

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-135

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding 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 after receiving the applicant's completed application on April 30, 2009, 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 January 28, 2010, 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 yeoman (YNC; pay grade E-7) in the Coast Guard, asked the Board to expunge an annual Enlisted Employee Review (EER) he received for the period October 1, 2004, to September 30, 2005, when he was assigned as the Chief of Administration and the Servicing Personnel Office (SPO) of Sector Xxxxxx, and asked that "any possible advancements possibly affected by this [disputed] EER be restored to me."

The applicant alleged that his Sector Commander and commanding officer, CAPT Y, abused his authority by marking the applicant as not recommended for advancement on the disputed EER. He alleged that CAPT Y's decision was "based on false accusations brought against me by the Dep[uty] Sect[or] Commander, [CDR X]," that these "accusations were racially motivated on the part of [CDR X,] and that the appeal process [he] went through was a farce."

The applicant alleged that as a result of the disputed EER his name was removed from the chief warrant officer eligibility list (CWO list). On March 14, 2006, a special board convened to consider reinstating him on the CWO list. In that board's report, dated May 25, 2006, he alleged,¹ the board noted that many of the criticisms of his performance in the disputed EER appeared to be contradicted by the findings of a District Administrative Officer who visited his unit, by the results of a Maintenance and Logistics Command (MLC) Compliance Visit, and by the performance evaluation prepared by his command in recommending him for appointment to CWO. The applicant also noted that when he left Sector Xxxxxx, he received a Letter of Com-

¹ The applicant did not submit a copy of the board's report.

mentation for his “outstanding performance of duty, meritorious service, and upholding the highest traditions of the United States Coast Guard” as the SPO supervisor, including the evaluation period for the disputed EER. The applicant alleged that the disputed EER “was significantly impacted because of incorrect information, conjecture, and prejudice.”

The applicant further stated that on September 26, 2008, he was visiting the Pay and Personnel Center and spoke to CDR A, a Senior Equal Opportunity Advisor, about what had happened at Sector XXXXXX. CDR A reviewed the applicant’s EER appeal and record and sent him the following email:

It appears that there were other reasons that were not documented to show how your performance took a dive for the period of then [CDR X’s] time at your command and the immediate rebound as soon as she departed. A lot did not add up. The CAPT should have handled it better, however. To give you an award for superior performance for a period that covers the time [CDR X] had indicated you were such a poor performer (which report the CAPT endorsed) befuddles me. I am sorry for the apparent poor leadership and what it has cost you. Actually that is what the CAPT should have written to you and in addition, offer to testify to get the marks removed from your record. Anyway, that was my take on what you gave me.

SUMMARY OF THE RECORD

On March 3, 1992, the applicant enlisted in the Coast Guard as a seaman. Because he had previously served in the U.S. Marine Corps for more than seven years, his active duty base date is August 2, 1984. The applicant entered the yeoman (administrative) rating.

Before arriving at Sector XXXXXX, the applicant was a first class yeoman (YN1) serving as the Administrative Officer for xxxxxxxxxxxxxxxx. The applicant received marks of 5, 6, and 7 on his EERs for this service (see Enclosure A) and advanced to YNC on June 1, 2003.

On August 1, 2003, the applicant reported to Sector XXXXXX to serve as the Chief of Administration and the SPO with eight active duty and reserve subordinates providing administrative support to 218 personnel assigned to eight XXXXXX and xxxxxxxx units. On his first EER in this position, for the period ending September 30, 2004, the applicant received one mark of 4, ten marks of 5, twelve marks of 6, and one mark of 7 in the performance categories,² and he was recommended for advancement. This EER was completed on October 28, 2004, and entered into the Coast Guard’s Direct Access database by the Deputy Sector Commander, CDR X, on October 29, 2004 (see Enclosure B).

On February 9, 2005, the MLC Compliance Assist Team evaluated the Sector XXXXXX Administrative Division and found it to be “satisfactory or better” in all areas. The report identified the following areas needing attention:

- Members’ training information had not been entered in the Direct Access database.
- Documentation of non-judicial punishments had not been properly processed.
- An alcohol incident had not been properly documented in a member’s record.

² Coast Guard enlisted members are evaluated in a variety of performance categories on a scale of 1 (worst) to 7 (best). They also receive marks for conduct (satisfactory or unsatisfactory) and for advancement (recommended or not recommended).

- A member incurring a drug incident had not received screening.
- Members email addresses had not been entered in Direct Access.

On March 7, 2005, the Sector Commander, CAPT X, supported the applicant's request for appointment to CWO by signing a non-numerical evaluation with highly laudatory descriptions of his work (see Enclosure C). CAPT X transferred from Sector Xxxxxx in June 2005 and was succeeded by CAPT Y.

From September 19 to 21, 2005, a District administrative officer visited Sector Xxxxxx to assess the SPO. His report, dated October 1, 2005, identified several problems (see Enclosure D). The officer concluded that his "overall impression is that the SPO is adequately staffed but certainly not overstaffed. They appear to be doing a good job and working hard."

The disputed EER covers the applicant's performance from October 1, 2004, through September 30, 2005, and is the second that he received while assigned to Sector Xxxxxx. It bears an electronic date stamp indicating that it was completed on October 28, 2005. The EER also shows that on October 31, 2005, the Sector Commander, CAPT Y, counseled the applicant about the EER and signed it but that the applicant refused to sign it. CDR X entered the EER into the Direct Access database the same day.

The disputed EER contains a mark of "not recommended for advancement" and "below-standard" marks of 3 in seven performance categories: Directing Others, Responsibility, Setting an Example, Integrity, Adaptability, Professional/Specialty Knowledge, and Administrative Ability. In addition, he received average marks of 4 in ten categories: Working with Others, Developing Subordinates, Evaluations, Loyalty, Professional Development, Organization, Using Resources, Monitoring Work, Stamina, and Communicating; and above-standard marks of 5 in another seven categories: Work-Life Sensitivity/Expertise, Health and Well-Being, Respecting Others, Human Relations, Safety and Occupational Health, Military Bearing, and Customs and Courtesies. The seven below-standard marks and the mark of not recommended for advancement are each supported by a paragraph of explanation of how the applicant's performance did not meet the command's expectations (see Enclosure E).

In addition, the Sector Commander signed a three-page Page 7 dated October 31, 2005 (see Enclosure F), which the applicant refused to sign, to explain the EER mark of non-recommended for advancement and advise the applicant how he could regain a recommendation for advancement, as required by the Personnel Manual.

On November 14, 2005, the applicant appealed the marks on the disputed EER. He alleged that it had been "significantly impacted due to incorrect information/conjecture, disproportionately low marks for the particular circumstance, and prejudice." The applicant alleged that two other chiefs at Sector Xxxxxx had received timely EERs signed by the Acting Deputy Commander, but his had been delayed until the Deputy Commander, CDR X, returned to the unit, which showed that CDR X "singled me out causing unwarranted prejudice." The applicant alleged that the majority of the below-standard ratings he received "directly from the Approving Official (AO)" had been "identified as areas needing improvement during the first quarter of the marking period, October through December 2004." However, he alleged that he was never warned or formally counseled in writing that his performance was below standard or that his rec-

ommendation for advancement was in jeopardy. The applicant stated that he did receive “informal feedback from time to time; and issues concerning my performance were immediately addressed and followed up by my supervisors on an occasional basis.” He stated that he ensured that all concerns about his performance were “immediately resolved” and so he is “perplexed by the low marks given by the AO without the benefit of prior counseling.” He also explained why he believes he deserved higher marks in each of the categories in which he received a below standard mark (see Enclosure G).

The applicant included with his EER appeal the MLC Compliance Team report from February 2005; the District administrative officer’s report dated October 1, 2005; a statement signed by a CWO F, who was chief of the Electronic Support Detachment on Xxxxxx; and several email messages from the applicant’s supervisor, SKCS X, and CDR X:

- On December 23, 2004, the applicant sent CDR X an ALCOAST announcing an upcoming CWO selection board. CDR X forwarded the ALCOAST to the applicant’s supervisor, SKCS X, saying “Please make your recommendation to the CO. You both know where I stand. Not sure how the fact that he was recommended for advancement on his evals impacts this decision. The question is, if he were to be selected for CWO, would you want him to fill the newly created CWO Admin billet. Let me know your decision so I can process the request out of my Direct Access worklist.”
- On December 27, 2004, SKCS X sent the Sector Commander an email recommending that the applicant be allowed to compete for appointment to CWO. SKCS wrote that the applicant “has made mistakes in the past and one should not be held to such a standard that making mistakes is condemning. One who is afraid of making mistakes cannot lead with confidence & no one is perfect. YNC, with my help, is striving to improve the customer service in PERSRU and Admin. If he simply did not learn from mistakes, then I surely would not put my name to a positive recommendation. [He] is trying and that is all I ask for as his Dept Head.”
- On January 6, 2005, the applicant sent the command a notice that because of the upcoming MLC Compliance inspection, the PERSRU would close at 2:00 p.m. each day so that the administrative staff could prepare for the inspection. On January 28, 2005, CDR X sent an email to SKCS X stating that she had stopped by the PERSRU that day and overheard a very loud discussion behind the closed doors and that when she stopped by later, the door was locked. She stated that she understood there was some emotional turmoil within the unit because the applicant had filed a civil rights complaint against her; that the staff might need “some downtime” because of the upcoming inspection; and that she had defended the office’s shortened open hours “from several disgruntled staff members”; but that granting liberty to the whole office under the circumstances might send a “conflicting message” that others would not understand. CDR X told SKCS X that in spite of what he and the applicant thought, she made “every effort to support the PERSRU and it becomes increasingly difficult to defend them against the almost daily complaints and comments I get from staff members about their service quality, accuracy, and timeliness. It is particularly frustrating to hear that [the applicant] tells everyone I have no compassion when he is so unaware of my efforts to support him and his staff. I consult DXX Admin staff on a regular basis for guidance on how to handle these challenges that we face in our PERSRU and they have been very supportive. They are aware of the situation in our

PERSRU and it is well documented which may be to my benefit should the complaint process go formal. I will continue to support the PERSRU and work with them by providing feedback I receive so they can continue to improve service. I share this with you in the hope that you will understand my challenging position.”

- On January 31, 2005, SKCS X advised CDR X, regarding the applicant’s discrimination complaint against her that he did “tell YNC that you inform me when he has done good work on some occasions, but it is much more powerful when it comes from you. He is afraid of you, even if I tell him that you mean well. ... Lately, YNC has communicated to me that he is afraid that when the CO and I depart that you are going to fire him or hurt his ability to get advanced in some way. He needs your confidence, even if it is just a one liner and not to be followed by correcting him in the same breath. You said in the email below that there are disgruntled staff members (this bothers me greatly), but I have yet to hear or read feedback in the customer service inbox indicating so. I ask that in the future you direct them to see me or take one minute to fill out the customer service card. Force those who want to be helped to help themselves. As Logistics Department head, I believe they (YNs) are working hard and I do my best to show you with customer service feedback cards I receive (no negative feedback as of yet). Know that YNC wants you to believe in him and he may just need for you to throw him a bone ... every now and then. CDR, you do great work and I respect you greatly but to be honest, you are much more critical with him then anyone else under this command. I am trying to bring YNC and his staff out of this deep hole they are in and I ask that you see and comment more on the other 90% of the things they do right. YNC is trying and I know you can see his attempt to impress you, can’t you? How can I help this situation?” After sending this email to CDR X, SKCS X sent it to the Sector Commander and then forwarded that email to the applicant.
- On February 3, 2005, SKCS X sent the Sector Commander another email stating that “[a]fter discussions with the XO [CDR X] and in her emails, I have come to a conclusion. The XO is working hard to justify why YNC should not have received a positive recommendation from either of us. I see a lot of effort in her part to bring forward the negative issues and not focus more on the positives with YNC and his Shop. I have spoken to her but want to make you aware of my thoughts. I am forwarding issues that have been resolved and in doing so, will assist in removing some bad light from over YNC’s shop. YNC is unhappy and does not understand why she continues to be so critical but that seems to be her style.” SKCS X sent the applicant a copy of this email later that morning.
- The applicant submitted emails showing that the Sector was notified by email in July 2004 that the latest COLA survey would result in a two-point decrease in the COLA for Sector personnel, which “equates to approximately \$50.” In response, MCPO I, the District Command Master Chief, asked for more information on the effect of this decrease on Sector personnel, and he was advised in an email also sent to the applicant and two others that the law did not allow the COLA rate of current personnel to be “grandfathered.” On March 10, 2005, CDR X sent the applicant an email directing that “[a]ny further action/information on this issue [the COLA survey] should be directed to me. Do not contact COMNAVXXX directly. While you may have valid concerns regarding your workload and this task, these issues need to be addressed internally. The USN staff members are completing this survey based on feedback from USCG personnel with the perception that the results of the last survey did not accurately reflect current costs. COMNAVXXX

warned us this would be a huge undertaking. Since our comments initiated this additional survey, we will find a way to complete it to their satisfaction. [Applicant]: Develop a plan for [the Acting Deputy Commander's approval next week]. I'd also like to re-emphasize my philosophy on relationships, particularly external relationships with organizations like COMNAVXXX. It takes a lot of work to build organizational relationship so we need to ensure we don't allow frustrations with a particular issue to tear them down. ... We are in this together so let's find a way to accomplish what needs to be done."

- CWO F stated that in April 2005, CDR X advised him that the applicant had been locked out of his work station by the District's Electronic Support Unit in xxxxx. CWO F was told that the applicant had been locked out because he had introduced a chain letter into the network. CWO F stated that the applicant had received the email at his work station and forwarded to his personal email address. When the applicant opened it on his home computer, he had forwarded it to a distribution list that included several Coast Guard and Department of Defense email addresses. The applicant told CWO F that he had put only one Coast Guard email address on the distribution list but that "others had been erroneously added by an option to add all incoming addresses to his distribution list." CWO F stated that the incident was caused by a simple oversight and that the applicant is a very trustworthy person with "the highest level of integrity." Regarding the functioning of the SPO, CWO F stated that "initially it was lacking. But several improvements, including extended hours and intervention by the logistics department head SKCS [X], resulted in a much improved SPO."
- On May 19, 2005, SKCS X sent CDR X an email asking her to send complainers to the chief of the department at issue rather than reacting to complaints and taking action herself. He stated that her tendency to try to resolve the complaints herself frustrated the department heads and encouraged complainers to take their complaints directly to her rather than to the department heads.
- On August 29, 2005, the Navy Housing Referral Supervisor on Xxxxxxx advised the new chief of the Logistics Department, LT X, who replaced SKCS X, that according to the Navy's expert, Mr. M, Sector Xxxxxxx was responsible for administering the Temporary Lodging Assistance (TLA) allowance for its own members and that if the Coast Guard wanted to do so, it could implement its own policy based on the Navy instruction, as a local Air Force unit did. LT X responded that the Coast Guard had to follow the Navy's lead and that she did not understand why Mr. M had stated that the Coast Guard could do whatever it wants to with regard to TLA. The Navy supervisor stated that Mr. M said he had no jurisdiction over the Coast Guard's TLA policy, only that of the services under the Department of Defense.

The Sector Commander, CAPT Y, forwarded the applicant's EER appeal to the District Commander on November 28, 2005. In his endorsement (see Enclosure H), CAPT Y stated that he did not agree with the applicant's claim that the marks in the EER were disproportionately low or based on incorrect information, prejudice, or discrimination. He stated that he had received positive and negative input about the applicant's performance from a variety of sources and that the marks were appropriate. CAPT Y stated that the applicant had "received extensive feedback regarding his performance throughout the annual evaluation period via email as well as numerous counseling sessions," and noted that the applicant had actually requested less frequent

feedback. He stated that the disputed EER had been prepared properly and timely and that he himself had counseled the applicant about the EER. He stated that following a visit from the District staff, the applicant "was directed to initiate the process improvements he raises in paragraph #9 of his appeal. The initial efforts showed great promise. However, in spite of direction to continue that effort, little further progress has been made." Regarding the applicant's inappropriate email, which caused his computer to be locked, CAPT Y stated that the problem was that the applicant "clearly provided conflicting statements to unit staff members regarding this incident." Regarding the applicant's claim that many of his office's problems were "systemic problems" in the Coast Guard's software, CAPT Y stated that the Sector contacted CGPSC about this claim and received the following response:

The "system" does not cause these problems. Overseas entitlements are complex. If transactions are entered into the pay and personnel system correctly, everything works fine. However, if the SPO enters transactions incorrectly, it can be very difficult and time consuming to undo the errors and make the member's account right.

My pay team supervisors report that they have tried to help your YNC on many occasions, giving him the correct steps for entering transactions to avoid problems for your members. Pay team supervisors also report that even after having been provided the proper advice/procedures, your YNC has a reputation for not following their direction and doing it his way rather than the right way.

CAPT Y stated that the applicant did not personally initiate the out-of-cycle review of the COLA for Xxxxxx but conducted research and facilitated the effort at the direction of the unit's Command Senior Chief, SKCS X and MCPO I, "whose tenacity and persistence drove the review process to fruition." CAPT Y noted that the emails submitted by the applicant to support his claim that he initiated the COLA review actually show that the staff was reprimanded for complaining to the Navy about having to complete the COLA survey. In addition, the command cadre of other Xxxxxx-based units and the yeoman detailer "have expressed their frustration in working with [the applicant] because of his perceived inability or unwillingness to provide/recommend a proper course of action. Because of this perception, customers have expressed their desire not to work with [him]. This situation shifts the workload either to the junior members of the SPO or up the chain of command to the Logistics Department or Deputy [Sector Commander]." CAPT Y concluded that the applicant's EER appeal "substantiates several reasons why unsatisfactory marks were assigned [in the EER]: unsubstantiated/unsupported claims; information misunderstood and/or misrepresented in a less than concise manner; and [the applicant's] repeated contention that he is not responsible for any of the acknowledged shortcomings in the Sector's Admin. Division/SPO."

On November 30, 2005, the chief of the Officer Boards Section of the Personnel Command notified CDR X of pending board action to remove the applicant from the CWO eligibility list. CDR X forwarded the notification to a lieutenant commander to be forwarded to the applicant with an explanation of the steps the applicant should take to submit information to the board.

On December 5, 2005, the applicant sent an email to CAPT X alleging that his supervisor, LT X, had recommended that he receive good marks on the disputed EER but that CDR X had thrown out LT X's recommendations and had had LCDR N, who was the Acting Sector Commander in CDR X's absence, prepare the EER with below standard marks based on

information from CDR X. The applicant stated that CDR X had abused her power. He acknowledged that the PERSRU had “had issues” in the beginning but alleged that things had “changed drastically” since January 2005; that they had recently had five consecutive error-free pay cycles; and that his office had “great working relationships with all our customers and tenant commands.”

On December 7, 2005, SKCS X sent an email to the applicant stating that the applicant’s 2004 EER had taken “longer than the rest of the chiefs because there [were] long discussions on my assessment of your quality of work.” SKCS X also stated that it was the applicant who had initiated out-of-cycle review of the OCONUS COLA for Xxxxxx with assistance from [a master chief petty officer]. I simply pushed with help from [MCPO I].” SKCS X stated that the applicant “did great work for Logistics when I was there. You made mistakes but learned from them, as we all do.”

On December 8, 2005, the applicant emailed CAPT X and asked him to contact the District Chief of Staff on his behalf concerning the applicant’s EER appeal. CAPT X responded and wrote that he had spoken with the District Chief of Staff the day before and “provided him an overview of my personal observation of your performance, the improvements to the SPO, and most importantly, I described your character, outstanding leadership, excellent appearance/military bearing, and your great potential for future service to the Coast Guard. It was well received. I tried to balance out the negative personal theme of your current performance review. This is a delicate position for me as I must respect and do not wish to interfere in the current leadership and executive decision-making process at Sector Xxxxxx. I do believe that you are a great CPO and very capable YNC and I wish you continued success in your excellent service to the CG.”

Also on December 8, 2005, the applicant submitted additional information regarding his EER appeal. He asked that CAPT X, who was the Sector Commander until June 2005, be contacted and asked about the applicant’s performance. The applicant alleged that the marks recommended by his supervisor, LT X, had been disregarded. The applicant noted that he had previously complained about a hostile work environment and requested “minimal contact from [CDR X].” He stated that the daily criticism he had received from her had “created undue stress and duress” and “undermined [his] credibility and leadership.” The applicant stated that some of the errors for which he was blamed resulted from “systemic problems with Direct Access,” including double payments for days on which members crossed the International Date Line. The applicant stated that he had advised the Personnel Service Center (PSC) that the system was contributing to a large number of the SPO’s pay problems, but “they refused to acknowledge these problems existed.” However, he was vindicated when the PSC “admitted in writing that the system failed to correctly process pay-related items.” The applicant attached emails concerning two members’ overpayments and how “the system” overpaid the members; how the T-PAX pay system handles per diem allowances for members crossing the International Date Line; and how one Sector member’s travel claim had been paid but payment of another member’s claim would have to wait until “the system is fixed” and able to process travel claims correctly.

On December 15, 2005, CDR X sent an email to the applicant reminding him that although he had 21 days from November 30, 2005, to submit information to the board, the CO, CAPT Y, was going on leave the next day, December 16, 2005. Therefore, unless the applicant submitted his information that day, the endorsement forwarding his submission to the board

would be prepared by her, as Acting CO, rather than CAPT Y. CDR X stated, "As you can imagine, I do NOT want to be put in this situation given the allegations made against me. ... Strongly suggest that any submission is carefully reviewed as both of the previous statements [EER appeal memoranda] contained errors (repeated sentences, typos, misused words, incorrect grammar) that seems contrary to the purpose of convincing readers that the performance has been assessed inaccurately and unfairly."

On December 15, 2005, the applicant submitted a letter to the board asking to be retained on the chief warrant officer eligibility list based on his impeccable service, skills, and dedication.

On December 19, 2005, CDR X sent an email to the Officer Boards Section of the Personnel Command asking whether the applicant's package had been received and was being processed in a timely manner. She asked for written confirmation because the applicant was very concerned. The chief of the section acknowledged receiving the applicant's package and stated that it would be presented to the board.

The applicant's EER appeal was denied and his name was removed from the chief warrant officer eligibility list.

On July 28, 2006, the applicant received a Letter of Commendation³ for his performance upon completing his tour of duty as Chief of the Sector XXXXXX SPO and Administration Division (see Enclosure I).

VIEWS OF THE COAST GUARD

On August 26, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The JAG argued that the applicant has failed to submit evidence showing that he was a target of racial bias or that "but for" the alleged bias he would have received a better EER in 2005. He argued that the applicant has submitted insufficient evidence to overcome the presumption of regularity accorded the disputed EER and his chain of command.

The JAG attached to the advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Service Center (CGPSC). CGPSC stated that there is no evidence of bias in this case or of error or injustice in the disputed EER.

CGPSC further stated that the emailed comments of CDR A to the applicant dated September 26, 2008, "have no bearing on this case ... and only represent the personal opinions rendered by [CDR A] based on input received from the Applicant."

³ A Letter of Commendation is issued "for an act or service resulting in unusual and/or outstanding achievement," and it is the lowest award for personal achievement issued by the Coast Guard. U.S. COAST GUARD, COMDTINST M1650.25D, MEDALS AND AWARDS MANUAL, Chap. 2.A.11. and Encl. (22) (May 2008).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 1, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 10.B.1.b. of the Personnel Manual in effect in September 2005 (COMDTINST M1000.6A, Change 39) states that “[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely employee reviews. To this end, the Service has made enlisted performance criteria as objective as possible, within the scope of jobs and tasks enlisted personnel perform.”

Article 10.B.2.b.11.c. of the Personnel Manual states that a rating chain for an enlisted member consists of a Supervisor, Marking Official, and Approving Official. Article 10.B.4.c. states that an enlisted member is evaluated by a rating chain to provide a “built-in check and accountability system to ensure supervisory personnel are aware of the importance of employee reviews and give them incentive to be totally objective and accurate.” Rating chain members are required to review and correct any inconsistencies found in an EER “when considering an individual’s performance compared to the written standard” and “[h]old the next lower supervisory level accountable for their employee reviews.” Article 10.B.4.c.2.

Article 10.B.5.a.1. states that members in pay grade E-7 (chief petty officers) on active duty receive regular, annual EERs at the end of each September. Article 10.B.4.a.4. states that each unit must ensure that an EER is completed, including the EER counseling sheet signed by the applicant, no more than 21 days after the end of the evaluation period. Article 10.B.5.a.3. states that “[r]egular employee reviews may not be delayed. The unit rating chain is responsible for ensuring complete reviews are acknowledged by the evaluatee and completed within CGHRMS not later than 30 days after the employee review period ending date.”

Article 10.B.4.c.3. states that the Supervisor must “clearly communicate goals and acceptable standards of performance to the evaluatee before and throughout the marking period.” However, Article 10.B.4.b. states that an enlisted member is ultimately responsible for “[f]inding out what is expected on the job,” “obtaining sufficient feedback or counseling[,] and using that information in adjusting, as necessary, to meet or exceed the standards.” Article 10.B.2.b.8. states the following regarding performance feedback during an evaluation period:

No specific form or forum is prescribed for performance feedback. Performance feedback - formal or informal - actually occurs whenever an evaluatee receives any advice or observation from a rating official on their performance or any other matter on which they may be evaluated. Performance feedback can occur during a counseling session, particularly during a mid-period session, through on-the-spot comments about performance, or at the end of the employee review period. Each evaluatee must be continuously alert for the “signals” received in one of these ways from the rating chain. If the signals are not clear, the evaluatee must ask the rating chain for clarification.

Article 10.B.4.c.4. states that the Marking Official reviews the marks recommended by the Supervisor and discusses with the Supervisor any recommendations considered inaccurate or inconsistent with the member’s actual performance. The Marking Official may return the EER to

the Supervisor for additional justification or support for any of the recommended marks. The Marking Official forwards the EER to the Approving Official, who under Article 10.B.4.c.5. of the manual is responsible for ensuring that there is the “[o]verall consistency between assigned marks and actual performance/behavior and output”; that the evaluatee is counseled and advised of the appeal procedures; and that the EER is submitted on time. The Approving Official must review the Marking Official’s recommended marks and discuss any recommendations considered inaccurate or inconsistent with the evaluatee’s actual performance. The Approving Official may return an EER to the Marking Official for additional justification or support for any mark.

After approving the EER, the Approving Official forwards the EER to the Supervisor, who counsels the evaluatee about his marks. Article 10.B.4.c.5.f. The Approving Official must ensure that the EER is completed and entered into the Coast Guard’s database no more than 30 days after the end of the evaluation period. Article 10.B.4.c.5.g. However, Article 10.B.4.a.4. states that the unit must ensure that “employee reviews are completed, including the signed counseling sheet, not later than 21 days after the end of the employee review period ending date.”

Article 10.B.6.a.5. of the Personnel Manual states that rating officials must mark evaluatees against the written standards on the EER form. Article 10.B.6.a.6. states that a mark of 4 “represents the expected performance level of all enlisted personnel. Normally, a single, isolated event, either positive or negative, should not drastically affect the marks assigned” on an EER. Article 10.B.6.a.7. states that a mark of 4 is an average mark indicating that the evaluatee met “all the written performance standards for this level and none in the ‘6’ level.” A mark of 5 is above average and means that the evaluatee met “all the written performance standards in the ‘4’ level and at least one of those in the ‘6’ level.” A mark of 3 is below standard and means that that the evaluatee “[d]id not meet all the written performance standards in the ‘4’ block.” Article 10.B.2.a.1. requires the rating chain to include supporting remarks in an EER for any numerical mark of 1, 2, or 7; an unsatisfactory conduct mark; or a non-recommendation for advancement.

Article 10.B.7.2. of the Personnel Manual states that a recommendation for advancement means that “[t]he member is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.” A mark of not recommended means that “[t]he member is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.” Article 10.B.7.4. states that the Approving Officials’ recommendation about advancement “is final and may not be appealed. However, if the Approving Official learns new information and decides to change the recommendation, they should follow the procedures in Article 10.B.10.b.”

Article 10.B.9.a.2. of the Personnel Manual states that the EER appeal process allows members to seek review of marks that they believe are disproportionately low or based on incorrect information, prejudice, or discrimination. However, a recommendation against advancement may not be appealed. Article 10.B.9.b. states that before filing an official appeal, an evaluatee should request an audience with his rating chain to discuss the EER. If not satisfied with the results of that meeting, the evaluatee “must submit the appeal within 15 calendar days ... after the date they signed the acknowledgment section of the counseling sheet for the disputed employee review. ... If appealing more than 15 calendar days ... after the date the member signed the employee review acknowledgment section, the member must explain the circumstances that did not allow or prevented him or her from submitting the appeal within the prescribed time limit.”

Article 10.B.10.b.1. of the Personnel Manual states that “Approving Officials are authorized to change any mark they assigned to members still attached to the unit if the Approving Official receives additional information that applies to the particular employee review period.”

Chapter 3.A.1.a. of the Equal Opportunity Manual (EOM) states that every member of the Coast Guard deserves to be treated with dignity and respect and to work in an environment free of discrimination. Chapter 3.A.3.a. of the EOM states that “[a]lthough the statutory prohibitions against discrimination in civilian employment do not apply to members of the uniformed services, it is the Coast Guard’s policy to provide its military members equal opportunity during their military service and access to the rights, responsibilities, and privileges of such service, regardless of: race; color; religion; sex; national origin; or participation in EO related activities.”

Chapter 3.A.4. of the EOM defines “discrimination” as “as any action prohibited by law, Executive Order, regulation, or policy in which members of a category or group of individuals are treated differently from members of another category or group,” and the prohibited discriminatory bases for military members are listed as race, color, religion, sex, national origin, and reprisal.

Chapter 5.B.15. of the EOM outlines the Coast Guard’s “Informal Complaint Program” for members who bring issues of discrimination to the attention of the command, also known as “aggrieved persons.” It states that an aggrieved person should notify his CO or OIC of her grievance through the chain of command within 45 days of the alleged incident of discrimination. If the complaint is not resolved to his satisfaction, the CO or OIC shall arrange for the aggrieved person to meet with a civil rights counselor, who shall make an informal inquiry and attempt to resolve the matter informally before advising the aggrieved person of his right to file a formal complaint.

The Commandant’s Equal Opportunity Statement in COMDTINST 5350.21D states the following in pertinent part:

All Coast Guard personnel—military, civilian, auxiliary—shall be treated with respect. The Coast Guard prohibits all forms of discrimination that violate law or policy in any action affecting our personnel, ... Our goal is to recruit, retain, train and deploy a highly capable, diverse and flexible workforce; ensure that all people are given fair and equal treatment in personnel decisions; evaluate personnel based on their job performance; provide advancement and retention opportunities based on demonstrated performance and potential; and take prompt, appropriate, and effective measures to enforce this policy and to ensure personal accountability. Every Commander, Commanding Officer, Officer-in-Charge, and supervisor is to be personally committed to and responsible for fair and equal treatment of all Coast Guard personnel and those with whom we interact. We must be a model organization that ensures no unlawful discrimination in recruitment, selection, assignment, retention, training, or general treatment of any member of the Coast Guard. T. H. COLLINS Admiral, U. S. Coast Guard

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 over this matter under 10 U.S.C. § 1552(a). Although the application was not filed within three years of when the applicant received the disputed EER, it is considered timely because the applicant has been serving on active duty.⁴

2. The applicant alleged that the low marks and non-recommendation for advancement in his EER for the annual evaluation period ending September 30, 2005, are erroneous, unjust, and a product of racial discrimination and asked the Board to remove the disputed EER from his record. Under Article 10.B.1.b. of the Personnel Manual, “[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely employee reviews.” The Board begins its analysis in every case by presuming that the disputed information is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁵ For the reasons discussed below, the Board finds the applicant has failed to meet his burden of proof.

3. The applicant submitted insufficient evidence to prove that the disputed EER resulted from racial discrimination. He submitted evidence showing that SKCS X and CAPT X evaluated his performance during the evaluation period for the disputed EER more favorably than did CDR X and CAPT Y, but nothing in the record supports his claim that the lower opinions of his performance in October 2005 sprang from racism rather than the rating chain members’ honest, professional assessments of his work and ability to perform well at a higher grade. The applicant attempts to support his claim of racism with CDR A’s email dated September 26, 2008, stating that it “appears that there were other reasons that were not documented to show how your performance took a dive for the period of then [CDR X’s] time at your command and the immediate rebound as soon as she departed.” However, CDR A’s vague statements and opinions are not evidence of racism. The Board notes that although the applicant alleged he had suffered a hostile work environment during the evaluation period, he apparently did not file a formal complaint after CDR X agreed to channel her feedback through his supervisor. The record supports his allegation that CDR X criticized his performance, but the record does not support his claim that her criticism resulted from racism rather than actual problems with his performance.

4. The record shows that the applicant received a very good EER in 2004 for his first year as a YNC and Chief of Administration at Sector Xxxxxx. CDR X was on the rating chain that prepared that 2004 EER. However, the record also shows that significant problems with the applicant’s performance were discovered in the fall of 2004 and continued throughout much of the evaluation period. The statements of CAPT X and SKCS X, both of whom left Sector Xxxxxx in July 2005, show that they felt that the applicant’s errors should not be documented by low EER marks or impede his advancement because he was learning from his mistakes. However, CDR X and CAPT Y clearly felt that the applicant’s mistakes should be documented by low EER marks and that his performance was not good enough during the evaluation period to warrant their recommendation for advancement in October 2005.

⁴ *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).

⁵ 33 C.F.R. § 52.24(b).

5. In support of his claim of superior performance warranting a recommendation for advancement, the applicant has submitted his own views of his performance, as shown in his EER appeal, which was reviewed and did not cause CAPT Y or the appeal authority to amend the EER. He also submitted a statement from SKCS X supporting his claim that he in some fashion “initiated” the COLA survey and an email from CDR X showing that he received a reprimand for complaints to the Navy about how much work the survey required; emails from SKCS X and CAPT X showing that their assessment of his performance and potential was better than that of CDR X and CAPT Y; a statement from CWO F reflecting the applicant’s explanation of how a “get rich quick” email moved from his Coast Guard work computer to the email addresses of many other Coast Guard and Navy members, but nothing that refutes the comments in the EER about his own varying explanations; emails showing that LT X was confused about the appropriate source for Sector Xxxxxx’s TLA policy and that “the system” was blamed for some overpayments; and an end-of-tour Letter of Commendation he received in July 2006. This evidence is insufficient to refute the numerous, substantive comments in the EER supporting the low marks or to persuade the Board that CAPT Y was mistaken in his assessment of the applicant’s performance. It is clear that, had SKCS X and CAPT X not been transferred in the summer of 2005, the applicant would likely have received a substantially better EER, but there is insufficient evidence in the record for the Board to conclude that their assessment of the applicant’s performance during the evaluation period and readiness for advancement was more accurate than that of CDR X and CAPT Y. The applicant has not proved by a preponderance of the evidence that his 2005 rating chain failed to exercise their best professional judgment or to assess his performance during the evaluation period and readiness for advancement accurately in the disputed EER.

6. The applicant alleged that his counseling about his 2004 EER was delayed until he returned to Xxxxxx from Chief Petty Officer Academy in December 2004. The copy of this EER submitted by the applicant shows that it was completed on October 28, 2004, and entered in the database on October 29, 2004. It may be, as the applicant alleged, that he did not receive counseling about this EER until December 2004 because he was away attending Chief Petty Officer Academy that fall. However, the marks and comments on the 2004 EER are very good, and he has not shown how he was harmed by any delay in being advised about that EER. The record shows that CAPT Y counseled the applicant about the disputed EER on October 31, 2005, which is ten days after the 21-day deadline for EER counseling under Article 10.B.4.a.4. of the Personnel Manual. However, the applicant has not shown how he was harmed by this ten-day delay. Moreover, the Board has long held that lateness, *per se*, is insufficient to justify removal of an otherwise valid performance evaluation.⁶

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁶ See, e.g., CGBCMR Docket Nos. 2008-076, 2008-035, 2005-053, 2004-041, 2003-110; 2002-015; 43-98; 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority); and 475-86.

ORDER

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

Robert S. Johnson, Jr.

Randall J. Kaplan

Thomas H. Van Horn