

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-006

FINAL DECISION

ULMER, Chair:

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 application was docketed on October 27, 2003, upon receipt of the applicant's completed application and military records.

This final decision, dated June 30, 2004, is 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 asked the Board to remove her enlisted performance evaluation marks (EPEM) for the period ending October 31, 1999. She alleged that the marks are unjust because of "the poor leadership of my supervisor." She stated that on July 14, 2000, her supervisor, a chief petty officer, was removed from duty as officer-in-charge of the recruiting office to which she was assigned when she received the disputed marks.

Apparently in response to being relieved as officer-in-charge of the recruiting office, the applicant's supervisor, who is currently retired, filed a discrimination complaint against the Coast Guard. The civil rights investigator assigned to the supervisor's discrimination complaint asked the applicant to answer a set of interrogatories. In support of her BCMR application, the applicant submitted a copy of her answers to the interrogatories, wherein she described the following conversations between the supervisor and herself:

[The civilian secretary] and I were talking about many children's books she could buy for her daughters. I told her one of my favorites was a classic Walt Disney book of short stories by "Uncle Remus"; one called Tar Baby. [The supervisor] overheard our conversation and brought me into his office. He told me how inappropriate it was to call black children "tar babies" and that I had an attitude against blacks. I told him I was referring to a story in a book that my parents used to read to me. He said, "Whatever excuse I need to hide the fact that I have a problem with black people." (Paraphrase)

* * *

[The supervisor] made a comment to TC1 . . . that he noticed that we [TC1 and I] were spending a lot of time together after hours and seemed to be pretty good friends. [The TC1] said he finally had another single person to hang out with, and that the married couples didn't like to go out much. [The supervisor] then asked [the TC1] how long we had been sleeping together and if I was any good in bed. This was said with applicants in the office. [The supervisor] had also asked [another female] if she had any information on that subject.

[The supervisor] asked me once while I was getting ready for a school visit why I didn't wear any make-up. I said that I didn't like it and I felt I didn't need it. He said, "My wife wears make-up, are you implying that she needs it?" I told him for me personally I didn't like the bother. He said to me that maybe if I wore a little make-up, I would have a better chance of meeting my monthly quota; and that I would be more attractive to the kids in high school.

* * *

I had requested to speak with someone about the way I was being treated and some of the things I heard [the supervisor] say to other recruiters in the office. I spoke with a [MK1] (the Executive Officer at the time) about my concerns, which were brought to [the supervisor] instead of the Recruiting Command, as I requested.

When my complaint was brought to the attention of the recruiting command, I felt it wasn't given any validity due to the page 7 I received and previous discussions [the supervisor] had about my performance. (The page 7 I received was subsequently dismissed).

* * *

A review of my past and present marking periods shows I have met and exceeded the expectations of my superiors. My marking period for the time I was under [the supervisor's] supervision shows a dramatic decrease in my performance. I believe this is due to [his] inexperience of being a Chief in a supervisory position . . .

As further evidence that the challenged marks are unjust, she noted that the evaluation of her performance for the period under review is much lower than any of her other past and current evaluations. She noted that her evaluations, except for the disputed one, show that she has always met the expectations of her superiors.

The applicant stated that she discovered the alleged error on May 31, 2001, and submitted an earlier application to the Board in August 2001. She stated that she received confirmation by telephone that the Board had received that application. According to the applicant, in September 2002 she called the BCMR again about her alleged earlier application and learned that the Board's staff had apparently misplaced her August 2001 application, whereupon she submitted the current application.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 6, 1992. On March 31, 1999, she reported to the recruiting office where she received the disputed performance evaluation. On October 31, 1999, she received the disputed performance evaluation. On April 5, 2000, she was released from active duty into the Reserve due to completion of required active service.

Disputed Performance Evaluation

The disputed performance evaluation for the period ending October 31, 1999, shows that the applicant earned the lowest marks of her military career. (Evaluation marks range from a low of 1 to a high of 7. A mark of 4 represents the expected performance level of all enlisted personnel.) The applicant was given two 3s in leadership¹, the lowest of her career in this category. She also received three 3s in professional qualities factor², the lowest of her career in this category.

VIEWS OF THE COAST GUARD

¹ According to Article 10.B.2.b.5.d. of the Personnel Manual the leadership factor "[m]easures a member's ability to direct, guide, develop, influence, and support others performing work."

² According to Article 10.B.2.b.5.c. of the Personnel Manual the professional qualities factor "[m]easures those qualities the Coast Guard values in its people."

On March 11, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

TJAG observed that the applicant failed to appeal her performance marks, which was her opportunity to submit documentation in support of her allegation of her supervisor's poor leadership. TJAG stated that Article 10.B.9. of the Coast Guard Personnel Manual provides for the appeal of enlisted performance marks. He further stated that according to Article 10.B.9.a.2. of the Personnel Manual, the appeals process is designed to review marks that the member believes were based on incorrect information, prejudice, discrimination, or disproportionately low marks for the particular circumstances.

TJAG also noted that the applicant failed to provide a reasonable explanation for not appealing her marks. TJAG said that reviewing the application of one who failed to make use of an established appeals process would "effectively eviscerate the regulatory scheme implemented by Article 10 [of the Personnel Manual]." TJAG argued that the Board is without jurisdiction to consider this application in the absence of a completed appeal until the applicant has exhausted "all administrative remedies afforded under existing laws or regulations."

TJAG said that the applicant alleged "poor leadership" on the part of her supervisor, but failed to provide any evidence to substantiate her allegation of "poor leadership". The only evidence she offered was her self-serving, uncorroborated allegation that poor leadership caused her to be marked erroneously. Such evidence, argued TJAG, is insufficient as a matter of law to overcome the presumption of regularity afforded military superiors. Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

TJAG submitted with his advisory opinion an email between the Chief, Administrative Support Branch of the Coast Guard Personnel Command and a chief warrant officer (CWO) who was the Northeast Sector Supervisor for the applicant's unit at the time of the disputed performance evaluation. In the email, the CWO confirmed that the supervisor was relieved as recruiter-in-charge for general incompetence, including creating a hostile work environment. The CWO verified that she reviewed all enlisted evaluations and forwarded them to the marking and approving official,³

³ The rating chain for an enlisted member consists of a supervisor, marking official, and approving official. Article 10.B.4.c.2. of the Personnel Manual states responsibility for evaluating the performance of enlisted personnel has been placed at several different levels. "The evaluation begins with the evaluatee's Supervisor and is progressively reviewed and modified, as necessary, by higher supervisory levels until finally approved by the Approving Official. Through this process, the EPES has a built-in check and

indicating her concurrence or non-concurrence. The CWO stated that during the time in question, she recalled only one person at the applicant's unit who formally appealed an evaluation. She stated that she specifically recalled counseling the applicant about her right to appeal her evaluation without fear of repercussions, but the applicant chose not to appeal it. The CWO also indicated that the applicant had encountered some performance problems for which she was counseled.

TJAG also submitted a copy of an email between the Chief, Administrative Support Branch of the Coast Guard Personnel Command and the applicant. The email indicates that neither the applicant nor the Personnel Support Center had a copy of the EPEF (Enlisted Performance Evaluation Form). The applicant also stated that she did not appeal the marks because after she complained to her Command Master Chief that the supervisor was discriminating against her, she was told there was no such thing as reverse discrimination. She stated that she felt at a loss and saw separation from the Coast Guard as her only option.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The BCMR sent the applicant a copy of the views of the Coast Guard and invited her to respond. No response was received.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 10.B.9.b.1.e. of the Personnel Manual provides that "[t]he member must submit the appeal within 15 calendar days (30 calendar days for reservists) after the date he or she signed the EPEF [Enlisted Performance Evaluation Form] acknowledgment sections."

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 section 1552 of title 10 of the United States Code.

accountability system to ensure supervisory personnel are aware of the importance of evaluations and give them incentive to be totally objective and accurate."

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. This current application was submitted approximately six months beyond the three-year statute of limitations. See 33 CFR 52.22.

4. However, the applicant has stated under penalty of perjury that she submitted an application to the Board for correction of her record in 2001 and was allegedly assured by a member of the BCMR staff that the application had been received. Although the Board has no evidence of having received the earlier application, there is also no concrete evidence to disprove the applicant's contention in this regard. Under the circumstances, the Board is persuaded that the applicant submitted a timely request for correction of her military record in August 2001.

5. The Board is not persuaded by TJAG's argument that the BCMR is barred from reviewing this application because the applicant did not appeal her marks as permitted under the Personnel Manual. The time for a marks appeal has expired. An appeal of marks must be made within 15 days of receipt of the evaluation. The end date for the performance evaluation was October 31, 1999. Therefore, appealing the evaluation was no longer available to the applicant at the time she filed her application with the Board. The Board deems that in situations where a remedy is no longer available, exhaustion of administrative remedies has occurred.⁴

6. Turning to the merits of the claim, the Board finds that the applicant has not shown by a preponderance of the evidence that the evaluation of her performance was erroneous. While there is evidence that the supervisor was relieved for general incompetence and for creating a hostile work environment, the applicant has presented insufficient evidence, which consisted only of her own statement, to prove that the supervisor's alleged poor leadership adversely impacted the evaluation of her performance. In addition, the supervisor's evaluation was not the only input into or review of the applicant's performance marks for the period in question. The CWO, who was the area supervisor for the applicant's unit, stated that she reviewed the performance evaluations of the applicant's unit and recommended either approval or disapproval before forwarding them to the marking and approving officials. The CWO did not indicate that she had any concerns about the evaluation of the applicant's performance; however, she mentioned that the applicant had some performance issues,

⁴ The Board does not agree with TJAG's position that the exhaustion of administrative remedies as discussed in the Board's rules (33 CFR § 52.13) bars the Board from considering an application where a remedy was but is no longer available due to a statute of limitations. If no current remedy is available, the applicant is considered to have exhausted his or her administrative remedies.

for which she was counseled. In addition, the CWO advised the applicant of the appeals process available to her if she were dissatisfied with her marks.

7. The applicant's more favorable past and subsequent performance marks do not prove, by themselves, that the marks for the period under review are inaccurate, as performance can change from one period to the next, particularly when (as here) the individual's duties have changed. The applicant has not submitted sufficient evidence to show that the supervisor was particularly biased against her or that her performance during the evaluation period merited higher marks.

8. Accordingly, the applicant has failed to prove an error or injustice in her record and her request should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of XXXXXXXXXXXXXXX, USCG, for correction of her military record is denied.

Philip B. Busch

Richard Walter

Suzanne L. Wilson