

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2004-019**

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**FINAL DECISION**

**ANDREWS, Deputy Chair:**

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 application was received on October 31, 2003, and docketed on November 3, 2003, upon the Chair's determination that his application was complete.

This final decision, dated August 19, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant, a chief food service specialist (FSC) in the Reserve, asked the Board to remove from his record an Enlisted Performance Evaluation Form (EPEF) covering his service from June 1 through October 12, 2000. The EPEF contains very low marks, and his rating chain did not recommend him for advancement.<sup>1</sup>

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard in 1973 and performed four years of active duty, during which he attended "A" School to join the FS rating. Since his discharge, he has remained a member of the Reserve, drilling and performing occasional short periods of temporary active duty and active duty for training. He attended "C" School to learn the skills required of an FSC. By the mid 1990s, he had advanced to FSC

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<sup>1</sup> Enlisted members are evaluated by a rating chain, which consists of a Supervisor, who recommends evaluation marks; a Marking Official, who assigns the marks; and an Approving Official (usually the CO), who approves the EPEF. All three members of the rating chain also indicate on the EPEF whether they recommend the member for advancement to the next pay grade. A member cannot be advanced if his Approving Official does not recommend it. Personnel Manual, Article 10.B.4.d.

and was earning marks of 4, 5, and 6 on his EPEFs.<sup>2</sup> He was also recommended for advancement on the EPEFs. From December 21, 1995, through January 31, 2001, he was assigned to Group Charleston. On his first EPEF at the Group, covering his work from August 19, 1995, through May 31, 1997, he received eighteen marks of 4 and six marks of 5 in the various performance categories and was recommended for advancement. On the applicant's second EPEF, covering his work from June 1, 1997, through May 31, 1999, however, he received twelve marks of 3 and twelve marks of 4 in the performance categories, and he was not recommended for advancement.

On the applicant's EPEF for the period June 1, 1999, through May 31, 2000, he received eleven marks of 3 and thirteen marks of 4 in the performance categories, and he was not recommended for advancement. On May 31, 2000, his commanding officer (CO) entered an Administrative Remarks ("page 7") in his record to document the lack of recommendation for advancement with the following text, which the applicant acknowledged with his signature:

[The applicant was] assigned mark of NOT RECOMMENDED for the annual evaluation period ending 31 May 2000 due to the reasons set forth below. [He] has been counseled on the steps necessary to earn a mark of recommended.

UNSATISFACTORY PERFORMANCE: [The applicant] was informed that for the previous 24 months his performance has been unsatisfactory compared to peers of the same pay grade. [He] is now placed on performance probation. [He] is to take stock of his actions that have caused this situation to develop and take corrective action. He will be coached through this process and performance must improve within the next twelve months. Absent improvement, we will take the necessary steps to transfer him to the [Individual Ready Reserve (IRR)].

There are several reasons why [the applicant] was not recommended for advancement and is being placed on performance probation. [He] has shown an overall lack of food service operations proficiency and productivity and a reluctance to lead and direct work that must be accomplished. His quality of work is poor or marginal. Weekend cleaning lists were not adequately completed. He is not familiar with galley standard operating procedures and required routine paperwork. [He] has had difficulty completing daily ration memos and had had problems producing meals by himself, or supervising meal production, in the allowed time. Meals are not completed/ready at the scheduled time. For his pay grade and years of experience, he has demonstrated a lack of routine food service skills and knowledge he should now possess. [He] shall learn galley food preparation and operating procedures, become familiar or re-learn required CG Dining Facility paperwork, work together and effectively communicate weaknesses with the FSO and galley personnel, agree to a timeline and write down and set improvement goals to improve written and oral communication skills. [His] department lacks the expected consistency and confidence of a Chief Petty Officer. [He] must put effort in his military bearing and appearance. Grooming and uniform appearance must be to standards; get a haircut & trim and come to work in a clean, ironed and sharp uniform – provide a good example to our junior personnel. We expect [him] to look good, direct and orchestrate and accomplish each and every task that an FSC must see done for weekend work at the galley. [He was] notified that he may make a written rebuttal statement regarding this

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<sup>2</sup> Members are rated on a scale of 1 to 7 in various performance categories, with 7 being best.

performance probation, provided such rebuttal is delivered to me no later than 60 days from his acknowledgment of witnessed refusal to sign.

On October 12, 2000, the applicant's rating chain prepared the disputed probationary EPEF pursuant to his pending transfer to another unit. On this EPEF, he received five marks of 2 in the categories "Setting an Example," "Adaptability," "Professional/Specialty Knowledge," "Professional Development," and "Administrative Ability"; seven marks of 3 for "Developing Subordinates," "Evaluations," "Organization," "Using Resources," "Monitoring Work," "Communicating," and "Military Bearing"; and twelve marks of 4; and he was not recommended for advancement. To explain the marks of 2, the unit's Supply Officer, who was the applicant's supervisor, prepared a page 7 with the following text, which was acknowledged by the applicant:

12OCT00: Assigned mark of 2 in the Setting an Example dimension of Enlisted Performance Evaluation Form CG-3788 dated 9 October, 2000. [The applicant] has demonstrated little motivation to seek opportunities to make decisions and recommendations. He has shown poor judgment in waiting too long to complete tasks assigned or following through with giving direction to subordinates. [He] seldom shows any initiative and generally waits until given further instruction on what to do next. On a number of occasions, while responsible for running the Galley, [he] left the cash box out too long after lunch.

Assigned mark of 2 in the Adaptability dimension of Enlisted Performance Evaluation Form CG-3788 dated 9 October, 2000. During [the applicant's] two weeks annual training, he had a very difficult time assuming the responsibility of managing the Galley. He was easily confused and unable to follow through with routine tasks such as ensuring the duty cook had checked the refrigerator and freezer temperature levels. [He] required continual supervision just to complete routine duties.

Assigned mark of 2 in the Professional/Specialty Knowledge dimension of Enlisted Performance Evaluation Form CG-3788 dated 9 October, 2000. [The applicant] demonstrated the proficiency level of a FS3 or FS2 not a FSC. He required constant reminders and training just to complete minimum tasks expected of a FSC. [He] was shown how to complete the daily Dining Facility paperwork. Each daily report submitted by [him] contained minor errors that would have made balancing the month very difficult. [He] was also tasked with performing the monthly inventory. The errors made by him during this inventory added up to over \$400.00.

Assigned mark of 2 in the Professional Development dimension of Enlisted Performance Evaluation Form CG-3788 dated 9 October, 2000. As a Foodservice Specialist Chief, [he] failed to actively seek out what he needed to do to improve his knowledge and skills. Although he was counseled every day, [he] failed to make needed corrections in the performance of his duties.

Assigned mark of 2 in the Administrative Ability dimension of Enlisted Performance Evaluation Form CG-3788 dated 9 October, 2000. [The applicant] was unable to complete required reports such as the Coast Guard Dining Facility Operating Statement. In addition, written reports lacked clarity and contained several grammatical errors. The reports submitted by [him] required constant oversight and review to ensure they were accurate and complete.

The applicant's CO also prepared a page 7, which the applicant acknowledged, to document the lack of recommendation for advancement with the following text:

[The applicant was] marked NOT RECOMMENDED in the Advancement section of his enlisted performance evaluation dated 12 October 2000. The assigned marks of 2 in the following dimensions of Setting an Example, Adaptability, Professional and Specialty Knowledge, Professional Development, and Administrative Ability have been well documented. [He] has been fully counseled regarding the steps he must take to earn an advancement recommendation.

On an administrative entry dated 31 May 2000, [he] was placed on an unsatisfactory performance probation. Two drill periods and Annual Training for two weeks [were] arranged to discuss performance development and to shore up weaknesses. Unfortunately, this evaluation has uncovered additional areas where performance must improve, as documented. This evaluation reports that performance has become worse and I caution [him] that he may well be a candidate for reduction in grade due to incompetency. [He] is to review 5.C.38.c. – Reduction for Incompetence, CG Personnel Manual, COMDTINST M1000.6A.

[The applicant] is afforded an opportunity to submit a rebuttal to this documentation provided it is delivered to me no later than 60 days from his dated acknowledgement or witnessed refusal to sign.

After receiving the Probationary EPEF, the applicant was transferred to the IRR.

### **APPLICANT'S ALLEGATIONS**

The applicant alleged that on March 31, 1999, another member of his unit, FS1, made false allegations about him in a memorandum to the Supply Officer. The applicant submitted a copy of this memorandum (see below), which is not part of his personnel record. The applicant alleged that the page 7 dated May 31, 2000, and the decision to put him on probation were based on the same incorrect information. He alleged that prior to being placed on performance probation, he was not aware that he had received unsatisfactory performance marks for the prior two-year evaluation period because he was never given a copy of his EPEF. He alleged that he was allowed to take the Service-Wide Examinations (SWEs) for advancement in 1997 and 1998, but his tests were never scored.

The applicant alleged that the mark of 2 that he received for "Setting an Example" on the disputed EPEF was unjust. He stated that he was very cautious in his actions and decision-making during the evaluation period because he was on probation, but he was never apathetic. He alleged that there were many changes to the routine during the period, but that he took all of them in stride. The applicant alleged that, although he was accused of having been careless with the lunch cash box, he never lost any funds and kept the box within his sight at all times. He stated that, although it was difficult, he always tried to project a positive and enthusiastic attitude.

The applicant alleged that during his probation, he was placed in charge of the galley for two weeks but given very little instruction or guidance. He stated that, previously, he had only been in charge of the galley for weekend drills and had worked in support roles, such as day worker, watchstander, and relief worker in the aftermath of hurricanes. Regarding the paperwork, the applicant stated that he had always handled food preparation and serving and had not been in charge of the paperwork, record-keeping, or report or menu preparation. He stated that he had done some paperwork in the past on paper but had never had to do any on a computer before. He alleged that standard practice was that only the senior member of the rate worked in the office and that junior personnel, and especially reservists, worked at "getting the crew fed" because regulars were "wary of reservists having anything to do involving records." He alleged that during his two-week period of active duty for training (ADT), both the Food Service Officer (FSO) and the senior FS had access to the office computer, which limited what he could accomplish.

Regarding the mark of 2 for "Adaptability," the applicant stated that, because the ADT lasted for only two weeks, he could not make many decisions "as it wasn't [his] shop" and he was "working under an awkward situation" in another man's space. He stated that he is used to filling temporary assignments, such as stepping in to cook when a boat was missing an FS, and did not have any opportunities to add or change policies, but that when he received written or oral feedback, he would make changes immediately. He alleged that he met the mission of feeding the crews during the ADT.

Regarding the mark of 2 for "Professional/Specialty Knowledge," the applicant noted that the period of ADT was the first time he was ever tasked with the overall management of the entire galley and that it should have been considered a training time, rather than an evaluation time. However, he alleged, his command was more interested in processing him out of the Service than in giving him a reasonable amount of time to train and learn the work. He submitted a copy of a training plan he was given (see below). He pointed out that in prior evaluation periods he had served on small vessels or stations and that for "years, [he was] the senior reserve FS, successfully holding down a reserve FSC billet supervising several people on reserve weekend drills, while serving over a hundred people" and that his concern had always been to get the crew fed, and he had "never had anything to do with the administrative side of the rate, such as ordering stores, drawing up menus or any of the record keeping." Regarding the \$400 inventory error, he stated that he was not aware of the error until he saw the page 7. He stated that he performed the inventory near the end of the month, but not at the end of the month, so he did not know if anything "was charged out of stores." He further stated that although he had assisted with inventories in the past, he had never been in charge of an inventory of someone else's stores.

Regarding the comment about his needing constant reminders, the applicant stated that he received only a short training on the computer and felt rushed whenever he was trying to work on it because others needed it. He alleged that the trainer, the FS1, trained him only for brief periods and seemed resentful that he had to do so. The

applicant alleged that he had had no problems with paperwork until he had to do it on a computer. When he had attended "A" and "C" School years before, he was trained to do all of the FS "paperwork" on paper, not on a computer.

The applicant alleged that when he learned that the duty cook was not checking the temperature levels in the refrigerator and freezer, he "reminded him to do so along with [the] consequences of such action" regarding spoilage and loss. He alleged that he had "never lost stores."

Regarding the mark of 2 for "Professional Development," the applicant alleged that the mark is unfair because every year during his ADT he would read through all of the manuals for his rate and he would read them all again prior to each SWE. In addition, he stated that he held study group sessions with fellow FS petty officers by coming in early before drills started. He further stated that, during his ADT during the probationary period, he spent much of his time studying manuals and food service-related publications because other senior FSes would be working in the office and there was always a duty FS standing watch in the galley. He stated that once during the ADT, when he was asked to give a lecture on nutrition, he not only consulted the service manuals, but also the source material that the manuals were based on, publications at his local library, and a college text book.

The applicant alleged that every day during the ADT he received counseling in the form of a page 7 from the FSO and that he would immediately correct any errors or shortcomings noted on the page 7s. He alleged that the goal of the ADT was to enable him to fill in when the FSO went on leave and that the ADT would have gone well if the FSO had showed him how he wanted the galley run. He alleged that he had no problems getting the meals prepared and served and that he could have successfully filled in for the FSO by working late to complete the administrative work at night.

Regarding the mark of 2 for "Administrative Ability," the applicant alleged that the comment that he "was unable to complete required reports such as the Coast Guard Dining Facility Operating Statement" is unfair because he was only on ADT for two weeks and "would need to come in before ADT started at the beginning of the month and after the end of the month to complete the monthly Dining Facility Operating Statement." He stated that when he tried to do such work on the computer, he always felt rushed and had insufficient time to notice and correct his errors before others noticed them. Moreover, he alleged, he never knew that his work had grammatical and clarity problems until he saw the page 7 dated October 12, 2000.

The applicant alleged that the mark of 3 he received for "Organization" was also unfair because he provided his supervisor with accurate reports and planned meals and ensured that they were prepared and served in a timely and appetizing way, which would not have been possible if he were not well organized. He alleged that he always served meals on time unless there was a power or equipment failure or a "last minute

change in operation plans” and that he knew how to prioritize work and to change priorities when necessary.

The applicant alleged that the mark of 3 he received for “Using Resources” was unfair because he always made good use of available personnel, equipment, materials, and publications; did not waste anything; and delegated tasks to the lowest practical level, following up as necessary to ensure completion.

The applicant alleged that the mark of 3 he received for “Monitoring Work” was unfair because he monitored work to ensure that it was in progress and made sure that assigned tasks with deadlines were completed on time. He alleged that he did so without being overbearing.

The applicant alleged that the mark of 3 he received for “Communicating” was unfair because the presentation that he made on nutrition was attended by the duty FS and the mess cook and that all other communications were “person to person or to a group of just two or three.” He stated that he has rarely had a chance to do any public speaking and so is inexperienced in this area.

The applicant alleged that the mark of 3 he received for “Military Bearing” was unfair because he made every effort to present a proper appearance while on probation. He alleged that prior to the ADT, he got a haircut and went “over his work uniforms to ensure the newest look possible.” However, because he worked in a kitchen with food, oil, grease, and leaky garbage bags, it was very difficult to keep his uniform clean.

The applicant alleged that he had no chance to appeal the EPEF because he was transferred to another unit in November 2000. He alleged that he discovered the error in his record on October 29, 2000. He alleged that, since his placement on the IRR, he has sought reassignment to no avail.

***Memorandum from FS1 to Supply Officer dated March 31, 1999***

The applicant submitted a copy of a memorandum dated March 31, 1999, from FS1, then the senior regular FS at the Group to the Supply Officer. The applicant stated that he did not receive a copy of the memorandum until the summer of 2000, when he was placed on probation. The memorandum explains the low marks that the FS1 was recommending for the applicant, presumably for the EPEF that covered his work from June 1, 1997, through May 31, 1999. The memorandum appears as follows:

DIRECTING OTHERS: giving mark of 3 because he has shown little or no leadership and direction of his subordinates. He shows no support or disapproval of other’s work. He appears confused under stress and occasionally makes himself unavailable in such situations.

WORKING WITH OTHERS: giving mark of 3 due to his inability to communicate with others in a working environment. When arguments occur between others, he takes no

part in stopping the disagreement or in helping it come to a pleasant solution. He simply ignores it.

DEVELOPING SUBORDINATES: giving a mark of 3 because he doesn't assist in the education of others for promotion or in preparation of meals. He rarely criticizes or compliments the work of other cooks.

RESPONSIBILITY: giving mark of 3 because he rarely accepts responsibility for his errors and gives excuses. He shows no regard for Coast Guard rules and regulations and rarely tells others to do so.

EVALUATIONS: giving mark of 3 because he has done little to mark or counsel his subordinates.

SETTING AN EXAMPLE: giving mark of 3 because he showed up late from time to time, appeared disheveled and uninterested in work on many occasions.

PROFESSIONAL/SPECIALTY KNOWLEDGE: giving mark of 3 because he takes long periods to complete simple tasks and is unsuccessful at finishing them most of the time. He cannot be relied on to cook meals alone.

PROFESSIONAL DEVELOPMENT: giving mark of 3 because he showed no desire to learn more "on the job training". He chose to learn "book" knowledge only.

ADMINISTRATIVE ABILITY: giving mark of 3 because he rarely does any paperwork or reports on personnel or for galley work. He avoids all such work in most cases.

ORGANIZATION: giving mark of 3 because he has no organizational skills. He creates a messy atmosphere in the galley when asked to prepare a meal. He also loses paperwork and important documents on occasion.

USING RESOURCES: giving mark of 3 because he improperly stores and uses food products causing spoilage. He doesn't delegate, he simply accepts what others choose to do. It takes him entirely too long to complete simple cooking tasks.

MONITORING WORK: giving mark of 3 because he is unable to cook a meal without the help or direction of another.

STAMINA: giving mark of 3 because he chooses not to take part in the preparation of the meals or paperwork, instead he chooses to relax.

COMMUNICATING: giving mark of 3 because he rarely listens to all of what others say and then taking things out of context thereby causing disagreements. He doesn't seem to say what he wants to half of the time and he shies from all conflicts.

### *Training Plan*

The applicant submitted a copy of a training plan for his probationary period. It indicates that during his ADT, he was expected to bake two kinds of bread in accordance with regulations; prepare two meals without help or supervision; secure the galley in the evening and supervise the mess attendant in doing so at least once; conduct an inventory and compare his findings with stock records, thereby identifying overage

or shortages; collect, account, and transmit collections for sales of meals; work as the Mess Deck Master at Arms in accordance with regulations; and complete software training with the help of another FSC. The plan also called for him to give a presentation on basic nutrition in September 2000 and to give other presentations and perform other work in the months after which he was transferred from the unit.

## VIEWES OF THE COAST GUARD

On April 1, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

TJAG argued that the Board should deny relief because the applicant failed to file his application within three years of the date he discovered it. He pointed out that the applicant alleged that he learned of the disputed EPEF on October 29, 2000, and that he apparently signed his application form, DD 149, on October 26, 2003, but it was not received by the Board until October 31, 2003.

TJAG further argued that the applicant has not shown why it would be in the interest of justice for the Board to waive the statute of limitations.<sup>3</sup> He pointed out that the applicant provided no justification for his delay in filing his application. In addition, he stated that a cursory review of the merits of the case indicates that the applicant "failed to exhaust his administrative remedies and offers no evidence of any error or injustice." He argued that the applicant's claim that he could not appeal the EPEF because he was transferred lacks merit. He alleged that the applicant's statements "for the most part *support* the low marks he received and merely seek to explain why his performance was substandard." Therefore, TJAG argued, the Board should not waive the statute of limitations.

TJAG also argued that the applicant "is estopped from alleging error or injustice regarding his disputed [EPEF] where he has failed to perfect an appeal of those marks." He alleged that the applicant "made a conscious decision not to appeal his marks" and that the Personnel Manual "provides specific instructions on how to submit an appeal in the event the member has been reassigned. By reviewing the application of one who has failed to make use of an established appeals process, the Board would effectively eviscerate the regulatory scheme implemented by Article 10 [of the Personnel Manual]." TJAG also alleged that, "in the absence of a completed appeal, it is submitted that the Board is without proper jurisdiction to consider this application." In addition, he alleged that the Board "should deem any issue not raised through this process to be waived, absent proof of compelling circumstances that prevented Applicant from raising such issues within the service's EPEF appeal system."

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<sup>3</sup> Pursuant to 10 U.S.C. § 1552(b), the Board may waive the three-year statute of limitations if it is in the interest of justice to do so. Before determining that it is not in the interest of justice to waive the statute of limitations, the Board should conduct a cursory review of the merits of the case and consider the reasons for the delay. *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

Regarding the merits of the case, TJAG argued that the applicant failed to meet his burden of proof by providing any evidence to substantiate his claim. He alleged that "the only evidence [the applicant] offers is his self-serving, uncorroborated allegation that his marks were somehow unfair." He argued that the applicant's own, better opinion of his performance "is insufficient as a matter of law to overcome the strong presumption of regularity afforded her [sic] military superiors." *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

TJAG based his recommendation in part on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC argued that most of the applicant's statements "exemplify [his] inability to demonstrate the performance qualifications required of a Chief Food Service Specialist as established by the Enlisted Performance Qualifications Manual, COMDTINST M1414.8 (series)." CGPC argued that the applicant has not overcome the presumption of regularity accorded Coast Guard records.

#### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On April 5, 2004, the BCMR sent copies of the Judge Advocate General's advisory opinion and CGPC's memorandum to the applicant and invited him to respond within 30 days. The applicant requested an extension and submitted his response on June 4, 2004.

In response to TJAG's arguments about the timeliness of his application, the applicant submitted a copy of a Priority Mail Service receipt from the U.S. Post Office dated October 28, 2003. In addition, he argued that his last contact with the Group command was in November 2000.

The applicant stated that after signing the disputed EPEF, he met with his CO and Executive Officer and was told that his options were to retire, to transfer to the IRR, or to be reduced in grade. No one mentioned that he could appeal his marks, and no one advised him of how he could regain his command's recommendation for advancement. He alleged that a Mr. W encouraged him to retire and that he was given papers showing that it would cost \$3,000 to hold a reduction-in-grade hearing. After a meeting with the Senior Enlisted Advisor, he signed papers to be transferred to the IRR. When he called the Group, he was informed repeatedly by Mr. W that he was no longer a member of the Group. He alleged that sometime later, he called a yeoman in "the section that handles records" at the Group, asked how to appeal his marks, and was told that he should apply to the BCMR and had three years to do so. The applicant alleged that he had no idea that he had a right to appeal the EPEF even though he was no longer assigned to the Group until he received the Coast Guard's advisory opinion. He alleged that he did appeal the marks he received at the end of May 2000, when he was put on probation, and would have appealed his October 12, 2000, marks if he had known that he could.

The applicant alleged that whenever he called to ask about a reassignment, someone would refer to Mr. W. He alleged that his command and Mr. W had "poison[ed] the well for future reassignment." He alleged that after September 11, 2001, he called and emailed the Reserve to ask for an assignment but received no response.

Regarding the merits of his case, the applicant repeated most of the arguments made in his application and added a few more details. He also pointed out that because he was a reservist, his CO had little direct contact with him and had to rely on the reports of others. He stated that the FS1 who wrote the memorandum about his performance dated March 31, 1999, was only the senior FS for a few months and was rarely around on weekends to observe his performance. He alleged that the FS1 recommended that he receive low marks in areas, such as paperwork, in which the FS1 himself was supposed to train the applicant but failed to do so.

The applicant repeated his allegations that he never saw the low marks that are in his record for the evaluation period ending on May 31, 1999, and that he received no training on how to be in charge of the galley until he was required to do it without training during his ADT on probation. He alleged that the only computer training he had ever received in the reserves was "one or two half-hour sessions." He stated that although he was asked to do the paperwork on the computer, he had no legal authority to finalize most of it or to take many other actions, such as getting a repairman for broken equipment, and so whoever was the senior regular FS on duty had to approve his decisions, which was awkward. He alleged that the regular FSes kept encouraging him to retire. He alleged that although he had studied for the SWEs and learned the skills of an FSC, he had never had a chance to practice any of them except cooking and serving food, as reservists were not trusted with more authority. He alleged that he received no counseling on any Enlisted Performance Support Form; instead, his command presented him every day with written comments about his performance the day before, typed on a page 7 form.

The applicant also stated that he does not understand why CGPC said that he was a member of the Group until January 2001, since he was told that he had been transferred to the IRR in November or December 2000.

## RELEVANT REGULATIONS

The BCMR's rule at 33 C.F.R. § 52.13 provides that "[n]o application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to the applicant."

Article 10.B. of the Personnel Manual governs the evaluation of enlisted members. Article 10.B.1.b. provides that "[e]ach commanding officer must ensure all enlisted members under their command receive accurate, fair, objective, and timely evaluations." Article 10.B.4.c. states that each "evaluatee is ultimately responsible for: ... 3. Obtaining sufficient feedback or counseling and using that information in adjusting, as necessary, to meet or exceed the standards. ... 5. Requesting a copy of their EPEF, if desired. 6. Signing in the member's signature block to indicate acknowledgment of: a. The counseling and review of their evaluation; ... c. The appeal time frame; [and] d. His or her advancement potential and recommendation... "".

Article 10.B.4.d.3. states that each member's Supervisor gathers written and oral reports on the member's performance; recommends numerical marks for each performance category; and "[c]ounsels [the] evaluatee on the evaluation after the Approving Official's action and, if requested, provides a copy of the EPEF to the member." Article 10.B.4.d.4. states that the Marking Official gathers reports on the member's performance; reviews the marks recommended by the Supervisor, and assigns the final marks.

Article 10.B.4.d.5. states that the Approving Official (normally the CO) for an EPEF gathers written and oral reports on an evaluatee's performance and is "responsible for ensuring (1) Overall consistency between assigned marks and actual behavior and output ... ; (2) Evaluatees are counseled and advised of appeal procedures; (3) Evaluations are submitted on time; (4) The required Administrative Remarks, CG-3307, are completed to: (a) Support all marks of 1, 2, or 7, with evaluatee's signature; ... (c) Document low factor marks [in accordance with Article 10.B.9.a.]; ... (e) Document mark of "Not Recommended" when assigned in the Recommendation for Advancement block of the EPEF [in accordance with] Articles 5.C.4.b.1.1., 5.C.4.e.5.a., and 10.B.7.3." After completing the EPEF and indicating whether he recommends the evaluatee for advancement, the Approving Official "[f]orwards the completed EPEF to the Supervisor to counsel and inform the evaluatee, via the Marking Official."

Article 10.B.7.3. provides that "[i]f the Approving Official marks "Not Recommended", he or she must counsel the member on the steps necessary to earn a recommendation and prepare an Administrative Remarks, CG-3307, when the member is otherwise eligible for advancement." Articles 5.C.4.b.1.1. and 5.C.4.e.5.a. also require this. Article 10.B.7.1. provides that a rating chain's recommendation for advancement must consider both past performance and "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.” Article 10.B.7.4. provides that the “Approving Official’s decision on the advancement recommendation is final and may not be appealed.”

Article 10.B.10.b.1.b. provides that if a member objects to an EPEF, he may request a meeting with the Approving Official. If the member remains unsatisfied after the meeting, he can appeal the numerical marks in writing and “[i]f the member has been reassigned, he or she must submit the appeal to the Appeal Authority for the former command, via the commanding officer of that command.” Article 10.B.10.b.1.d. provides that reservists have 30 days to submit an appeal after they sign their EPEFs.

Article 8.B.1. of the Reserve Policy Manual states that “[t]he provisions of article 12.B concerning separation of enlisted members in the Personnel Manual, COMDTINST M1000.6 (series), also apply to enlisted members in the Ready Reserve.” Article 12.B.16.c. of the Personnel Manual, entitled “Probation,” provides that COs “will not initiate administrative discharge action for inaptitude, apathy, defective attitudes, unsanitary habits, not adhering to core values, or financial irresponsibility until they have afforded a member a reasonable probationary period to overcome these deficiencies. When commands contemplate discharging a member for these reasons, they shall counsel the member that a formal probationary period of at least six months has begun and make an appropriate Administrative Remarks, CG-3307, entry in the member’s PDR that administrative discharge processing will be initiated unless the member shows significant improvement in overcoming the deficiency during the probationary period. The member must acknowledge this entry in writing. Commanding officers are authorized to recommend discharge at any time during probation if the member is not attempting to overcome the deficiency. Submit copies of all CG-3307 entries as an enclosure to the discharge recommendation submitted to Commander, (CGPC-epm-1).”

Article 10.B.5.b.4.d. of the Personnel Manual provides that a rating chain must prepare a special EPEF “[a]t the end of a three-month probationary period for incompetency. [See] Article 5.C.38.c.” Article 5.C.38.c., titled “Reduction for Incompetence,” provides that a member may be reduced in grade for incompetence if “the person is not qualified to perform the duties of his or her rate. “[T]he commanding officer shall make an Administrative Remarks, CG-3307 entry in the Personnel Data Record stating that the individual is a candidate for reduction in rate by reason of incompetence and the following three-month period will constitute a formal evaluation of his or her competency. The entry will clearly identify the factor(s) involved and the exact areas that need improvement. The member will acknowledge this entry by signing the Administrative Remarks, CG-3307. A reevaluation will be performed at the end of the three month period. ... If the individual responds to counseling and improves his or her evaluation(s), no further action is required. But if at the end of the three month period, the individual has failed to demonstrate the required level of professional competency, the reduction shall go into effect or be recommended to higher authority as befits the individual's rate.” Article 7.C.8. of the Reserve Policy Manual provides that “[t]he three-month probationary period required for active duty members recommended for reduc-

tion in rate due to incompetence shall be extended to six months for SELRES reservists.” Article 5.C.38.d. of the Personnel Manual provides that a member may also voluntarily request a reduction in rate.

Article 4.B.1. of the Reserve Policy Manual provides that “[c]ommands shall monitor member participation and evaluate performance of prescribed training requirements to determine compliance with [participation standards]. Every effort shall be made to correct performance deficiencies by timely counseling of members who are not participating satisfactorily. Commands shall document all counseling in accordance with Preparation and Submission of Administrative Remarks (CG-3307), COMDTINST 1000.14 (series).” Article 4.B.2.b. provides that “[m]embers of the SELRES who have fulfilled their statutory MSO under 10 U.S.C. 651 and whose participation has been unsatisfactory, may be transferred to the IRR or the Standby Reserve, ISL, for the balance of their current enlistment if they still possess the potential for useful service if mobilized. They may also be discharged as outlined above if they do not possess the potential for useful service if mobilized.”

## 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. TJAG argued that the application was untimely because it was received by the BCMR on October 31, 2003, three years and two days past the date the applicant signed the EPEF, October 29, 2000. Title 10 U.S.C. § 1552(b) states that an application for correction must be “file[d] within three years after [the applicant] discovers the error or injustice,” unless the Board waives the statute of limitations “in the interest of justice.” The Board’s rules at 33 C.F.R. § 52.22 do not define the word “filed,” the Board knows of no case law that defines the word within the special context of the BCMRs, and TJAG has cited none. The general rule, however, is that “filed” means actually received by the court—or in this case the Board—not just mailed.<sup>4</sup> This rule decreases disputes and uncertainty over when a filing has occurred.<sup>5</sup> The applicant has asked the Board to correct the EPEF that he signed on October 29, 2000, and the application was not received by the BCMR within three years of that date.<sup>6</sup> Therefore, the Board finds that the application was untimely.

2. The Board, however, may waive the three-year statute of limitations when it is in the interest of justice to do so. 10 U.S.C. § 1552(b). TJAG argued, citing *Allen v.*

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<sup>4</sup> *Houston v. Lack*, 487 U.S. 266, 274 (1988) (citing many lower court cases).

<sup>5</sup> *Id.* at 275.

<sup>6</sup> Although on his application form, DD 149, the applicant stated only that he was appealing the marks on the EPEF, the Board notes that he elsewhere indicates that he believes his transfer to the IRR was unjust. He was not transferred to the IRR until January 31, 2001. Therefore, to the extent that his application constitutes a request to be reinstated in the Selected Reserve, the application was timely.

*Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), that it is not in the interest of justice to waive the statute of limitations because (a) the applicant did not explain his delay and, TJAG alleged, (b) a cursory review of the application indicates that it lacks merit. In *Allen*, however, the court did not say that those two factors provided the only basis on which the Board could find it to be in the interest of justice to waive the statute of limitations. The court merely stated that, in light of the language in 10 U.S.C. § 1552(b), the Board cannot deny a case for untimeliness without at least considering those two factors.

3. There are many exceptions to the general rule that “filing” means “receipt,”<sup>7</sup> and the Board’s congressional mandate is strongly equitable in character.<sup>8</sup> In *Houston v. Lack*, 487 U.S. 266, 271 (1988), the Court held that *pro se* prisoners should not be held to the general rule that “filing” means “receipt,” in part, because they are dependent upon the mail and cannot deliver their documents to their local courts in person. The same logic applies to the Board’s applicants, most of whom are without counsel and live far from Washington, D.C. The applicant has submitted a copy of a receipt that indicates that he mailed his application from his home in South Carolina on October 28, 2000, by Priority Mail Service. This evidence shows that he made a reasonable effort before the three-year statutory period expired to get his application to the Board. Therefore, the Board finds that it is in the interest of justice to waive the statute of limitations and consider the merits of this case.

4. TJAG argued that the applicant’s failure to appeal his EPEF left the Board without jurisdiction over his request. TJAG offered no authority to support his position, except for his interpretation of the Board’s rule at 33 C.F.R. § 52.13(b), which states that “[n]o application shall be considered by the Board until the applicant has exhausted all *effective* administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate and *available* to the applicant.” (Emphasis added.) In *Avocados Plus v. Veneman*, 370 F.3d 1243, 1248 (D.C.C. 2004), the court stated “[w]hile the existence of an administrative remedy automatically triggers a non-jurisdictional exhaustion inquiry, jurisdictional exhaustion requires much more. In order to mandate exhaustion, a statute must contain “sweeping and direct” statutory language indicating that there is no federal jurisdiction prior to exhaustion.”<sup>9</sup> The Board’s rule does not contain

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<sup>7</sup> *Houston v. Lack*, 487 U.S. 266, 273-75 (1988) (citing the Court’s own Rule 28.2 and other instances in which courts count submissions as timely filed if they are mailed by an expeditious means within the prescribed period). The Supreme Court’s rule (now Rule 29.2) is that “[a] document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days.”

<sup>8</sup> *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959) (holding that the BCMR has “an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief”).

<sup>9</sup> *Avocados Plus v. Veneman*, 370 F.3d 1243, 1248 (D.C.C. 2004) (citing *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975)).

“sweeping and direct” statutory language divesting it of jurisdiction due to a failure to exhaust administrative remedies. Therefore, the Board finds that even if the applicant did not exhaust an effective administrative remedy, the Board still has jurisdiction over his case under 10 U.S.C. § 1552.

5. TJAG argued that the Board should dismiss this case or deny relief because the applicant did not appeal his EPEF marks. Under Article 10.B.10.b.1.d. of the Personnel Manual, the applicant could have appealed the disputed EPEF within 30 days of the day he received it. Many more than 30 days have now passed, however, and the chance to appeal the EPEF under Article 10.B.10.b.1.d. is no longer available or practical. The Board's policy is that exhaustion of administrative remedies has occurred in situations where a remedy existed but is no longer available or practical. The Board's policy is consistent with its rule at 33 C.F.R. § 52.13(b) and with congressional intent. The Board believes such blanket denial of applications, as suggested by TJAG, would be a violation of its responsibility under 10 U.S.C. § 1552. The Board notes that the only limitation Congress placed on filing an application with the BCMR is the three-year statute of limitations, and even allowed that to be waived in the interest of justice. Can an agency completely divest an active duty or former service member of review by the BCMR when Congress did not do so? We think not. As the Supreme Court stated in *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), “Of ‘paramount importance’ to any exhaustion inquiry is congressional intent.”<sup>10</sup>

6. In light of the above considerations, the Board finds that the applicant has exhausted all practical and effective administrative remedies now available to him. The Board will therefore consider his case on the merits.

7. Absent evidence to the contrary, the Board presumes that the applicant's rating officials acted correctly, lawfully, and in good faith in making their evaluations.<sup>11</sup> The applicant's own opinion that his performance was not sufficiently poor to merit his rating chain's actions and the EPEF marks is insufficient to overcome this presumption. The applicant made many allegations about his command's deficiencies in terms of record-keeping, counseling, and training of and attitudes towards reservists, but he submitted no evidence to support his allegations.

8. The record indicates that on May 31, 2000, the applicant was counseled about the perceived deficiencies in his performance and placed on performance probation in accordance with Article 12.B.16.c. of the Personnel Manual. The record further indicates that he did not meet his command's expectations during the period of probation. Although he alleged that he received insufficient counseling, he admitted that during his ADT he received written counseling about his performance every day on a page 7.

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<sup>10</sup> *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (citing *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)).

<sup>11</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

9. The applicant did not allege that he could perform all of the duties of his rate without significant assistance from other FSes; instead, he alleged that he could have learned to perform them if his command had provided him more training. The record indicates that the applicant attended both "A" and "C" Schools, and he has admitted that he was later provided some computer training for his rate by the Coast Guard. The applicant has not proved that he had the skills required of an FSC or that his command acted unreasonably in expecting him to have those skills with the training already provided him. Moreover, the Board notes that much of the criticism of the applicant's performance made by his command both on May 31, 2000, and on October 12, 2000, had nothing to do with his computer skills.

10. The record indicates that the applicant's command acted in accordance with Articles 12.B.16.c., 10.B.5.b.4.d., and 5.C.38.c. of the Personnel Manual in placing the applicant on performance probation. Under Articles 12.B.16.c. and 5.C.38.c., the CO acted within his discretion in terminating the probationary period early and preparing the disputed EPEF. Rather than separating the applicant, the CO apparently gave him the options of accepting a reduction in grade or transferring to the IRR. Although the applicant made many allegations about his command's attitude and deficiencies, he submitted no evidence to support his allegations, and he has not proved that his CO abused his discretion in placing him on performance probation, in terminating the probationary period early, and in offering the applicant the stated options, which resulted in his transfer to the IRR.

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

**ORDER**

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

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Terry E. Bathen

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Dorothy J. Ulmer

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Molly McConville Weber

