

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-258

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

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 September 24, 2011, 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 June 21, 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 yeoman, first class (YN1; pay grade E-6) in the Coast Guard, asked the Board to correct six semiannual Enlisted Employee Reviews (EERs) covering his performance as a YN1 from June 1, 2006, through May 31, 2009, by correcting the recommendation of his commanding officer (CO) on those EERs from not recommended for advancement (N) to chief petty officer to recommended for advancement (R). (After the EER dated May 31, 2009, the applicant was recommended for advancement.)

The applicant alleged that the marks of N were erroneous and unjust because "the number factors in all the enlisted employee reviews all exceed the minimum average mark of '4'." He noted that under Article 10.B.6.a.6. of the Personnel Manual, a mark of 4 is the expected level of performance for all enlisted members. He alleged that the inequitable disparity between his high performance marks and the recommendations against advancement he received constitute an injustice that should be corrected. The applicant also noted that Article 10.B.7. states that an enlisted member should receive a mark of R "regardless of the member's qualification or eligibility for advancement" and that an enlisted member who receives a mark of N must be properly counseled on how to receive a mark of R. The applicant stated that the number of Ns in his EER summary has caused the Career Retention Screening Panel to select him for involuntarily retirement.

SUMMARY OF THE RECORD

On February 26, 1991, the applicant enlisted in the Coast Guard. He earned the yeoman (YN) rating and advanced to YN3 in 1993. The applicant received many below-standard marks of 3 in his EERs as a YN3 until 1998, when he began receiving EERs with primarily marks of 5 and some marks of 6. He advanced to YN2 in 2000. However, in 2001 and 2002, the applicant again received some below-standard marks on his EERs. Page 7s documenting counseling in the applicant's record show that from 1992 through 2002 he was counseled numerous times about such matters as incompetence, very untimely work, inattention to detail, a 23% accuracy rate, conducting personal business in lieu of work, performance probation, and being disrespectful to a superior. However, his marks improved to primarily 6s in 2003, and he advanced to YN1 in 2006.

On his first EER as a YN1, the applicant received primarily marks of 5 and 6 and he was recommended for advancement. However, thereafter, he received the six disputed EERs, which cover his performance from June 1, 2006, through May 31, 2009. The applicant received satisfactory conduct marks but recommendations against advancement to chief petty officer on all of these disputed EERs.

On the first disputed EER, dated November 30, 2006, the applicant received a mark of N despite receiving one mark of 7 (best),¹ five marks of 6, fourteen marks of 5, and five marks of 4 in the various performance categories. The counseling documentation stated that he had "displayed strong potential to grow and contribute to organization, however efforts have been severely hampered by personal issues that affect consistent work attendance. At this time personal issues detract from member's ability to lead and manage others as would be required following an advancement to E-7. Member has skills and knowledge, needs more emphasis on consistent presence within office and improving teamwork skills."

On the second disputed EER, dated May 31, 2007, the applicant received a mark of N and one mark of 7, two marks of 6, twelve marks of 5, and ten marks of 4. The counseling documentation stated that he had "not demonstrated level of supervisory skills necessary to become a CPO. Frequent personal issues coupled with numerous everyday problems presented to command without solutions. In order to advance to next rank, member must alleviate these issues."

On the third disputed EER, dated November 30, 2007, the applicant received a mark of N and four marks of 5, ten marks of 4, nine below-standard marks of 3, and three poor marks of 2. He was counseled in writing about his negative attitude, continuous complaints, contempt toward his supervisor, lack of commitment, lack of loyalty, and lack of leadership.

In 2007, the applicant was advised that he would be processed for separation due to a diagnosed personality disorder. On January 8, 2008, an Administrative Separation Board (ASB) recommended that the applicant be retained and reevaluated in six months. However, Com-

¹ 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 (S) or unsatisfactory (U)) and for advancement (recommended (R) or not recommended (N)).

mander, Personnel Command disapproved the ASB's recommendation and issued discharge orders on May 1, 2008. For reasons not in the record, the applicant was not separated in 2008.

On the fourth disputed EER, dated May 31, 2008, the applicant received a mark of N, five marks of 5, and otherwise all marks of 4. The counseling documentation stated that he had "not displayed any leadership potential and has not showed he could handle roles requiring greater leadership or responsibilities. He has not shown he has the rating knowledge required for promotion to Chief Petty Officer."

On the fifth disputed EER, dated November 30, 2008, the applicant received a mark of N, one mark of 7, three marks of 6, fourteen marks of 5, and seven marks of 4. The counseling documentation noted that he "is on performance probation through June 9, 2009. During the current rating period, he demonstrated that he can perform at a satisfactory or higher level in all areas. Provided he maintains this positive trend moving forward, he is well on his way to earning a mark of Recommended in the future."

On the sixth disputed EER, dated May 31, 2009, the applicant received a mark of N, three marks of 6, twelve marks of 5, and ten marks of 4. The counseling about the mark of N stated, "Completing a 1 year performance probation. If [he] continues to perform at a satisfactory level, he will receive 'Recommended' on his next evaluation."

In his subsequent EERs in 2009, 2010, and 2011, the applicant was recommended for advancement to chief petty officer and received primarily marks of 6. However, in 2011, the applicant's record was reviewed by a Career Retention Screening Panel, and he was selected for involuntary retirement. He was retired as of May 1, 2012, with 21 years, 2 months, and 5 days of active duty.

VIEWS OF THE COAST GUARD

On February 24, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. In so doing, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC noted that Article 3.A.4.e.4. of the Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2, states the following:

A recommendation for advancement shall be based on the individual's qualities of leadership, personal integrity, adherence to core values, and his or her potential to perform in the next higher pay grade. Although minimum performance factors have been prescribed to maintain overall consistency for participation in SWE, the commanding officer shall be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation.

PSC argued that "nowhere in [the above regulation] should it be construed that simply meeting the minimum rating in all performance categories is in itself tantamount to a recommendation for advancement by one's commanding officer—as the applicant suggests." PSC stated that the

marks of N in the applicant's EERs mean that his chain of command determined that he was not capable of performing satisfactorily the duties and responsibilities of the next higher pay grade. PSC noted that the applicant properly received written counseling about the mark of N on each of the disputed EERs.

PSC argued that the six marks of N are all well documented and justified. PSC alleged that the applicant has not shown that the Coast Guard erred, acted in bad faith, or failed to follow policy when evaluating his performance as a petty officer. Therefore, PSC argued, the applicant has not overcome the presumption of regularity or substantiated any error or injustice in his record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 21, 2012, the Chair of the Board 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 2006 through 2009 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.6.a.1. states that when assigning numerical marks for the various performance categories of competency, "[t]he rating chain shall base employee reviews on how the member performed in each competency consistently throughout the period, except for conduct, to which the member must adhere every day of the period. Normally, a single, isolated event (either positive or negative) should not drastically affect the marks assigned during the employee review period. However, the rating chain must consider the overall positive or negative impact of the event."

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. states the following about advancement recommendations:

1. While the rating chain must consider past performance, it must also consider and base the recommendation on the member's potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, and adherence to the Service's core values. Each rating chain member must address this independent section every time they complete an employee review.

2. When completing this part of the employee review, the rating chain should focus on the guidelines in Chapter 5.C. on advancement recommendations and then select one of the following choices.

a. **RECOMMENDED.** The member is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade. The rating chain should choose this entry regardless of the member's qualification or eligibility for advancement. If the member has met all eligibility requirements, choosing this value constitutes an official recommendation for advancement. Personnel, E-6 and above, must receive a supporting remarks entry clearly documenting their present and future leadership potential for greater responsibility Article 10.B.2.a.(1)(e).

b. **NOT RECOMMENDED.** The member is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.

3. If the Approving Official marks "Not Recommended," they must ensure the member is properly counseled on the steps necessary to earn a recommendation and prepare supporting remarks in accordance with Articles 5.C.4.b.2., 5.C.4.e.5.a., and 10.B.2.

4. The Approving Official's decision on the advancement recommendation 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 5.C.4.e.4. states that the following about an advancement recommendation:

The CO/OICs recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. A recommendation for advancement shall be based on the individual's qualities of leadership, personal integrity, adherence to core values, and his or her potential to perform in the next higher pay grade. Although minimum performance factors have been prescribed to maintain overall consistency for participation in SWE, the commanding officer shall be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation.

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 some of the disputed EERs, it is considered timely because the applicant has been serving on active duty.²

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).

2. The applicant alleged that the non-recommendation for advancement in six of his EERs are erroneous and unjust and have unfairly caused his involuntary retirement through the CRSP. 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.³ For the reasons discussed below, the Board finds the applicant has failed to meet his burden of proof.

3. The applicant argued that the fact that he received standard marks of 4 or above-standard marks in some of the disputed EERs proves that his CO’s decision not to recommend him for advancement is erroneous and unjust. The Board notes in this regard that one of the six disputed EERs contains many below-standard and poor marks and that in the other five disputed EERs, he received many mediocre marks and some very good marks. However, as the PSC noted, a member’s recommendation for advancement in an EER does not depend upon his or her marks in the various competency categories. Instead, the CO bases the recommendation on “the individual’s qualities of leadership, personal integrity, adherence to core values, and his or her potential to perform in the next higher pay grade.”⁴ In the applicant’s case, his EER competency marks show that he usually performed his duties at least adequately, but they do not prove that his CO was satisfied with his leadership, integrity, or adherence to core values or was confident that the applicant could perform well as a chief petty officer. The supporting comments in the EERs show that the applicant was properly counseled about the negative marks he received.

4. The applicant alleged that he was entitled to a recommendation for advancement in his EERs because Article 10.B.7.2.a. of the Personnel Manual states that when preparing an EER, “[t]he rating chain should choose this entry [recommended] regardless of the member’s qualification or eligibility for advancement.” According to the applicant’s interpretation of this sentence, a rating chain would have to recommend every member for advancement. This interpretation is clearly erroneous because Article 10.B.7.2.b. of the Personnel Manual states that the rating chain should not recommend a member for advancement if the member “is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.” Moreover, Article 10.B.7.1. states that a member should only be recommended for advancement if the rating chain is satisfied with the member’s “potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, and adherence to the Service’s core values.” The Board finds that in the context of Article 10.B.7., the disputed sentence clearly means that a rating chain may recommend a member for advancement even if the member is not technically eligible or qualified for advancement for some other reason, such as having insufficient time in grade or sea duty.⁵ The Board is not persuaded that the applicant was entitled to his CO’s recommendation for advancement under Article 10.B.7.2.a.

5. The applicant has not proved by a preponderance of the evidence that the marks of N denoting recommendations against advancement in the six disputed EERs are erroneous or unjust. Accordingly, his request for relief should be denied.

³ 33 C.F.R. § 52.24(b).

⁴ Personnel Manual, Article 5.C.4.e.4.

⁵ See Personnel Manual, Article 5.C.4. *et seq.* (providing numerous requirements for eligibility for advancement).

ORDER

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

Philip B. Busch

Lynda K. Pilgrim

Vicki J. Ray