

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-242

**XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

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 application upon receipt of the applicant's completed application on September 1, 2010, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated June 3, 2011, 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 ALLEGATION

The applicant asked the Board to correct his record by removing the below average marks of 3 from his enlisted employee review (EER) for the period ending May 31, 2009. Enlisted marks range from a low of 1 to a high of 7. The applicant alleged that his supervisor marked him unjustly and that he was not given an opportunity to review his marks until after his supervisor transferred. The applicant alleged that he was advised that he would not be able to appeal the marks because the "marks were late for review."

The applicant stated that he has been in the Coast Guard for 20 years and has never received a performance mark lower than 4 until the May 31, 2009 EER. He stated that the 3s in the performance categories of directing others, setting an example, and initiative will inhibit his opportunities for further advancement and education and for selection for warrant officer. In support of his application, he submitted copies of his other EERs.

VIEWS OF THE COAST GUARD

On September 1, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG stated that the applicant has failed to prove that his supervisor and/or marking official did not provide a fair and accurate appraisal of his performance in the disputed EER. The JAG stated that there is no substantiated evidence to support the applicant's allegations that the marks of 3 are unjust.

Additionally, the JAG stated that the applicant has failed to prove error or injustice in the EER process. The JAG stated that the applicant was provided with his EER along with a counseling receipt on August 5, 2009, and that he did not submit any evidence that he attempted to appeal the marks.

The JAG attached a memorandum from the Commander, Personnel Service Center (PSC) and asked that the comments be accepted as a part of the advisory opinion. PSC noted that the applicant received marks of 3 in directing others, setting an example, and initiative. PSC submitted a statement from the applicant's supervisor who refuted the applicant's claim that he was not permitted to file an appeal. In this regard, the supervisor stated that the head of the division would not have tolerated anyone who attempted to impede a member's right to appeal his marks. With regard to the applicant's performance, the supervisor stated the following:

[T]he applicant is a skilled, and knowledgeable Health Services Technician who absolutely had the potential to become an equally skilled clinician . . . However [the applicant] refused to accept any leadership roles and responsibility while serving . . . at Seattle clinic. There were numerous documented incidents of his demonstrated failure to take initiative with directing and instructing junior personnel; resolving occupation and personnel conflicts with his subordinates; and taking on responsibilities expected of a First Class Petty Officer. . . . [The applicant] did not have the respect of his juniors and this led to numerous interventions by me and the clinic administrator to preserve good order and discipline.

Despite the challenges [the applicant] had, the leadership of the clinic made use of every resource conceivable to improve his performance. [The applicant] was brought before the Chief's Mess to ascertain the cause of his performance problems and provide guidance to shore up weaknesses. He was sent to LAMS as an HS1 when it was discovered he had never attended. [The applicant] was encouraged to seek out a mentor that was not part of the clinic, but he did not take advantage of this opportunity. Consequently, several of the senior chiefs volunteered to work with [the applicant], and yet [he] did not avail himself of those individuals. . . .

[The applicant] has always set his priority on becoming a physician's assistant. He was quite vocal in his lack of interest in the administrative side of his rating and frequently made it clear that "he only wanted to treat patients."

PSC concluded that the Coast Guard is presumptively correct and that the applicant has failed to substantiate any error or injustice.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 6, 2010, the Board sent a copy of the views of the Coast Guard to the applicant for a response. The Board did not receive a reply from the applicant.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant contended, but failed to prove by a preponderance of the evidence, that the marks of 3 in the directing others, setting an example, and initiative categories on his EER for the period ending on May 31, 2009 were inaccurate. The applicant provided only his statement and his marks from other performance periods to prove that the marks of 3 were inaccurate for the period under review. However, a written statement from his then-supervisor attested to the accuracy of the marks, and while the applicant's previous and subsequent EER marks were not below a 4, they do not prove that the marks assigned for the period under review were inaccurate. Performance can vary from period to period, and in this case the supervisor noted clearly that he had concerns about the applicant's performance for the period under review.

3. The applicant alleged that he was advised that he could not appeal the marks because the "marks were late for review." Article 10.B.5.a.3. of the Personnel Manual states that the unit rating chain is responsible for ensuring complete reviews are acknowledged by the member and completed within Direct Access not later than 30 days after the end of the enlisted employee review period. In this case, the EER was not finalized within 30 days of the end of the reporting period. The period ended on May 31, 2009, and the applicant did not receive the EER for signature until August 5, 2009. In a similar case, the Deputy General Counsel for the Department of Transportation ruled in Docket No. 84-96 that "simple time delay in submission of an [evaluation report] does not by itself constitute prejudicial error." She stated that the question is "whether the delay led to material inaccuracies in the report, or otherwise created errors or injustices."

4. The applicant has not proven that the marks are inaccurate. Nor has he shown by a preponderance of the evidence that the 15 days allotted under Article 10.B.9.b.1.d. for him to appeal his marks after August 5, 2009, were denied to him. In this regard, the applicant presented no evidence that he attempted to appeal the marks; nor did he submit a statement from the individual who allegedly told him he could not appeal them. Additionally, the supervisor stated that the head of the applicant's division would not have permitted any interference with the applicant's appeal right.

5. Therefore, the applicant has failed to prove by a preponderance of the evidence that his marks were inaccurate or that he was denied the right to appeal the marks. Accordingly, the applicant's request for relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Andrew D. Cannady

Nancy L. Friedman

Dorothy J. Ulmer