

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2000-192

FINAL DECISION

██████████ Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on September 25, 2000, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated July 12, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a ██████████ (pay grade E-8), asked the Board to remove a negative administrative remarks (page 7) entry from his record and to reinstate him on the 1999 advancement eligibility list for promotion to AVTCM ██████████ (pay grade E-9). The applicant took and passed the May 1999 servicewide examination (SWE) for advancement. However, when the E-9 advancement eligibility list was published on August 9, 1999, the applicant's name was not on the list. The applicant claimed that his name was removed from the eligibility advancement list because he was not recommended for advancement on a transfer performance evaluation for the period ending June 14, 1999.¹

SUMMARY OF RECORD AND SUBMISSIONS

The applicant claimed that on June 9, 1999, two days prior to his scheduled permanent change of station (PCS) transfer, he was given a negative administrative remarks (page 7) entry documenting a not recommended for advancement that he received on his special transfer evaluation for the period ending June 14, 1999.

The applicant stated that because of the recommendation against advancement, his name was removed from the E-9 eligibility advancement list. He stated that he believed that the transfer evaluation and page 7 entry were inaccurate, unfair and untimely. He stated that the negative comments contained in the page 7 entry are inconsistent with his performance evaluation marks, which consisted of eight 4s, nine 5s, and six 6s. His conduct was rated as satisfactory, but he was not recommended for advancement.

¹The Coast Guard stated that the applicant took a subsequent SWE and is number 2 on the 2001 E-9 advancement eligibility list.

The page 7 entry, which provides justification for the recommendation against advancement, stated the following:

[The applicant] is assigned a mark of Not Recommended for the evaluation period ending 14Jun99. In general, he has failed to maintain the level of performance and leadership expected of an E-8/E-9. His efforts to encourage and monitor the development and progress of personnel under his supervision in the completion of [REDACTED] qualifications were minimal. Weekend trips to his home out of the local area resulted in numerous late arrivals to work. Additionally, he was inconsistent in keeping his supervisors informed of changing work conditions, and his personal liberty, work, and medical status. When counseled on these issues, improvements were minor or temporary. The example he set for others was not one expected of a senior petty officer in a leadership position. [The applicant] was unable to gain or maintain the confidence of his Supervisor, his Department Head, or the Command Master Chief.

{The applicant} is capable of the effort required to earn a mark of Recommended. His transfer did not afford him the time to regain such a mark here; but it will provide a new start at a unit he desires, with the opportunity to quickly prove his potential as a Coast Guard Master Chief.

The applicant rebutted the contents of the page 7 entry by stating that he had asked each of his subordinates to read and sign the email from the supervisor that they were to be fully qualified [REDACTED] by a specific date. He stated that he referred the subordinates to the [REDACTED] and he advised each one to keep a record of events in case they did not meet the qualifying deadline. He stated that one of the individuals qualified by the deadline, one failed to qualify due to medical problems, and the other failed to qualify due to personal problems that led to medical problems. He stated that the command was well aware of the reasons that these two individuals failed to qualify by the deadline.

The applicant stated that he was not aware of any instances in which he did not keep his supervisor informed of the work status of his department or of his medical or personal liberty status. With respect to arriving late to work, the applicant admitted that he was occasionally late for work because of traffic delays on his commute from his home in [REDACTED] to his workstation in [REDACTED]. He commuted back and forth on weekends. The applicant claimed that the negative performance evaluation resulted from a personality conflict that existed between the rating chain supervisor and himself.

The applicant stated that his Department head never interacted with the maintenance chiefs, and that the command master chief, to the best of his knowledge, was not active in the chief's mess or active in the concerns of any [REDACTED] chief petty officers. The applicant further stated as follows:

The Enlisted Performance Evaluation System is extremely important to the careers of all Coast Guard Enlisted Personnel. It is vital that all members receive "fair, accurate, objective and timely evaluations." I

strongly feel that [REDACTED] did not afford me this. The "apparent" misalignment between the adverse page 7 and the evaluation on the EPEF [enlisted performance evaluation form] was said to be a result of "generosity." With all due respect, I do not feel gratuitous. I received these marks on June 9, 1999, two days prior to my PCS orders. I spent countless hours preparing for the May 1999 Servicewide Exam. I have to believe the command was aware of this recommendation prior to the May 11, 1999 testing date of the SWE. This was hardly a timely evaluation.

On October 12, 1999, the applicant filed a complaint for redress against his commanding officer under Article 138 of the Uniform Code of Military Justice. In this complaint, the applicant requested to be restored to the advancement eligibility list.

On December 29, 1999, the Commander, [REDACTED] Coast Guard District, directed that the applicant's Article 138 complaint be investigated. On February 11, 2000, the investigating officer (IO) filed his report of investigation. The IO found that the applicant was not treated unfairly and that he suffered no injustice, discrimination or prejudice by any member of the command. In reaching this conclusion, the IO telephonically interviewed the applicant, CO, XO (executive officer), engineering officer (department head), rating chain supervisor, engineering department leading petty officer (who was the command master chief), and the maintenance control supervisor, applicant's work place supervisor.

The CO told the IO that the applicant was counseled on at least three occasions during the marking period and told that he was not leading by example, not working toward unit's goal, arriving late and leaving early, and accordingly was not recommended for advancement due to his inadequate performance and attitude. About the disparity between the performance marks and the not recommended for promotion, the CO stated that the applicant was marked generously to give him an opportunity to recover from the negative impact of the performance evaluation. The CO stated that the applicant was not marked high enough for a recommendation for advancement to E-9.

The XO agreed that the applicant received counseling but stated that he (XO) was not aware that the applicant was not on track for advancement E-9. The XO stated that the applicant was a marginal performer prior to the arrival of the rating chain supervisor. The XO stated that the applicant's performance improved after counseling but subsequently declined.

The applicant's department head told the IO that he did not provide the applicant with any formalized counseling but he did provide some informal counseling. The department head listed the same problems with the applicant's performance as those described by the CO.

The applicant's rating chain supervisor told the IO that the applicant began working for the supervisor in December 1998. He stated that he counseled the applicant on February 25, 1999. He identified the same problems with the applicant's

performance as those described by the CO. The IO stated that the applicant's rating chain supervisor thought that the chiefs at the unit were slackers.

The command master chief stated that the applicant had no leadership potential and that his performance marks were higher than deserved. He stated that the applicant should never have been promoted to senior chief and that he was not accountable and responsible.

On February 28, 2000, the Commander, [REDACTED] Coast Guard District, denied the applicant's Article 138 complaint. The Commander also stated the following:

I feel compelled specifically to address your contention that the numerical marks you were assigned bear a causal relationship to your [CO's] advancement recommendation, and that because you received good marks you are somehow entitled to a recommendation for advancement. This contention shows a fundamental lack of understanding of our evaluation system. Numerical marks and the advancement recommendation are not inextricably linked. The marks document past performance in an existing pay grade. The recommendation captures the members future potential to serve successfully in a higher pay grade. Though good marks and a positive advancement recommendation often co-exist, the latter is not dependent upon the former. In this case, I am satisfied that your commanding officer acted properly on a matter that is solely within his discretion.

The applicant, in his statement to the Board, denied that he was counseled or that he was aware that he was not on track for advancement to E-9. He stated that he received mid-term counseling in which he disputed a number of 2's on the mid-term counseling evaluation. He stated that the supervisor told him that "the highlights [for the midterm counseling] were done weeks prior to the midterm counseling and that [the rating chain supervisor's] view had changed to a more positive light." In this regard, the applicant pointed out that the XO stated that he was not aware that the applicant was not on track for E-9. He stated that the findings in the Article 138 investigation were based on opinions and hearsay. He stated that the command could provide no documented counseling because there was none.

The applicant stated that the IO used the "loop holes" in the poorly written enlisted evaluation policy to justify his decision. He further stated as follows:

I have become frightenly alarmed at the shortcomings of our Enlisted Evaluation System and the Advancement process. The inadequacies in this crucial process are the basis of my response to the "Not Recommended" argument. Eligibility requirements for advancement are described in the Personnel Manual . . . in particular Article 5.C.4.E, which . . . states: "The CO's recommendation is the most important eligibility requirement in the Coast Guard advancement system." With that said, I would like to point out the policy contradictions and loopholes that support "most important eligibility requirement."

Enlisted personnel can receive good marks and still not be recommended for advancement based solely upon the opinion that an individual cannot perform the duties of the next higher pay grade. My contention is how do we measure a member's ability to perform at the next higher grade if past or present evaluations are not used. There is no requirement to provide documented counseling. The only required documentation is a page 7 which is given to a member at the end of the marking period.

The [Article 138 investigation] concludes that rating chain evaluators are not required to provide documented counseling throughout the marking period and enlisted evaluations bear no relationship to advancement recommendations. Therefore, the investigation seems to take the position that Supervisors are allowed to surprise evaluated members with an adverse page 7 . . . declaring them ineligible for advancement at the end of the marking period. . . . I agree that the [CO's] recommendation is a crucial part of the advancement system. I strongly believe a commanding officer should be given factual, documented information on which to base his or her decision. Evaluations are vital to the careers of all enlisted members. Good supervisors provide documented counseling through out the marking cycle to members who are not meeting the published standards. It was the contention of [REDACTED] I was not on track for [E-9], yet I received word two days prior to my departure on overseas orders. According to the investigation, every one in the rating chain was aware, except the Executive Officer and myself.

Views of the Coast Guard

On February 26, 2001, the Chief Counsel provided the Coast Guard's comments to the Board. He recommended that the Board deny relief to the applicant. In a memorandum from the Commander, Coast Guard Personnel Command, attached to the advisory opinion as enclosure (1), CGPC stated that the applicant's name was never placed on the advancement eligibility list because of the non-recommendation for advancement. The advancement eligibility list was published on August 9, 1999.

The Chief Counsel stated that "absent strong evidence to the contrary, it is presumed Applicant's marking officials executed their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (D.C. Cir. 1992)." The Chief Counsel stated that the applicant's command complied with the Personnel Manual and had a reasonable basis for not recommending the applicant for advancement to E-9. He stated that the CO made his recommendation based on his own observations and those of the other rating chain members that the applicant had not exhibited the necessary leadership skills or caliber of performance to indicate that he was capable of performing at the next pay grade. He stated that the non-recommendation for advancement was properly documented on a page 7, which is required to provide the member with guidance and feedback. See Articles 5.C.4.b.1.1., 5.C.4.e.5.b., and 10.b.3, of the Personnel Manual.

Responding to the applicant's argument that his performance marks and past performance as an E-8 contradicts the recommendation against advancement, the Chief

Counsel stated that according to Article 10.B.7.1. of the Personnel Manual, "past performance is a factor, *the [CO] must base the recommendation on the member's potential for satisfactory performance at the next higher rank.*" The Chief Counsel further stated as follows:

The Enlisted Performance Evaluation System (EPES) is designed to evaluate the performance of an enlisted member at his current pay grade and position. See Article 10.B.1.a., CGPERSMAN. Although the numerical marks provide some information about an enlisted member's potential, it is not the only factor in considering a member for advancement. Other criteria include completing or fulfilling required performance qualifications, military requirements, time in service requirements, sea duty requirements, and servicewide examinations. . . . However, the Commanding Officer's recommendation for advancement is the most important eligibility requirement for advancement. Article 5.C.4.e., CGPERSMAN.

The Chief Counsel stated that Article 5-C-4 of the Personnel Manual requires the CO to be personally satisfied that a member's performance has been strong enough to earn the recommendation for advancement. The Chief Counsel stated that the CO determined the applicant's performance was not strong enough for an advancement recommendation. He further stated that the applicant's disagreement with the CO's evaluation of his performance is not evidence of error or injustice.

The Chief Counsel stated that while the applicant's marking officials deviated from Coast Guard regulations by not ensuring that the applicant signed his special (transfer) evaluation 15 days or more prior to his PCS transfer, such deviation constituted harmless error. According to Article 10.B.5.b.1. of the Personnel Manual, commands shall ensure members sign transfer marks no later than 15 days before departing the unit to allow adequate time for counseling, appeal, and administration. The applicant's marks were given to him two days before his departure for another duty station. The Chief Counsel stated that this deviation from regulation did not deny applicant due process and was harmless. The Chief Counsel further stated as follows:

The purpose of the regulation [directing that members be given their marks 15 days prior to departing] is to allow departing Coast Guard members adequate time for counseling, appeal, and administration. In his application, applicant is not disputing the fact that he was never counseled, nor is Applicant challenging the marks that he was given. Applicant's only objection is the "not recommended" for advancement endorsement and the corresponding [page 7]. However, under Coast Guard regulations, Applicant has no right to appeal the advancement recommendation of the Commanding Officer to a higher authority. Article 10.B.7.4, CGPERSMAN.

Applicant's Reply to the Views of the Coast Guard

On March 28, 2001, the Board received the applicant's reply to the views of the Coast Guard. He stated that the fact that he was not given the page 7 until his arrival at

his new duty station and that he was not provided with feedback and guidance on improving his performance is sufficient to rebut the presumption of regularity. In addition, he stated that he has submitted evidence challenging the accuracy of the page 7 entry. He also stated that the following statements support his allegation that the Article 138 investigation did not adequately evaluate his claim that the not recommended mark was inaccurate and unfair.

1. A chief petty officer (CPO) W, who was the applicant's direct supervisor (not the rating chain supervisor), stated that the applicant always kept him informed of the status of all maintenance activities concerning the [REDACTED]. He stated that the applicant kept him informed about his personal liberty status and medical appointments. He stated that the applicant would schedule dental appointments in [REDACTED] on his return weekend trips from his home in [REDACTED]. He stated that if the applicant was going to be late returning, he would always inform him and ensure that someone else from the applicant's shop would be present at the morning brief. He stated that the relationship between the applicant's rating chain supervisor and the chiefs was tense. He stated that he was surprised by the adverse marks the applicant received but did not have time to discuss them with him due to the applicant's quick departure. He stated the applicant's rating chain never approached him about input to the applicant's performance evaluation. He stated that he was contacted by the IO for the Article 138 complaint who asked one sided questions and who did not want to hear his opinion about the relationship between the rating chain supervisor and the chiefs.

2. CPO M, one of the applicant's subordinates for the period in question, stated that on January 15, 1999, he was directed by the applicant to become fully qualified in [REDACTED] by April 15, 1999. He stated that the applicant required him to sign the email from the applicant's rating chain supervisor about the training, informed him to keep a log tracking his progress, and directed him to schedule training with the training CPO. This individual stated that he met the qualification deadline, but the two other members did not.

3. An [REDACTED] wrote that he was told of the training requirement by the applicant. He stated that he was required to sign the email, informed to keep a training log, and directed to the training CPO to schedule the necessary training. He stated that he did not meet the qualification deadline because of unforeseen medical problems that he brought to the attention of both the applicant and the applicant's rating chain supervisor. He was granted an extension to become qualified and did so on July 6, 1999. He stated that there was tension between the applicant's rating chain supervisor and the chiefs.

The applicant also submitted a rapiddraft letter from the CO of the [REDACTED] unit to his then current command asking the current command to counsel the applicant on the performance evaluation and to have the applicant sign the evaluation form. In this regard the applicant submitted a statement from a master chief petty officer of his current unit stating that during the first week of July 1999 he received from the applicant's previous command a page 7 entry dated June 1, 1999, signed by the previous CO but not signed by the applicant, a set of marks for the applicant signed on June 9, 1999, and a set of marks dated November 30, 1998.

The applicant stated that the rating chain CO did not faithfully and correctly execute his duty under Article 5.C.4. and 5.C.25.d. of the Personnel Manual because he canceled the applicant's advancement although he expected that the applicant would be qualified for advancement prior to the expiration of the advancement list. Article 5.C.25.d. states that: "If at any time prior to effecting an advancement, a commanding officer wishes to withdraw his or her recommendation because an individual has failed to remain eligible and it appears that eligibility will not be attained prior to expiration of the current eligibility list, the commanding officer shall advise the Human Resources Service and Information Center by message . . . to remove the individual's name from the eligibility list."

The applicant stated that from the following page 7 comment, "the CO was reasonably aware that the applicant [could] regain his eligibility prior to the expiration of the advancement list on December 31, 2000[:]" "I am confident [the applicant] is capable of the effort required to earn a mark of recommended. This transfer did not afford him the time to regain such a mark here." The applicant stated that he had a full 18 months to regain eligibility between the time of the recommendation against advancement and the expiration date of the advancement eligibility list.

Prior and Subsequent Performance

The applicant's prior and subsequent evaluations do not show any below average marks and or any other recommendations against advancement.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The BCMR has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. The application was timely.
2. The applicant is mistaken in his assertion that his name was removed from the eligibility advancement list. Although he took and passed the May SWE, according to the Chief Counsel, his name was never placed on the advancement eligibility list because of the June 1999 recommendation against advancement. The applicant has presented no evidence to the contrary. The Human Resources Service and Information Center (HRSIC) has the responsibility for publishing the advancement eligibility list. HRSIC did not place the applicant's name on the advancement list because he was not recommended for advancement by the CO on the June 1999 transfer evaluation. The Board is not aware of any provision under the Personnel Manual that permits a unit CO to place a member's name to an advancement list when the member's name was never placed on the list by HRSIC.
3. The issues in this case are (1) whether the page 7 entry documenting the CO's recommendation against the applicant's advancement is in error or unjust and (2) whether the rating chain committed an error by not recommending him for advancement to E-9 on the June 1999 transfer evaluation. For the reasons discussed

below the Board finds that the applicant has failed to prove by a preponderance of the evidence that the Coast Guard committed an error or injustice in this case.

4. Article 10.B.7. of the Personnel Manual states that a "recommendation for advancement must be based 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." Moreover, Article 5.C.4. of the Personnel Manual states that "although minimum performance factors have been prescribed to maintain overall consistency for participation in the SWE, the [CO] shall be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation." In addition, Article 10.B.7.4. of the Personnel Manual states that the approving official's decision on the advancement recommendation is final and may not be appealed within the Coast Guard. These provisions of the Personnel Manual give the CO great discretion in deciding whether to recommend an enlisted member for advancement to the next higher grade. The CO, in this case, did not recommend the applicant for advancement on the June 1999 transfer evaluation. Notwithstanding the Personnel Manual, the Board has the power to review the entire record for error or injustice.

5. The Personnel Manual requires that a page 7 entry is prepared documenting a recommendation against advancement. On the page 7 entry for this case, the CO stated that the applicant was not recommended for advancement because he had not maintained the level of performance or leadership that was expected from an E-8/E9. The CO provided the basis for this conclusion by stating that the applicant put forth minimal effort toward ensuring that his personnel obtained their [REDACTED] qualification, abused liberty, and failed to keep his supervisor informed about the status of his work. There is no evidentiary basis for the Board to conclude that the CO's concerns with regard to these issues were invalid.

6. The applicant obviously disagrees with the CO's reasons for not recommending him for advancement. However, it is the CO's assessment in this regard that controls. The applicant presented a statement from his direct supervisor that the applicant kept him informed of the work place conditions and his liberty status. However, the rating chain supervisor and the marking official (department head), who were in positions to observe the applicant's performance, agreed with the CO about the applicant's shortcomings. The Board finds that the applicant has not shown by a preponderance of the evidence that the CO's comments were anything other than his professional judgment about the applicant's readiness for advancement to E-9.

7. The applicant submitted insufficient evidence to prove that the CO's comment that the applicant put forth minimal effort in getting his subordinates qualified as [REDACTED] was inaccurate. Although the applicant submitted statements from three of his subordinates explaining the action the applicant took toward the qualification effort - having the subordinates sign an email, keeping a log of their efforts, and scheduling training with the training officer - the command thought he should have done more toward accomplishing this goal. The applicant failed to present evidence that he checked on their training, followed-up with the training officer, or provided guidance during the training process. Therefore, the Board cannot conclude that the CO's comment in this regard is inaccurate or unfair.

8. The applicant complains that he was not counseled that he was not on track for advancement to E-9. However, the CO stated that the applicant was counseled at least three times and the rating chain supervisor stated that he was counseled in February 1999. The applicant himself admits that he was counseled in February 1999 because he stated that he contested a number of 2s on this mid-term counseling evaluation. This mid-term counseling session should have put the applicant on notice that the rating chain was dissatisfied with his performance. As an E-8, the applicant should have followed-up with the rating chain about his progress and should not have waited until the end of the evaluation period to find out that he would not be recommended for advancement. The command was not required to maintain written documentation each time it mentioned the applicant's performance to him whether positive or negative. The CO was only required to document the negative advancement recommendation, which he did. Based on the evidence of record, the Board finds that the applicant has submitted insufficient evidence to show the CO's reasons for not recommending him for advancement are inaccurate.

9. While the marks on the performance evaluation appear to be inconsistent with the not recommended for advancement mark, the Personnel Manual makes it clear that the advancement recommendation is not dependent on the marks in the performance categories, but rather on the CO's assessment of an individual's readiness to assume the duties and responsibilities of the next pay grade. By giving the applicant average to above average marks in the performance categories, the CO recognized the applicant's performance in the present pay grade had been satisfactory. However, the CO could not recommend the applicant for advancement to next higher grade because of the CO's concerns about the applicant's leadership skills. The Board finds that since the performance marks and the advancement recommendation are not dependent on each other, no inconsistency exists between the performance marks and the not recommended for advancement on the subject performance evaluation. The Board further finds that if any inconsistency does exist between the performance marks and the not recommended for advancement mark, it is one permitted under the Personnel Manual.

10. The applicant complained about an enlisted performance evaluation system that allows him to receive average to above average marks and a not recommended for advancement. However, the performance marks measure the members performance in the current pay grade against a predetermined standard. The advancement recommendation on the other hand, is the CO's assessment on whether a member is ready to assume the responsibility of the next pay grade. It is conceivable that a member can perform his current duties satisfactorily, but not have leadership skills, maturity level, or commitment necessary to perform at the next higher pay grade. The Coast Guard has intentionally developed the system in this manner to serve its needs and the Board will not interfere with that process.

11. The Coast Guard did not comply with the requirement to give the applicant his performance evaluation 15 days prior to his transfer from the unit. The purpose of this 15-day period is to provide time for counseling and appeal of the performance evaluation. The recommendation against advancement is not appealable and therefore an appeal of the evaluation would not have helped the applicant in this regard. While

end of period counseling may not have occurred, there is evidence that the CO requested that the applicant's new unit provide him with the necessary counseling. In addition, the applicant had his concerns about the performance evaluation investigated by the District Commander as a result of filing an Article 138 complaint against the CO. Accordingly, the applicant has not shown that he suffered any prejudice or loss of due process, because of the command's failure to have him sign the performance evaluation 15 days prior to his transfer from the unit.

12. The Board is not persuaded that the negative advancement recommendation the applicant received was due to a personality conflict between the applicant and the rating chain supervisor. In this regard, the applicant did not provide a basis or reason for the alleged personality conflict. There was some evidence that the rating chain supervisor thought that the chiefs at the unit did not work as hard as they should have, but such evidence is insufficient for the Board to reach the conclusion that the rating chain supervisor's evaluation of the applicant's performance was impacted by a bias against the applicant.

13. The applicant has not shown that the CO committed an error either in the evaluation of his performance for the period ending in June 1999 or in the Coast Guard's refusal to place his name on the E-9 advancement eligibility list. The Personnel Manual leaves the advancement recommendation to the judgment of the CO and prohibits that recommendation from being appealed. The Board finds no reason to disturb the CO's recommendation in this case.

14. Accordingly, the applicant's request should be denied.

ORDER

The application of
his military record is denied.

USCG, for correction of

