

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-060

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 Chair docketed the case on December 29, 2006, upon receipt of the completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 4, 2007, is approved and 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 record "by (1) expunging any and all documentation referring to the removal of his name from the PY05 [lieutenant commander (LCDR)] promotion list; and (2) promoting him pursuant to his selection by the PY05 promotion board retroactive to his original promotion date. The board should also grant such other and further relief as may in the circumstances be just and proper."

SUMMARY OF THE RECORD

The applicant received his commission as an ensign on May 24, 1995. He received very high performance marks as an ensign (primarily marks of 5 and 6 on a scale of 1 to 7, with 7 being best) and was promoted to lieutenant junior grade on November 24, 1996. He received exceptionally high marks as a lieutenant junior grade (primarily marks of 6 and 7) and was repeatedly recommended for accelerated promotion on his officer evaluation reports (OERs). He was promoted to lieutenant on November 24, 1999. As a lieutenant, the applicant continued to receive excellent marks (primarily marks of 5 and 6) in the various performance categories in his OERs, as well as his reporting officers' "highest recommendation" for promotion.

In the summer of 2004, the applicant began serving as the supervisor of a Marine Safety Team geographically removed from the parent Marine Safety Office. He supervised xx petty officers. Also in the summer of 2004, his name was included on the list of those selected by the

PY 2005 LCDR selection board for promotion to LCDR, which list was subsequently approved by the President and confirmed by the Senate.¹

On January 28, 2005, a preliminary investigation officer (PIO) issued a report of his investigation into the circumstances of the applicant's computer use. The unauthorized use had been detected by an Electronic Systems Support Unit, which provided a User Activity Log for the period November 5, 2004, through January 5, 2005. The PIO reported the following facts, which the applicant forthrightly admitted:

- On thirteen dates between November 5, 2004, and January 5, 2005, during working hours, the applicant connected his personal computer to the Coast Guard Data Network at various times to access various internet websites.
- At 10:32 a.m. on Tuesday, January 4, 2005, the applicant used his Coast Guard workstation computer to access for less than a minute a pornographic website that he had heard about on a radio program.
- During working hours on January 4 and 5, 2005, the applicant connected his personal computer to the Coast Guard Data Network "and accessed nine pornographic websites and streaming media (radio) on the internet." The applicant stated that he had switched from using his workstation computer to his personal computer to try to avoid detection.

The PIO opined that the applicant had violated Article 92 of the UCMJ by failing to obey an order or regulation and Article 133 by committing conduct unbecoming an officer and gentleman. He stated that the applicant was forthright and regretful and realized "the stupidity of his actions." The PIO recommended that the "case be disposed of at mast." He noted that enlisted members who had committed similar offenses had been awarded non-judicial punishment (NJP) "with fines and ranks suspended for 6 months."

On February 10, 2005, the applicant was taken to mast and awarded the following Punitive Letter of Admonition as NJP:

1. Per references ..., you are hereby admonished for your conduct at Marine Safety Team ... from 5 Nov 2004 until 5 Jan 2005. I have found that your conduct violated Article 133 of the Uniform Code of Military Justice.
2. Your conduct, as described in [the report of the investigation], constitutes conduct unbecoming an officer and gentleman. Specifically, you hooked an unauthorized computer on to the CG Data Network and viewed sexually explicit material using the CG Data Network. You exercised poor judgment and your actions were contrary to the Coast Guard Core Values of Honor, Respect, and Devotion to Duty. I will not tolerate this conduct.

¹ 14 U.S.C. § 271 states that "(a) [w]hen the report of a [selection] board convened to recommend officers for promotion has been approved by the President, the Secretary shall place the names of all officers selected and approved on a list of selectees in the order of their seniority on the active duty promotion list. ... (b) Officers on the list of selectees may be promoted by appointment in the next higher grade to fill vacancies in the authorized active duty strength of the grade as determined under section 42 of this title ... (e) Appointments of regular officers under this section shall be made by the President, by and with the advice and consent of the Senate except that advice and consent is not required for appointments under this section in the grade of lieutenant (junior grade) or lieutenant. ...". The regulations corresponding to these statutes appear in Article 5.A.4.g. of the Personnel Manual.

3. Your misconduct distracted personnel from the xxxxxxxxxxxxxxxxxxxxxxxx, Marine Safety Office ..., and Marine Safety Team ..., and consumed valuable time and resources that should have been used to effectively accomplish our missions. Any further misconduct on you part will be dealt with severely.

4. You are advised of your right to appeal to RADM ..., Commander Xxx Coast Guard District, in accordance with Section 1.F. of [the Military Justice Manual].

The applicant was removed from the Marine Safety Team and did not appeal the NJP.

On April 18, 2005, CGPC validated a special OER (SOER) prepared by the applicant's rating chain in accordance with Article 10.A.3.c.1.(a) of the Personnel Manual to document performance "notably different [from] previous period and loss of command confidence." The rating chain included the executive officer of the MSO as the supervisor; the commanding officer (CO) of the MSO as reporting officer; and the Commander of the Xxx District Marine Safety Division as the reviewer. The SOER noted that the applicant had been awarded NJP and removed from his primary duty on February 10, 2005. The Punitive Letter of Admonition was attached to the SOER. In the SOER, the applicant received marks of 2 for "Judgment" and "Workplace Climate"; marks of 3 for "Results/Effectiveness," "Responsibility," and "Professional Presence"; and a mark in third spot on the comparison scale, which means that, in comparison with other lieutenants, the reporting officer rated the applicant as a "fair performer." The other performance marks on the SOER are mostly 5s and there are many positive comments, but the executive officer and CO supported the low marks with the following comments:

... Improper usage of CG computers resulted in NJP/relief, caused extra work/disruption for team/command: to divert scarce qualified individuals fm unit's departments to fill the Supervisory billet, to cover the extensive inspection load, to counsel impacted team members, etc. ...

... By choosing to view sexually explicit sites at work, did not consider long/short impacts of his personal decisions on unit/crew/self or that such actions are juxtaposed [sic] to intent of CG human resource policies and Core Values. ...

Despite institutionalized warnings, very poor personal decisions led to NJP & relief as Tm Leader, but [the applicant] readily took full responsibility for his actions. ...

... Personal judgment lapse led to NJP: for "streaming" utilizing CG computer/work time; accessing sexually explicit web sites; & hooking personal computer to CG network, a possible security threat. Took responsibility for actions when questioned & had not involved/exposed crew to personal actions. ...

... NJP/relief as Team Leader drove his personal decisions and the long range impact of those decisions on others, home. Due to strong past performance & obvious lessons learned during NJP proceedings, recommend [the applicant] selection to LCDR be given favorable consideration for promotion. [He] has been temporarily reassigned to xxm where he should be able to clearly demonstrate his continued worth to the CG. Recommended for future promotion with peers.

The reviewer attached the following extra comments to the SOER:

[The applicant] has been TAD to XX(m) as the result of NJP. Member is very productive and has demonstrated superb initiative by coordinating the Compliance Branch's input to the XX(d) morning brief, is the property and record administrator, and has involved himself with every aspect of day to day Marine Safety functions. Member is highly motivated and is remorseful for his lapse in

personal judgment that led him to NJP. I recommend that member be promoted to Lieutenant Commander as previously scheduled.

Because the SOER was derogatory, the applicant was entitled to attach an addendum of comments concerning his conduct. He wrote the following:

I am aware of the performance report and know that I displayed poor judgment during this marking period. Understandably this mistake has brought down my marks significantly during this period but I am confident in my abilities to recover from this, learn from my mistakes and show the Coast Guard the high performing officer I've been in the past. I would also like to clarify the statement in the attached Letter of Admonition "viewed sexually explicit material using the CG Data Network" were specifically on the dates of 04JAN05 and 05JAN05. I have been counseled on the contents of Article 10.A.4.h. of the Coast Guard Personnel Manual.

His rating chain's endorsement to the SOER addendum states that the investigation indicated that the applicant "hooked an unauthorized personal computer on to the CG Data Network at various times from 5 November 2004, until 5 January 2005; utilized streaming media and 'chat' rooms at various times from 8 December until 26 December 2004; and viewed sexually explicit material using the CG Data Network on 4 and 5 January 2005. The viewing time for the sexually explicit material using the CG Data Network was approximately 34 minutes."

On April 28, 2005, CGPC informed the applicant that a special board would be convened to recommend whether his name should be removed from the promotion list because information had been received that cast doubt on his qualification for promotion. CGPC advised him that he could submit written comments on his own behalf within 21 days of receiving the notification.

On May 4, 2005, the applicant submitted the following statement to the special board:

1. Thank you for allowing me the opportunity to address the special board that has convened to determine whether I should remain on the Lieutenant Commander promotion list. I understand and appreciate that you must ultimately decide what is best for the Coast Guard. Regardless of your decision, I shall continue to perform and contribute to the best of abilities. That said, I respectfully request you allow me to remain on the promotion list.

2. First and foremost, I take full responsibility for my actions and I make no excuse for my behavior. I understand that my actions were not consistent with our core values and the behavior expected of a Coast Guard officer. I have tarnished my reputation, adversely impacted my career, and embarrassed my family. I am so sorry for the burden I have placed upon my co-workers, superiors and the Coast Guard. I know by connecting my personal laptop to the Coast Guard server to listen to the radio, I created a potential security risk. I also understand that accessing inappropriate web sites is against Coast Guard policy, completely inappropriate and downright stupid. Again, I make no excuse for my lapse of judgment.

3. As you review my record, I hope you see this incident is clearly an aberration. I have worked extremely hard over the last 10 years, establishing a reputation as a high performing officer. I have always been one who is willing to take calculated risks, shoulder additional responsibilities, and assume leadership roles. It is this performance and potential that led to my selection for LCDR. I know this incident has rightfully brought doubt to that selection. However, I assure you I am still that high performing officer today. This incident has not changed that nor has it lessened my commitment to the Coast Guard. I have been extremely pro-active as a member of the Xxx District Marine Safety staff since arriving here three months ago. I have volunteered to take on numerous projects and have consistently provided great results while maintaining a positive attitude and displaying a strong work ethic. I have received orders to take over the coordination of

the Incident Command System (ICS) program for Atlantic Area and am looking forward to showing the true high performing officer I am. The LCDR promotion board recognized that potential. I have so much to offer the Coast Guard. Please allow me the opportunity to prove it.

4. This incident has made me more knowledgeable and helped me to better understand my shortcomings, all of which has helped me become a better person. I know that I am far from perfect, and am keenly aware that a temporary lapse in judgment can change your life in a second. With that, I believe a true sense of a person's character is not in the mistakes a person makes in life but how one responds to and learns from those mistakes. I can honestly say that I have become a better officer and person having gone through this and will do whatever it takes to prevent others from making the same mistake. If I can serve as an example to others and reiterate to them the consequences of not following the rules, it will somehow make my mistake worthwhile.

5. Thank you for this opportunity to communicate to you directly. Again, I am so sorry for what I did and I sincerely hope that you consider everything I've done throughout my ten-year career as well as my future potential to the organization.

On May 9, 2005, the CO of the Marine Safety Office endorsed the applicant's statement to the special board and recommended "favorable consideration to retain [him] on the LCDR promotion list." The CO wrote that the applicant's "abilities and 'can do spirit' to his credit have not faltered since his NJP was conducted. He went to District and fully engaged right off which is not the path that many take after such a significant event. I believe he has fully accepted his actions, learned fully from the consequences and will be a stronger officer for the experience."

Commander, Xxx District Marine Safety Division also endorsed the applicant's statement to the special board and "highly recommend[ed] favorable consideration to retain [him] on the Lieutenant Commander promotion list." He wrote that during his three months serving on the Commander's staff, the applicant "has proven to be an exemplary officer, highly intelligent and has become one of the most productive members on staff. I completely trust [the applicant] and hold him in high regard. I can say with certainty and with nearly 30 years of Coast Guard experience, that the Coast Guard is a much better organization having [the applicant] within its officer ranks. If I were able to pick my own staff, [he] would be my first choice."

On a concurrent OER covering the applicant's service from February 11 through May 31, 2005, the applicant received very high marks of 5 and 6 in the various performance categories and a mark in the fifth spot, denoting an "excellent performer," on the comparison scale. His reporting officer highly recommended him for promotion. Because the applicant's name was still on the list of selectees from 2004, his record was not reviewed by the LCDR selection board that convened in the summer of 2005.

On June 7, 2005, a special board of three commanders convened at CGPC to consider whether the applicant should be removed from the list of selectees for promotion to LCDR and issued the following recommendation:

It is the unanimous recommendation of the Board that [the applicant's] name should remain on the PY 2005 list of selectees for promotion to lieutenant commander. The reason for this recommendation is as follows:

[The applicant] showed an egregious lapse in judgment and absolute disregard for the [Commandant's] core values when he used the Coast Guard network to view sexually explicit materials, and used unauthorized websites over a two-month period. However, his exceptional past performance

coupled with his genuine remorse and ownership of his mistakes, leads the Board to recommend that he remain on the PY05 promotion list. We feel he will be of continued value to the Coast Guard at the O-4 level.

The special board's report notes that the applicant's May 4, 2005, statement was considered, along with his personnel data record, his notification and acknowledgement of the special board, and the board's precept, but the report appends only the precepts as Appendix "A" and does not expressly append the applicant's statement or any of the other considered documents.

Commander, CGPC forwarded the report of the special board to the Commandant via the Assistant Commandant for Human Resources. Commander, CGPC stated in his "first endorsement" that he disagreed with the findings of the special board. He noted that connecting a personal computer to the Coast Guard's data network "is a prohibited action in itself" and that the applicant was attempting to avoid detection by using his personal computer. He stated that the applicant had significant responsibilities as the supervisor of an independent duty station and that his conduct required his removal. He also stated the following:

Selection to the grade of lieutenant commander is an important milestone in an officer's career. By selection to lieutenant commander, you transition to positions of greater responsibility and leadership and you are guaranteed, with satisfactory performance, to stay in the Service and collect a retirement regardless of future promotions. Given these important considerations, LCDR Selection Boards are very competitive and if this material had been presented to a LCDR Selection Board, it is my opinion that he would not have been selected for promotion.

The Assistant Commandant for Human Resources forwarded the report of the special board to the Commandant and wrote a short "second endorsement" on the first endorsement, in which he stated that he disagreed with the recommendation of the special board as "[t]his is unacceptable conduct for an officer expected to assume more senior leadership positions."

On August 1, 2005, the Commandant forwarded the report of the special board to the Secretary and added a "third endorsement" in which he "recommend[ed] you disagree with the recommendation of the Board and remove [the applicant's] name from the PY05 list of selectees for promotion to lieutenant commander."

On October 25, 2005, the applicant was informed that his promotion to LCDR, which was scheduled for November 1, 2005, would be delayed pursuant to Article 5.A.13. of the Personnel Manual based upon the "special board action" initiated on April 28, 2005.²

On December 9, 2005, acting on behalf of the President, the Secretary signed a "fourth endorsement" in which he "removed [the applicant] from the PY05 list of selectees for promotion to lieutenant commander" pursuant to 10 U.S.C. § 272. This endorsement states that the

² 14 U.S.C. § 271(f) states the "promotion of an officer who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed without prejudice by the Secretary until completion of the investigation or proceedings. However, unless the Secretary determines that a further delay is necessary in the public interest, a promotion may not be delayed under this subsection for more than one year after the date the officer would otherwise have been promoted. An officer whose promotion is delayed under this subsection and who is subsequently promoted shall be given the date of rank and position on the active duty promotion list in the grade to which promoted that he would have held had his promotion not been so delayed."

“proceedings, findings, and recommendation of the Board are noted.” The removal constituted the applicant’s first failure of selection for promotion to LCDR.³

On his regular OER for the period February 11, 2005, through March 31, 2006, the applicant received exceptionally high marks of 6 and 7 in the various performance categories and a mark as an “excellent performer” on the comparison scale. His reporting officer wrote that the applicant was an outstanding officer who “has my highest recommendation for promotion to O-4 w/ best of peers.” His reviewer also added a page of comments strongly recommending the applicant for promotion.

On March 27, 2006, CGPC notified the applicant of his removal from the promotion list as follows:

1. On 07 June 2005, a Coast Guard board was convened under the provision of [10 U.S.C. § 272 and Article 5.A.13.f. of the Personnel Manual] to recommend to the President whether your name should be removed from the list of selectees for promotion to the grade of lieutenant commander. On 09 December 2005, the Secretary of Department of Homeland Security, acting for the President, approved the recommendation that your name be removed from the 2005 lieutenant commander selection list. A copy of the Board report is provided.
2. You will go before the Promotion Year 2007 Lieutenant Commander Selection Board. If not selected, you will be considered as having twice failed of selection for promotion.

The applicant failed of selection a second time when his record was reviewed by the LCDR selection board that convened in August 2006, and so he was separated on June 30, 2007, in accordance with 14 U.S.C. § 283,⁴ having completed more than twelve years of active duty.

APPLICANT’S ALLEGATIONS

The applicant stated that when interviewed by the PIO he immediately and honestly admitted to his misuse of the Coast Guard Data Network. He stated that he had connected his personal computer to the Data Network to access streaming media (radio) and nine sexually explicit websites. He visited the sexually explicit websites on two occasions—January 4 and 5, 2005—for a total of about 34 minutes.

The applicant pointed out that in the SOER he received as the supervisor of the Marine Safety Team, his rating chain had recommended his retention on the promotion list in the SOER. In addition, when forwarding his May 4, 2005, statement to the special board, his new commanding officer also “highly recommend[ed]” that he be retained on the promotion list, and the special board unanimously recommended his retention despite his “egregious lapse in judgment.”

³ 14 U.S.C. § 262(a) states that an officer “fails of selection if he is not selected for promotion by the selection board which considered him, or if having been recommended for promotion by the board, his name is thereafter removed from the report of the board by the President.”

⁴ 14 U.S.C. § 283 states that active duty lieutenants who twice fail of selection for promotion to LCDR will be “honorably discharged on June 30 of the promotion year in which his second failure of selection occurs” unless they request an earlier separation date or unless they have accrued 18 years of active duty.

The applicant complained that despite these strong recommendations in his favor, the Commandant recommended to the Secretary, without explanation, that he disapprove the recommendation of the special board, and the Secretary removed the applicant's name from the promotion list without any explanation. Therefore, the applicant argued, the Secretary's removal of his name from the promotion list "was arbitrary, capricious, and an abuse of discretion." He argued that he should not have been denied promotion based on "an isolated lapse of judgment" that is inconsistent with his "stellar 11-year record" as an excellent performer.

The applicant noted that Commander, CGPC, argued for his removal from the list based upon his opinion that the applicant would not have been selected for promotion had the Punitive Letter of Admonition and the SOER been in his record when it was reviewed by the LCDR selection board. However, he argued, the special board that recommended his retention on the promotion list was convened under the same guidelines provided for selection boards. The applicant argued that although a special board's recommendation is not binding on the Secretary, it is "entitled to deference. Otherwise, the process is pro forma and serves no useful purpose." However, the Coast Guard treated the special board "as a perfunctory exercise."

The applicant also alleged that language in the March 27, 2006, letter notifying him of the Secretary's action shows that the Secretary was unaware of the special board's actual recommendation when he removed the applicant from the promotion list. He pointed out that the letter notes the fact that the special board had convened to make a recommendation regarding his retention on the list and then immediately states that the Secretary had "approved the recommendation that your name be removed from the ... list." The applicant argued that this language indicates that the Secretary removed the applicant's name from the promotion list contrary to the recommendation of the special board without actually seeing the special board's recommendation. He also argued that the Secretary acted without an articulated rationale and so his removal from the promotion list must be considered "arbitrary, capricious, and an abuse of discretion."

VIEWS OF THE COAST GUARD

On June 7, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. The JAG adopted the facts and analysis of the case provided in a memorandum prepared by CGPC.

CGPC stated that the special board was convened in accordance with regulations and that the "forwarding endorsements on the special board report clearly articulated the rationale behind providing a counter recommendation to that of the special board of officers." CGPC alleged that the "Secretary made his decision in the light of day with the express knowledge that the Commandant's recommendation was counter to that of the special board" and "exercised his discretion appropriately."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 12, 2007, the Chair sent the applicant copies of views of the Coast Guard and invited him to respond within 30 days. The applicant requested and was granted an extension of the time to respond and responded on August 15, 2007.

The applicant submitted copies of an email exchange with the JAG's Office of Military Justice. In response to an email from the applicant dated July 11, 2007, asking whether his statement to the special board and the positive endorsements from his superior officers were reviewed by the Secretary, the Office of Military Justice replied that "[i]t is not the practice to send to the Secretary a member's correspondence submitted pursuant to PERSMAN Ch. 5.A.13.f.4. to a special board convened to consider removal of an officer from a promotion list. All records indicate that the Coast Guard followed this practice in [the applicant's] case and his 04 May 2005 communication to the Special Board was not provided to the Secretary."

The applicant argued that under *Law v. United States*, 11 F.3d 1061 (Fed. Cir. 1993), Title 14 of the United States Code "does not impose procedural constraints on the President's power to remove names from a Coast Guard promotion list. Nor does Article 5.A.13.f. of the Personnel Manual require in so many words that a respondent's submission in a Show Cause Board case be supplied to the final decision maker." The applicant argued, however, that "in keeping with [the BCMR's] broad remedial power under 10 U.S.C. § 1552," the BCMR must determine "whether it is fair and equitable for such a submission (or the chain of command's endorsements to it) not to be among the papers considered by the decision maker at the end of the promotion list removal process." The applicant argued that the BCMR should set aside the removal of his name from the promotion list because it was unfair for CGPC to forward its recommendation without also forwarding his statement and the attached recommendations from his superiors.

APPLICABLE LAW

Article 5.A.13.f. of the Personnel Manual provides the following procedures for delaying the promotion of an officer whose name is on a list of selectees:

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 has disqualified him 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 of 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 acknowledgment 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. To receive an acknowledgement, the officer should submit a completed, self-addressed Acknowledgement/Referral Card, CG-4217, with the letter.

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 cancelled. [Emphases added.]

Title 14 U.S.C. § 272 states the following regarding the removal of an officer from a list of selectees for promotion:

(a) The President may remove the name of any officer from a list of selectees established under section 271 of this title.

(b) If the Senate does not consent to the appointment of an officer whose name is on a list of selectees established under section 271 of this title, that officer's name shall be removed from this list.

(c) An officer whose name is removed from a list under subsection (a) or (b) continues to be eligible for consideration for promotion. If he is selected for promotion by the next selection board and promoted, he shall be given the date of rank and position on the active duty promotion list in the grade to which promoted that he would have held if his name had not been removed. However, if the officer is not selected by the next selection board or if his name is again removed from the list of selectees, he shall be considered for all purposes as having twice failed of selection for promotion.

Article 5.A.4.h. of the Personnel Manual provides the following regarding the removal of an officer from a list of selectees for promotion:

1. The President may remove any officer from a list of selectees established under Article 5.A.4.g.

2. If the Senate does not consent to appoint an officer whose name is on a list of selectees established under Article 5.A.4.g., that officer's name shall be removed from this list.

3. An officer whose name is removed from a list under these subparagraphs remains eligible for consideration for promotion. If promoted as a result of selection by the next selection board, he or she holds the date of rank and position on the ADPL in the grade to which promoted which he she would have held if his or her name had not been removed. However, if the next selection board does not select the officer or if his or her name again is removed from the list of selectees, the officer shall be considered for all purposes as having twice failed of selection for promotion (14 U.S.C. 272).

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 10 U.S.C. § 1552. The application was timely.

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.

3. Absent specific evidence to the contrary, the Board presumes that Coast Guard officers, including the applicant's CO, have acted correctly, lawfully, and in good faith in performing their duties.⁵ The applicant alleges and bears the burden of proving by a preponderance of the evidence⁶ that the Coast Guard committed an error or injustice in removing his name from the list of selectees for promotion. The applicant alleged that his removal from the list was unjust because

- a) Commander, CGPC based his negative recommendation on an assumption that the applicant would have failed of selection in 2004 had the selection board seen the SOER and the Punitive Letter of Admonition;
- b) the Secretary was not aware of the positive recommendation of the special board;
- c) the Secretary abused his discretion by removing him from the list, contrary to the special board's recommendation, without written explanation and contrary to significant evidence of the applicant's ability to perform at the grade of LCDR; and
- d) the applicant's May 4, 2005, statement to the special board, with the positive endorsements attached by his chain of command, was not forwarded to the Secretary.

4. In recommending that the Secretary remove the applicant from the promotion list, Commander, CGPC wrote near the end of his first endorsement to the report of the special board that "LCDR Selection Boards are very competitive and if this material had been presented to a LCDR Selection Board, it is my opinion that he would not have been selected for promotion." The applicant argued that this statement was improper and unfair since the special board that recommended his retention was convened under the same guidelines provided for selection boards. Although the guidelines may be similar, the functions of such boards are quite different. The applicant's special board reviewed only his records and made a recommendation about whether he should be removed from a promotion list, whereas a selection board compares the records of all eligible candidates for promotion to determine who is "best qualified." Given this functional difference, the Board finds that the applicant has not proved that Commander, CGPC's statement—which is an opinion based on significant experience if also an assumption—was inaccurate, improper, or unfair. The Board notes that in addition to making the point that the applicant would not have been selected for promotion in 2004 if the selection board had seen the SOER, Commander, CGPC's first endorsement discusses several other sound reasons for his negative recommendation.

5. The juxtaposition of the first two sentences⁷ in CGPC's letter to the applicant dated March 27, 2006, could lead an unknowing reader to believe that the special board recommended the applicant's removal from the promotion list. Unstated in CGPC's letter is the fact that the negative recommendation approved by the Secretary on December 9, 2005, was not the

⁵ 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ 33 C.F.R. § 52.24(b).

⁷ The sentences are as follows: "On 07 June 2005, a Coast Guard board was convened under the provision of [10 U.S.C. § 272 and Article 5.A.13.f. of the Personnel Manual] to recommend to the President whether your name should be removed from the list of selectees for promotion to the grade of lieutenant commander. On 09 December 2005, the Secretary of Department of Homeland Security, acting for the President, approved the recommendation that your name be removed from the 2005 lieutenant commander selection list."

special board's recommendation but the Commandant's. However, this letter was sent from CGPC to the applicant to notify him of the Secretary's decision. Presumably, the letter was neither written nor seen by the Secretary, and it cannot be considered significant evidence of what the Secretary knew when he made his decision. On the other hand, the Commandant's endorsement highlighted for the Secretary the special board's stance by recommending that the Secretary "disagree with the recommendation of the Board and remove [the applicant's] name from the PY05 list of selectees for promotion to lieutenant commander." And the Secretary's endorsement removing the applicant from the promotion list noted the "proceedings, findings, and recommendation of the Board." Therefore, the applicant has failed to prove by a preponderance of the evidence that the Secretary mistakenly believed that the special board had recommended his removal when the Secretary removed him from the promotion list.

6. The applicant alleged that the Secretary's decision to remove him "was arbitrary, capricious, and an abuse of discretion" because he acted contrary to the special board's recommendation and the endorsement the Secretary signed to remove the applicant from the promotion list did not explain his reason for doing so. However, in making his decision, the Secretary had before him not only the special board's recommendation and the Commandant's endorsement, but also the endorsements of Commander, CGPC and the Assistant Commandant for Human Relations, which provided several sound reasons for the Secretary to remove the applicant from the promotion list. Although the Secretary did not elaborate upon which of those reasons he found most compelling, his failure to do so does not render his decision arbitrary or capricious or an abuse of discretion given that there were ample reasons for removing the applicant clearly articulated in the record.

7. Under 14 U.S.C. §§ 271 and 272, which provide for the delay of the promotion of a Coast Guard officer and for his removal from a promotion list, Congress has not required that any input from the officer be presented to the final decision maker, who is the Secretary acting with delegated authority on behalf of the President. In *Law v. United States*, 11 F.3d 1061, 1067-68 (Fed. Cir. 1993), when the appellant argued that the Secretary should have received the appellant's submissions before approving his removal from a promotion list, the court held that "[a]ppellant's argument must be rejected. Section 272(a) does not impede the President's discretion, nor the Secretary's discretion when acting for the President, [citation removed] to remove a name from the promotion list. ... Congress has not imposed the procedural limitations on the President's exercise of the authority which appellant asserts. It would be outside our province to create them."

8. Nor do Coast Guard regulations require an officer's input on his possible removal from a promotion list to be presented to the Secretary. While paragraph 4 of Article 5.A.13.f. of the Personnel Manual affords the officer a right to submit a statement to the special board that will make a recommendation on his removal, paragraph 5 of that article requires the president of the special board to forward only a report of the proceedings to the Commandant, who in turn must forward to the Secretary only the special board's report and any endorsements added to the report by intermediary authorities. The JAG's office has confirmed that "[i]t is not the practice to send to the Secretary a member's correspondence submitted pursuant to PERSMAN Ch. 5.A.13.f.4. to a special board convened to consider removal of an officer from a promotion list. All records indicate that the Coast Guard followed this practice in [the applicant's] case and his 04 May 2005 communication to the Special Board was not provided to the Secretary."

9. Although the applicant's name was removed from a promotion list, the Board is not persuaded that he had a constitutional liberty or property interest in his promotion that would mandate any due process except that granted by statute or regulation.⁸ The applicant was not entitled to any more procedure than that required by Article 5.A.13.f. of the Personnel Manual. Therefore, the Board finds that the Coast Guard committed no legal error in failing to forward the applicant's statement to the Secretary. However, the Board must still consider whether the applicant's removal from the promotion list was unjust because his statement was not forwarded to the Secretary.⁹ For purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice but is not technically illegal."¹⁰ The Board has "an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief."¹¹

10. In considering this issue, the Board bears in mind that, although the report of the special board in this case recommended the officer's retention on the promotion list, in many if not most such cases an officer's own statement would be the only voice in favor of his retention, and yet the Coast Guard would not forward it to the Secretary under current regulation and practice. And even in the applicant's case, where the special board's recommendation was in his favor, the special board's positive recommendation was so brief—five sentences in all—that it barely mentions the applicant's "exceptional past performance" and makes no mention of the recommendations of his rating chain for the SOER and of his new chain of command that he be retained on the promotion list. Certainly the Board believes that the better practice would be to present an officer's statement on his own behalf along with such positive endorsements to the Commandant and the Secretary, who must make the final decision whether to remove the officer from the promotion list. All military officers should be entitled to such minimal due process particularly because removal from a promotion list constitutes a failure of selection for promotion and two such failures often require the officer to be separated from the Service,¹² as has happened to the applicant.

11. The Board notes that under 10 U.S.C. § 624(d)(3), Congress has required the Army, Navy, and Air Force to forward an officer's own statement about his possible removal from a promotion list to the Secretary as follows: "An officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to the Secretary concerned in response to the action taken. Any such statement shall be given careful consideration by the Secretary." The Army, Navy, and Air Force have each made regulations requiring an officer's statement to be presented to the Secretary concerned. Army regulations, for example, provide that "[t]he officer will be afforded a reasonable opportunity to submit com-

⁸ *Blevins v. Orr*, 721 F.2d 1419, 1421-22 (D.C. Cir. 1983) (holding that "it is clear that military promotion decisions *simpliciter* are not susceptible to due process challenges, inasmuch as there exists no property or liberty interest in a military promotion *per se*").

⁹ Under 10 U.S.C. § 1552(a), the Board should correct a military record when it "considers it necessary to correct an error or remove an injustice."

¹⁰ *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

¹¹ *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959).

¹² 14 U.S.C. §§ 262(a), 272, and 283; *see* 10 U.S.C. §§ 629(d)(2) and 632(a) for comparable statutory provisions for the Army, Navy, and Air Force.

ments on that information to the [Promotion Review Board] and the officials reviewing the recommendation”¹³ and the officer “may include the opinion and statements of third persons in his or her submission.”¹⁴ Navy regulations state that the Secretary must receive a “statement by the officer” when a promotion has been delayed so that the Secretary may consider exercising his authority to remove a Naval officer.¹⁵ In the Air Force, the officer’s written response is included in the case file,¹⁶ which is forwarded in its entirety to the Secretary of the Air Force.¹⁷

12. Although the Board believes the Coast Guard’s practice of withholding from the file forwarded to the Secretary its officers’ own statements about their possible removal from a promotion list to be unreasonable, the Board is not persuaded that the applicant’s removal from the promotion list was unjust under the circumstances. In their endorsements to the special board’s report Commander, CGPC and the Assistant Commandant for Human Resources articulated several sound reasons why an officer who had recently committed the misconduct that the investigation revealed should not receive a pending promotion. Commander, CGPC stressed not only the applicant’s short lapse in judgment in viewing pornography over the Coast Guard Data Network, but his long-term attempt to avoid detection of his misuse of the network by connecting his personal computer to it, which was also contrary to regulation. The Board notes that according to the officer who investigated the applicant’s misconduct, enlisted members who had committed similar offenses had been awarded NJP “with fines and ranks suspended for 6 months.”

13. Accordingly, the applicant’s request should be denied because he has not proved by a preponderance of the evidence that his removal from the promotion list was erroneous or unjust.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹³ Army Regulation 600-8-29, Chap. 8-6.

¹⁴ Army Regulation 600-8-29, Chap. 8-7.c.

¹⁵ SECNAVINST 1420.1A, para. 23.b.(2)(b).

¹⁶ Air Force Instruction 36-2501, para. 5.7.1.6.

¹⁷ Air Force Instruction 36-2501, para. 5.7.3.5., 5.7.4., and 5.7.6.

ORDER

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

October 4, 2007
Date

Toby Bishop

Patrick B. Kernan

Dorothy J. Ulmer