

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-074

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the completed application on February 18, 2012, 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 September 27, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a chief petty officer on active duty, asked the Board to remove from his record an Administrative Remarks form CG-3307 ("Page 7")¹ dated September 19, 2003. He alleged that the Page 7 was entered in his record "out of spite due to a tumultuous command relationship and the fact that I had reported the BMC [X's] failures as an Officer in Charge to the Silver Badge at the Group, Senior Chief [X]." The applicant stated that there was a personality conflict between him and the OIC of his unit that created a hostile work environment. He explained that the OIC retaliated against him when the applicant "went outside of his Command and reported problems we were having at the unit. If you review his PDR you will be able to confirm the issues I am referring to."

The applicant stated that the disputed Page 7 is "completely false and has cost me many promotions and advancements." Although he himself "did not handle the situation as professionally as possible," he is not guilty of any of the misconduct listed on the Page 7. In fact, the applicant alleged, the allegations of misconduct on the disputed Page 7 were investigated and dismissed because they had no merit. Therefore, he was not subject to any disciplinary action. However, the OIC had the authority to enter the Page 7 in his record despite the findings of the

¹ Chapter 10.A. of the Pay and Personnel Procedures Manual in effect in 2003 states that the CG-3307 "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."

investigation. He alleged that his OIC “acted immaturely and unprofessionally exercising any avenues possible to stain my career.”

The applicant alleged that he discovered the Page 7 in April 2008 and that it was submitted in 2003 without his knowledge. Regarding a handwritten notation on the Page 7 stating that he had refused to sign it, the applicant wrote that he “had never signed it because I had not seen it until I requested a copy of my [record] in 2008 when I was first applying for Chief Warrant Officer”—an appointment he has not received.

As evidence of the inaccuracy of the Page 7, the applicant pointed to the impeccable quality of his career during the ten years before and ten years after the Page 7 was prepared. He noted that he has received many of the highest possible marks of 7 on his Enlisted Employee Reviews (EERs) and has not received any other negative Page 7s or other negative entries. In addition, he has been constantly driving himself to increase his education to better serve the country and his family.

Regarding the timing of his application, the applicant stated that since he discovered the disputed Page 7 in April 2008, he has twice tried to have it removed through his chain of command to no avail. He only recently learned that it could be removed through the BCMR.

SUMMARY OF THE RECORD

The disputed Page 7, dated September 19, 2003, contains the following statements as well as a handwritten note by the OIC of the applicant’s station at the bottom claiming that the applicant had refused to sign it:

[The applicant] was counseled concerning his performance as the Engineering Petty Officer, his poor decision making and keeping the command informed. On or about 05 September, [he] let the air out of a crewmember’s car tires after finding paint dust on his motorcycle. This was done in anger and retaliation.

[The applicant] had on occasion kept a handgun in his tool box that was kept in the EPO office. This is in direct violation of Station Standing Order #14. [He] was told at no time is a personal fire arm allowed on the unit without prior authorization from the Officer in Charge. As the EPO, he is required to know and enforce unit regulations. He was counseled on his poor judgment and decision making.

[The applicant] did, without prior consent or knowledge from the OIC or XPO, install cable TV hookup to the EPO office. Cable wire was routed on the outside of the station grounds and through the Engineering building. In doing so, holes were drilled in the walls of the building and routed to his office.

[The applicant] was counseled on his leadership skills. Members of the engineering department came to the command stating that the department was frustrated with working for the EPO. They felt they could not go to him for assistance for fear of being yelled at. [The applicant] was counseled on better leadership skills and better ways to lead his personnel. During the month of September 2002, [he] attended the Leadership and Management School.

Aside from the disputed Page 7, the applicant’s record contains numerous positive Page 7s documenting high marks in his EERs and other laudable service. His performance evalua-

tions show that on his five EERs as an MK2, the applicant received primarily marks of 5 and 6 and a few 7s in the numerous performance categories. On his thirteen EERs as an MK1, he initially received primarily marks of 5 and 6 and gradually improved to primarily marks of 6 with many marks of 7 too. Generally, his marks in the Performance categories have been higher on average than those in the Professionalism categories, which have been higher on average than those in the Leadership categories. On his EER for the half-year ending on November 30, 2003, however, which was his second as an MK1, the applicant received mostly marks of 4 and 5 with only two marks of 6 and a mark of “not recommended for advancement.” The written comments for this EER state the following:

Member is developing his leadership abilities and correcting actions that were non-productive or did not promote sound judgment. Member has assumed the EPO position recently, taken on a Dept head role and become a member of the Command Cadre. His leadership in these roles is constantly developing.

[The applicant] has CG-3307 [Page 7] dated 19 Sep 03 documenting behavior and leadership deficiencies. He has been counseled on steps necessary to correct them. At this time in his career, he [is] not yet ready to advance to the next higher paygrade.

The applicant’s record also contains an end-of-tour Achievement Medal he received for serving as the EPO of the station from July 2002 through July 2006, a second Achievement Medal for his next tour as Assistant EPO of a cutter from July 2006 through August 2009, and several Good Conduct Medals and unit and team awards. From July 2009 through July 2011, the applicant’s duty consisted of full-time instruction in electrical engineering and since then he has served as the EPO of another station. Transcripts in his record show that he has taken many classes over the years and has received two Associate’s degrees in Engineering Technology and Criminal Justice Technology/Public Safety Services.

VIEWS OF THE COAST GUARD

On July 19, 2012, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG noted that apart from the applicant’s own claims, he failed to submit any evidence that contradicts the Page 7, which is presumptively correct under 33 C.F.R. § 52.24(b). The JAG stated that the Page 7 was properly prepared by the OIC in accordance with the Personnel and Pay Procedures Manual (PPPM) in effect in 2003 and that under those rules, the applicant’s refusal to sign it did not invalidate it. The JAG stated that the OIC’s actions are also presumptively correct, lawful, and performed in good faith. The JAG argued that because the evidence of record is insufficient to overcome the presumption of regularity, the Board should deny the applicant’s request.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC noted that the applicant did not contest his November 2003 EER, in which he received slightly lower marks than usual and was not recommended for advancement.

PSC stated that it has no record of the applicant ever petitioning for removal of the Page 7 in the past. PSC also stated that because the OIC is now no longer a member of the Coast Guard, it is very difficult for the Coast Guard to determine the facts of the matter since it can get no input from the OIC. Therefore, PSC argued, and in the absence of compelling evidence to the contrary, the Board should deny the applicant's request.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 24, 2012, the applicant responded to the views of the Coast Guard. He said that he is puzzled by those views and asked the Board "to explore the rest of the facts of the case, not just the deficiency in formal rebuttal paperwork."

The applicant repeated some of his prior allegations and again pointed to the lack of other derogatory information in his record. He noted that the OIC had recommended him for advancement on his May 2003 EER and his May 2004 EER and argued that this is evidence that the Page 7 is erroneous as it is unlikely that he would have gone "from a recommended E-6 for E-7 in May of 2003 to not recommended in Nov of 2003 to recommended again in May of 2004. In addition, he alleged that it is illogical that someone who received all average or above average marks, as he did even in November 2003, would be not recommended for advancement.

The applicant also said, in response to the Coast Guard's claim that the disputed Page 7 and the OIC must be accorded a presumption of regularity, that if the Board checks the personnel file of the OIC, "you will find that on many instances his leadership, credibility, and job performance were found to be sub-par and illegal. For an individual of such poor natured performance and integrity issues to tarnish my record is appalling."

The applicant also addressed the allegations of misconduct and poor leadership in the disputed Page 7. Regarding the statement that he had deflated another member's tires, the applicant said that he had previously counseled a member about his failure to respect others' property and to be mindful of his surroundings when working and when the tires were found flat the member assumed he had done it because of "practical jokes the duty standers would play on each other at night."

Regarding the allegation that he had kept a handgun in his tool box at the station against orders, the applicant stated that if the Board checks the station's armory log, it would find that he checked his personal weapon into the armory daily, and checking in a weapon must be witnessed by the Officer of the Day, who must sign the log. He alleged that it is illogical that he would check his weapon into the armory and then keep it in his tool box in the office, that no one ever accused him of doing this, and that "it never happened."

Regarding the allegation about the cable installation, the applicant stated that if the Board reviews the station's purchase ledger, it will find that a "purchase request" for coaxial cable, coaxial fittings, and coaxial splitters was submitted through the chain of command and signed by both the XPO and CIO. He alleged that their signatures prove that they were "aware of the cable installation in conjunction with the fact that I told him previously about the coax wire install to

my office in the adjacent building. Why would he approve the purchase of TV cable if all the rooms in the main station already had TV service?”

Regarding the allegation that he was counseled about yelling at subordinates, the applicant stated that in the military “authoritative voice inflection” is sometimes necessary, especially when subordinates are lackadaisical or irresponsible. The applicant stated that while he “may not have been the best leader at the time, [he] was definitely a good one.”

The applicant stated that he would be delighted to submit documentation contradicting the allegations in the Page 7, but he “cannot create documents that were dismissed and thrown out due to their lack of validity.” He asked the Board to contact the investigating officer and the Deputy Sector Commander, who dismissed the charges following the investigation, as they are still on active duty. He repeated his allegation that the Page 7 was retaliatory because he filed a complaint against the OIC in September 2003, which triggered an investigation.

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. Although the application was not filed within three years of the applicant's discovery of the alleged error or injustice, it is considered timely.²

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

3. The applicant alleged that the Page 7 in his record dated September 19, 2003, should be expunged because it is erroneous and unjust. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁵

² *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

³ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁴ 33 C.F.R. § 52.24(b).

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

4. Although the applicant alleged that he never saw the Page 7 until 2008, the Page 7 was mentioned on his November 2003 EER, and so he clearly knew of its existence in 2003 even if he chose not to read it or sign it.

5. The applicant has submitted insufficient evidence to overcome the presumption of regularity and to support his claim that the Page 7 is erroneous and unjust. Although he argues that the Page 7 must be erroneous because it is the only negative entry in his record, the Board finds that the fine quality of the remainder of the applicant's record does not prove that the Page 7 is erroneous or unjust.⁶ In addition, the validity of the Page 7 is supported by his November 2003 EER.

6. Although the application in this case is considered timely filed, the Board notes the Coast Guard's laches argument that the applicant's delay has prejudiced the Coast Guard's ability to submit evidence because a significant witness, the OIC, is no longer available.⁷ However, it is not necessary for the Board to address the issue of laches because the applicant has not submitted sufficient evidence to overcome the presumption of regularity accorded the Page 7.⁸

7. Accordingly, the Board finds that the application should be denied because the applicant has not submitted sufficient evidence to overcome the presumption of regularity.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁶ See *Grieg v. United States*, 640 F.2d 1261, 1269 (Ct. Cl. 1981) (holding that "the fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied").

⁷ See *Lebrun v. England*, 212 F. Supp. 2d 5, 13 (D.D.C. 2002); *Detweiler v. Pena*, 38 F.3d 591, 595 (D.C. Cir. 1994) (holding that even when the Board's statute of limitations is tolled, "the doctrine of laches remains available to the government to protect itself from stale claims."); *Bliss v. Bliss*, 50 F.2d 1002, 1004-05 (D.C. Cir. 1931) ("Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them.").

⁸ 33 C.F.R. § 52.24(b).

ORDER

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

Evan R. Franke

Thomas H. Van Horn

Barbara Walthers