

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-137

FINAL DECISION

ANDREWS, Attorney-Advisor:

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on May 30, 2000, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated April 12, 2001, 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, a xxxxxxxx, asked the Board to correct her military record by removing a negative "page 7" (Administrative Remarks form CG-3307) dated April 5, 2000, which was written in support of low marks she received on a performance evaluation for the period October 1, 1999, through March 31, 2000. The page 7 prepared by her supervisor, a TC1, stated the following:

[The applicant] has not earned my recommendation for advancement. During the marking period [she] briefly stood break-in watches in the Group xxxxx as we attempted to qualify her as a xxxx. During this time she showed no initiative to do so. On two occasions she was found in the ODO bunkroom in bed during the work day, once while on watch. She routinely missed radio calls. On her last radio watch she missed several calls from a CG helo which was carrying both the Group Commander, and District Seven//OSR//. After the helo incident command concern arose over her competency as a xxxxxxx. She was removed from the break-in watch rotation and assigned to dayworking duties. During this time the only project she showed any interest in was drafting an ADC in which she offered to re-enlist "if" they assigned her to RuitOff xxxxx.

Due to the lack of command confidence in this PO's ability to stand a proficient radio watch, and her lack of sincere motivation to learn how to do so, her access to the xxxxxx was rescinded. She has been assigned to the xxxxx force since her return from leave, and is pending transfer back to xxxxxxxx.

The applicant alleged that none of the incidents described in the page 7 happened during the marking period. She alleged that after missing several radio calls in August 1999, which she admitted was a serious mistake, she was removed from the xxxx break-in rotation even though she had almost completed the xxxx qualification process. However, she alleged, this all happened in August 1999, before the marking period began. Therefore, the remarks about her watchstanding during the marking period are clearly inaccurate because she was no longer standing watches.

The applicant further alleged that she completed the ADC to apply for a recruiting position on September 19, 1999, and it was disapproved by her command one week later. Therefore, the comments about her interest in and efforts to become a Coast Guard recruiter are also inaccurate because her application was made and disapproved before the marking period ever began.

The applicant alleged that because she was in her seventh month of pregnancy, an obstetrician at the Naval hospital sent her supervisor a list of duty limitations in August 1999. One limitation was that she was supposed to rest for 20 minutes every four hours. She alleged that she never laid down unless her supervisor or whoever was in charge at the time told her she could do so, and she never laid down for more than 20 minutes, except at lunch time, when she took naps. Moreover, she stated, this occurred only in August and September 1999, before the marking period began.

The applicant alleged that after she was removed from the watch rotation and during the first month of the marking period, she "dayworked for Operations." Her duties included ordering supplies, correcting charts, copying manuals and hurricane plans, loading "crypto," destroying superceded material, running errands, standing by the radio when the xxxx stepped out for a minute, filing, logging in information, answering phones, and cleaning the "head." From October 29, 1999, through February 11, 2000, she was on maternity leave. When she returned from maternity leave, she was assigned to work with the Group xxxxxxxx.

VIEWS OF THE COAST GUARD

On November 30, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request for lack of proof.

The Chief Counsel argued "[a]bsent strong evidence to the contrary, Coast Guard officials, such as Applicant's Commanding Officer and immediate supervisors, are presumed to have executed their duties correctly, lawfully, and in good faith." See *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). He alleged that because the applicant failed to submit any evidence corroborating her allegations, she has failed to overcome this presumption of regularity.

The Chief Counsel submitted with his advisory opinion a memorandum prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that the applicant's marks show that her job performance was declining. CGPC also pointed out that an "approving official's decision on advancement recommendation is final and cannot be appealed." Therefore, although the applicant could have appealed her evaluation marks (but she did not), she could not appeal the decision not to recommend her for advancement, which was documented on the page 7.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On December 5, 2000, the BCMR sent the applicant a copy of the Chief Counsel's advisory opinion and invited her to respond within 15 days. No response was received.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on xxxxxx, for a term of four years. Upon finishing boot camp, she was assigned to the cutter xxxxxx. The applicant's record contains two page 7s prepared by her supervisor on the cutter. The first, dated March 31, 1998, states that she had been assigned a mark of "progressing" because she remained unqualified as a xxxx. It further states that "[a]lthough this condition is not due to negligence on her part, she does not yet possess the technical skills necessary for a recommendation for advancement." The second, dated January 20, 1999, states that she "failed to conduct a proper security check prior to departing Radio Central" and that she was advised that "any future incidents of this nature may lead to further disciplinary action." After the applicant reported her pregnancy in April 1999, she was transferred to the Group xxxxxxxxx, where she served until her maternity leave began, apparently on October 29, 1999. After returning from maternity leave in February 2000, she was temporarily assigned to another unit, the xxxxxxxxxx.

Coast Guard enlisted members are evaluated semi-annually in 22 performance categories on a scale of 1 to 7, with 7 being best. The applicant's record includes the following marks, which she received as a xxx:

DATE	MARKS OF 3	MARKS OF 4	MARKS OF 5	MARKS OF 6	CONDUCT	RECOMMENDATION FOR ADVANCEMENT
3/31/98		15	5	2	S	Progressing
9/30/98		15	6	1	S	Recommended
3/31/99	4	15	2	1	S	Not Recommended
9/30/99		22			S	Recommended
3/31/00	9	13			S	Not recommended

APPLICABLE REGULATIONS

Article 10.B. of the Personnel Manual governs the preparation of Enlisted Performance Evaluation Forms (EPEFs). Article 10.B.1.b. states that “[e]ach commanding officer must ensure all enlisted members under their command receive accurate, fair, objective, and timely evaluations.” Each enlisted member is evaluated by a “rating chain” of three persons: a supervisor, a marking official, and an approving official. Article 10.B.4.d. After the supervisor and marking official assign the member marks in the performance categories, the EPEF is reviewed by the approving official, who must concur in marks and indicate whether he or she recommends the member for advancement to the next highest grade. Article 10.B.4.d.(5). A member cannot take the examination for advancement without the recommendation of her approving official.

Article 10.B.7. states that in deciding whether to recommend a member for advancement, the rating chain must consider the member’s past performance and ability to perform the duties of the next higher pay grade.

Under Article 10.B.7.a.(4), if a member’s approving official does not recommend her for advancement or marks her as “progressing,” she must be counseled, and a page 7 concerning the counseling must be entered in her record. The page 7 must explain the rating chain’s reasons for not recommending her for advancement. Under Article 10.B.7.a.(5), an approving official’s decision about whether to recommend the member for advancement is final and cannot be appealed, although a member may appeal her performance marks. Article 10.B.10.

ALCGENL 048/99, issued by CGPC on August 3, 1999, announced the annual solicitation for applications for recruiter duty. The bulletin stated that interested members should promptly complete an application and submit the application and a brief resume no later than September 1, 1999, to the Coast Guard Recruiting Center.

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. The application was timely.
2. The applicant alleged that the statement in the disputed page 7 regarding her being found in bed twice during the work day, once while on

watch, should be removed from her record because she had received medical permission to take 20-minute rests during her pregnancy. However, the fact that she was allowed to take rests does not by itself prove that the two instances referred to in the page 7 were necessarily allowed under her doctor's orders.

3. The disputed page 7 states that the poor performance at the xxxxxx that caused the applicant's rating chain not to recommend her for advancement occurred "[d]uring the marking period" of October 1, 1999, to March 31, 2000. The applicant alleged that the disputed page 7 should be removed from her record because the examples of poor performance cited occurred in August and September 1999, before the marking period began.

4. The record indicates that the applicant worked at the xxxxxxxx after she became pregnant in the spring of 1999 until her maternity leave began on October 29, 1999. After her return from maternity leave in February 2000, she was temporarily assigned to a different unit for the remainder of the marking period. Therefore, it appears that the applicant worked at the xxxxxxxx only during the first month of the marking period, October 1999. However, her superiors at the center continued to serve as her rating chain by preparing the EPEF and making the nonrecommendation for advancement.

5. Although the applicant submitted no proof that she was removed from the xxxx rotation in August 1999 and that her application for recruiter duty was disapproved in September 1999, before the marking period began, her allegations seem credible. Under ALCGENL 048/99, applications for recruiting duty had to be submitted by September 1, 1999. Furthermore, the page 7 indicates that her absorption in applying for recruiter duty occurred after she was removed from the xxxx rotation. Because the deadline for applying for recruiting duty was September 1, 1999, this statement strongly supports her contention that she was removed from the xxxx rotation in August. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that the comments concerning her poor performance on the xxxx watch and her absorption with applying for recruiter duty referred to her performance prior to the beginning of the new marking period on October 1, 1999.

6. The applicant alleged that it was erroneous and unjust for the page 7 to refer to her performance during the previous marking period. However, no regulation requires a rating chain to base its recommendation for advancement solely on the member's performance during the marking period. Under Article 10.B.7. of the Personnel Manual, a rating chain should base its decision about whether to recommend a member for advancement on the member's past performance and ability to perform the duties of the next higher pay grade. The

page 7 documenting a nonrecommendation must cite reasons for the rating chain's decision.

7. The applicant has not proved that it was either erroneous or unjust for her rating chain to base its decision regarding her advancement on her poor performance during the previous marking period. Nor has she proved that any of the comments – other than the words “During the marking period” – are false. Therefore, the Board finds no reason to remove the disputed page 7, in its entirety, from her record.

8. The applicant has proved by a preponderance of the evidence that the words “During the marking period” on the disputed page 7 are inaccurate because they erroneously indicate that the poor performance described on the page 7 occurred during the marking period October 1, 1999, to March 31, 2000.

9. Accordingly, the Board finds that partial relief should be granted by correcting the disputed page 7 by replacing the words “During the” with the words “In the previous.” No other relief should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former XXXXXXXXXX, USCG, for correction of her military record is granted in part as follows:

The page 7 entry (CG-3307) dated April 5, 2000, shall be corrected by replacing the words "During the" at the beginning of the second sentence with the words "In the previous," so that the sentence shall read as follows: "In the previous marking period [the applicant] briefly stood break-in watches in the xxxxxx as we attempted to qualify her as a xxxx."

No other relief shall be granted.

James K. Augustine

Coleman R. Sachs

Edmund T. Sommer, Jr.