

DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-186

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 September 14, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated May 19, 2005, 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 removing an administrative remarks page¹ (page 7) dated November 19, 1999, from his record. He further requested that the Board remove his 2002 and 2003 failures of selection for promotion to lieutenant commander (LCDR). The applicant also requested backdating of his date of rank, with back pay and allowances, if he is selected for promotion to LCDR by the first board to consider him based on a corrected record. (The applicant was selected for promotion to LCDR by the 2004 selection Board.)

The Disputed Page 7

¹ An administrative remarks page provides a means of recording miscellaneous entries, which are not recorded elsewhere in a Personnel Data Record (PDR). Administrative Remarks entries are made to document counseling or to record any other information required by current directives, or considered to be of historical value. Section 10.A. of the Pay and Personnel Manual (HIRSICINST M1000.6A)

The applicant's record contains the following copy of a page 7 with the commanding officer's (CO's) signature:

"Entry Type: Performance and Discipline (P&D-8)

"Reference: Section 8-B and 8-M, Personnel Manual, (M1000.6 (series))

"Responsible Level: Unit

"Entry:

"19NOV99: Necessary article of the Uniform Code of Military Justice (UCMJ), and the Code of Conduct explained this date as required by sections 8-B and 8-M, Personnel Manual, COMDTINST M1000.6 (series)

APPLICANT'S ALLEGATIONS

The applicant alleged that the references to Article 8-B (civil arrests and convictions) and Article 8-M (Support of Dependents) of the Personnel Manual on the page 7 created the erroneous impression in his record that he had encountered problems in these areas that required corrective counseling by the CO. The applicant stated that he has never been arrested or convicted and that he did not have dependents at the time the page 7 was entered into his record.

In addition, he argued that the page 7 is in error because it does not document the unit wide training on inappropriate personal relationships, as directed by the CO. According to the applicant, two enlisted individuals were taken to non-judicial punishment (NJP) for having an inappropriate romantic relationship. At the NJP each claimed that they were not aware of the rules. The applicant stated that the CO decided to have everyone assigned to the cutter sign a copy of a page 7 to be placed in the military record stating that he or she had been counseled on the contents of the Personnel Manual regarding personal relationships. He stated that the page 7 in his record is not the one he reviewed and signed because it does not contain his signature.

The applicant argued that the disputed page 7 made his record appear as if he was involved in an adverse event, when in fact, no such incident occurred. Therefore, his record as it appeared before the 2002 selection board was unfair and the page 7 was also the reason he was not selected for promotion to LCDR by the 2003 selection board. The applicant recognized that it is difficult to prove a negative, but stated that his officer evaluation reports [OERs] show good to excellent performance with recommendations for promotion. He stated that he received the Coast Guard Achievement Medal for his performance during the same period that the challenged entry was made. The applicant further stated as follows:

The references in the challenged form are errors. The Precept for the 2002 [LCDR] Board . . . compounds the effect of the error by emphasizing that

the requirements for selection are related to "personal example" of adherence to "honor, respect, and devotion to duty." The errors in the challenged form appear to say that [the applicant] does not conform to this standard. Moreover, the February 2004 ALCGPERSCOM message . . . reports that the Promotion Selections Boards are making decisions based on evaluation of key areas of performance, particularly: adherence to policy on interpersonal relationships . . . and personal finances . . . These are areas directly related to the erroneous entries on the challenged form.

VIEWS OF THE COAST GUARD

On January 24, 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 stated that the applicant failed to carry his burden of production and persuasion and did not show that the page 7 was improperly entered into his record. In this regard, he stated that the applicant had offered no evidence that the Coast Guard committed an error or injustice. He stated that to the contrary, the record shows that the page 7 was prepared in accordance with the governing regulation at that time. He stated that:

Commandant Instruction 1000.14A, Preparation and Submission of Administrative Remarks (CG-3307) was in effect at the time the page 7 in question was prepared. That instruction provided specific guidance for the completion of each type of Coast Guard Form 3307 entry. The [page 7] dated 19 November 1999 in the applicant's record conforms exactly to the guidance in Commandant Instruction 1000.14A. . . . According to that instruction, a member receiving the particular entry of which Applicant complains is not required to sign an acknowledgement statement . . . Had the page 7 entry been meant to document misconduct, it would have been prepared differently and would have required applicant's signature.

The JAG stated that the applicant's speculation that the selection board would not know the true intent of the form and infer that it was placed in the applicant's record because of suspected misconduct is not supported by the evidence and is contrary to the presumption of regularity afforded the Coast Guard. He stated that selection boards are instructed in their precept to confine themselves to matters of record and not to act on hearsay or rumor. "It would be completely inappropriate for the Board to assume that the presence in Applicant's record of a page 7 documenting unit-wide training and prepared in accordance with governing instructions was

erroneously interpreted by two promotions boards as evidence of the applicant's misconduct."

The JAG stated that the following evidence in the applicant's record may have led the two selections boards to properly decide that the applicant was not among those "best qualified" for promotion to LCDR:

Prior to the 2003 [LCDR] board, the applicant received three [OERs], each covering a one-year period for service as Engineer Officer aboard [a Coast Guard cutter]. There is a decline in several performance dimensions from the first evaluation of the tour and the second. The same commanding officer served as reporting officer for both evaluations. The third evaluation on [the cutter] shows improvement in some areas, but declines in three performance dimensions (Evaluations, Judgment, and Health and Well being) . . .

An additional, and most significant, area of the officer evaluation is block nine. In this block, the reporting officer compares the individual evaluated with all the other officers of that grade they have known in their career. Applicant's marks in block nine shifted downward from a mark of excellent performer to a mark of good performer between his first and second evaluation aboard [the cutter]. This downward shift came late in Applicant's service as a [LT], and Applicant remained at the lower number, even with a new [CO] in the applicant's third year as Engineer Officer.

With a stated opportunity selection of 88% during both the 2002 and 2003 lieutenant commander selection boards, there was a requirement to not select 93 and 127 candidates respectively. Although the deliberations of a selection board are confidential and the exact reason(s) Applicant was not selected each year are known only by the members, Applicant's downward trend in marks and the overall comparison scale decrease to good performer as documented by two reporting officers provide a much more rational explanation for Applicant's failures to select than Applicant's assertion that they were caused solely by a properly prepared page 7 documenting unit training.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 27, 2005, the BCMR sent the applicant a copy of the views of the Coast Guard, to which he responded on February 28, 2005. The applicant did not agree with the advisory opinion.

The applicant acknowledged that on the surface, the page 7 appears to have been properly prepared, but he continued to argue that its content is erroneous due to incorrect references to sections of the Personnel Manual and UCMJ that were allegedly explained to the applicant. He stated that the Coast Guard ignored the applicant's sworn statement that the subject of the unit training was inappropriate relationships not civil convictions and non-support of dependents. The applicant pointed out that his affidavit is the only testimonial evidence in the case.

With respect to his allegation that the page 7 was not inserted into everyone's record as directed by the CO, the applicant stated that the Coast Guard has access to these records and could have checked them to determine whether they contained the same page 7. Since no such evidence was submitted the reasonable conclusion is that the Coast Guard cannot refute the applicant's statement in this regard, and the Board is free to draw reasonable inferences from the evidence submitted.

The applicant argued that the error in the content of the page 7 occurred because it was taken verbatim from the example provided for preparing page 7's in COMDTINST 1000.14A, without making the necessary modifications to reflect the direction of the CO.

The applicant asserted that the page 7's inference that his conduct required the CO to explain to him the unacceptability of "Civil Arrest and Conviction" and failure of "Support of Dependents" is certainly shocking to any reasonable sense of justice. He stated that the errors, which created the injustice, merit correction.

With respect to the request for removal of his failures of selection, the applicant stated that under *United States v. Engels*, 678 F.2d 173 (Ct. Cl. 1982), it need not be proven 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.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

From February 2, 1997 to the present, the Personnel Manual contained a discussion of the Code of Conduct and the UCMJ under Article 8-A, a discussion of civil arrest and conviction under Article 8-B, and a discussion of support of dependents under Article 8-M. Prior to February 2, 1997, Article 8-B discussed the UCMJ and Article 8-M discussed Code of Conduct for Member of the United States Armed Forces.

Provisions in Effect in 1997 and Forward

Article 8.A.4.a. states that the Code of Conduct for members of the United States Armed Forces shall be explained to each member upon entry into active duty.

Article 8.A.4.b. states that Article 137 (UCMJ) and sexual and homosexual conduct policies shall be explained upon entry onto active duty and again after the member has completed six months of active duty, and periodically thereafter, including upon reenlistment. It further provides that for Article 137 briefings only, an entry will be made on a page 7 in the member's Personnel Data Record.

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 under *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 "tolls the BCMR's limitations period during a servicemember's period of active duty").

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. By virtue of the CO's signature, the page 7 appears to have been properly placed in the applicant's record to document unit wide training on a particular issue. The dispute is whether the contents of the disputed page 7 accurately reflect the unit wide training as directed by the CO.

4. The applicant's statement alone, albeit sworn, does not persuade the Board that the page 7 should be removed from the applicant's record because it does not reflect training on inappropriate romantic relationships as allegedly directed by the CO. Even if the CO had directed that page 7s documenting training on inappropriate relationships be placed in the records of all members of the unit, such would not establish that he did not authorize the disputed page 7 be placed in records to document training on the UCMJ and Code of Conduct. The training documented by the entry -- Code of Conduct and UCMJ training -- is permissible under the Personnel Manual and training on the subject matter is required. However, the page 7 contains an inconsistency because it references Articles of the Personnel Manual that do not discuss Code of Conduct and UCMJ training.

5. The body of the page 7 states that the "necessary articles of the Uniform Code of Military Justice . . . and the Code of Conduct explained this date as required by sections 8-B and 8-M, Personnel Manual . . ." However, under the Personnel Manual as it existed on November 19, 1999, Article 8-B discusses civil arrest and convictions and Article 8-M discusses support for dependents. Article 8-A discusses the UCMJ and Code of Conduct training. So, it is clear that the page 7 references to Article 8-B and Article 8-M of the Personnel Manual are not correct.

6. The correct reference for the training documented by the page 7 is Article 8-A of the Personnel Manual, which discusses the Code of Conduct and the UCMJ training. Specifically, Article 8.A.4.b. reads as follows:

Both Article 137 and sexual and homosexual conduct policies shall be explained again after the member has completed six months of active duty, and periodically thereafter, including upon reenlistment. For Article 137 [UCMJ] briefings only, an entry will be made on an Administrative Remarks Sheet, CG-307, in the members Personal Data Record.

7. Prior to February 3, 1997, Article 8-B and 8-M of the Personnel Manual referenced the Code of Conduct and the UCMJ. However on February 3, 1997, Change 26 to the Personnel Manual revised Article 8, and the discussion about the UCMJ and Code of Conduct training were relocated to Article 8-A from Article 8-B and 8-M; and the content dealing with civil arrests and convictions was moved to Article 8-B from Article 8-C, and the content dealing with support of dependents was moved from Article 8-G to 8-M.

8. The Coast Guard argued that the page 7 was prepared as required by COMDTINST 1000.14A (Preparation and Submission of Administrative Remarks). However, the Coast Guard seemingly relied on a sample page 7 entry documenting Code of Conduct and UCMJ unit training contained in Enclosure (5) to the instruction as issued on April 17, 1995. Apparently, COMDTINST 1000.14A was issued before Change 26 to the Personnel Manual and was not updated until April 27, 2000. The current version of this instruction revised the sample Page 7 to show Article 8.A. as the reference for documenting unit wide training on the UCMJ and the Code of Conduct.

9. In light of the above, the page 7 contains a minor error by referencing Articles 8-B and Article 8-M of the Personnel Manual. Therefore, the question is whether the applicant was prejudiced before the 2002 and 2003 LCDR selection boards by this error. To resolve this issue, the Board must apply the test set out in *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982). In *Engels* the Court of Claims held that, if the Board finds that an officer's record contained an error when it was reviewed by a selection board, the Board should decide whether the officer's failure of selection for promotion should be removed by answering two questions: "First, was [the applicant's] 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 [the applicant] would have been promoted in any event?"

10. The Board finds that the applicant's record did not appear worse than it would have in the absence of the error. Therefore the applicant suffered no prejudice when his record was reviewed by the 2002 and 2003 selections boards. In this regard, the explanation for the training documented by the page 7 would have been the same; however the reference would have been to Article 8-A rather than 8-B and 8-M. The point is that the page 7 reflects that the unit, including the applicant, received training on the UCMJ and the Code of Conduct on November 19, 1999. Civil arrest, conviction, and support of dependents is not discussed anywhere in the explanation of the page 7. As the Coast Guard stated, if the applicant had received personal counseling in these areas, he would have been required to acknowledge the page 7 with his signature. His signature was not required on the disputed page 7 because it was a unit wide training entry. In addition, the Board notes that the reference line on the page 7 does not state the words "arrest and civil convictions" or "support of dependents". It merely references "Section 8-B and 8-M, Personnel Manual."

11. Documenting unit wide training on page 7s occurs frequently in the Coast Guard. Certainly, if the applicant had required personal counseling on civil arrest and convictions and/or support of dependents, it would have been reflected in the marks and comments on his OERs, which it is not. The applicant's OERs reflect average to above average performance, with recommendations for promotion. Accordingly, the Board finds that the applicant's record did not appear worse than it would have in the absence of the error and that he suffered no prejudice before the 2002 and 2003 selection boards. The Board's finding in this regard is supported by the fact that the applicant was selected for promotion to LCDR in 2004 with the page 7 in his record.

12. Since the Board has determined that the error on the page 7 is of a minor and harmless nature, no corrective action will be ordered. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of _____, for correction of his military record is denied.

William R. Kraus

Dorothy J. Ulmer

George A. Weller