointment Board “discharge[d] their duties correctly, lawfully, and in good faith.” Sanders v. United States, 219 Ct. Cl. 285, 302, 594 F.2d 804, 813-14 (1979). As the applicable regulations provide general guidance only, the language of paragraphs 1 and 2 of Article 1.D.8.e. does not limit the CWO Appointment Board’s authority to decide who is not “fully qualified.” Since the records have been found to contain a fair and accurate portrayal of the applicant’s career, this Board has no reason to question the findings of the CWO Appointment Board.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXX XXXXXXXX X. XXXX, XXX XX XXXX, USCG, for correction of his military record is denied.

Christopher A. Cook

Karen L. Petronis

Kathryn Sinniger