

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-003

**XXXXXXXXXXXXX
XXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on October 5, 2007, upon receipt of the completed application, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 24, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct her record by reinstating her to YN1 (pay grade E-6) effective November 8, 2005, the date on which she was reduced to YN2. She further requested that all documentation pertaining to her reduction in rate be removed from her military record.

The applicant contended that her reduction in rate was not processed in accordance with the requirements of the Personnel Manual. In this regard, she argued that she was not counseled formally when placed on probation as stated in the administrative remarks page¹ (page 7) dated April 5, 2005. Further, the applicant alleged that the page 7 placing her on probation did not clearly state what requirements she had to meet for a successful probation. Also she argued that she was never given a mark of 2 in any performance factor² on her enlisted evaluations reviews³ prior to being placed on probation.

¹ An administrative remarks page provides a means of recording miscellaneous entries, which are not recorded elsewhere in a Personnel Data Record (PDR). Administrative Remarks entries are made to document counseling or to record any other information required by current directives, or considered to be of historical value. Section 10.A. of the Pay and Personnel Manual (HIRSICINST M1000.6A).

² Enlisted marks range from a low of 1 to a high of 7. A 4 is considered an average mark. See Article 10.B.6.a.3.7. of the Personnel Manual.

The applicant contended that her probation was, in part, retaliation by her supervisor because in March 2005 she had reported him for sleeping at his desk and because the van pool, in which she was the driver and the supervisor was a passenger, could not wait for the supervisor on a particular day and left without him. The applicant also complained that the supervisor sent sexist and gender-based jokes to members of the unit, including herself, which created a hostile work environment. These emails are dated June 7, 2005, June 21, 2005, and July 14, 2005. The emails were entitled “when men are in charge of cleaning the house” with a non-discernable picture, “Blonde Joke” with the punch line “So tell me” says the blonde, “How is it that you feel qualified to discuss nuclear power when you don’t know s___,” and “Words women use.” She stated that she filed a discrimination complaint against her supervisor on April 3, 2005, which was followed with a formal complaint on September 13, 2005.

The applicant contended that the command’s reason for reducing her in rate had nothing to do with her performance during the probationary period. As evidence, she pointed to the commanding officer’s (CO’s) letter to the Commander Mid-Atlantic Region recommending her reduction. According to the applicant, the letter did not reference her failure to meet any particular performance factor on her enlisted employee review. She further argued that her mentor for the probationary period checked all of her work prior to it being submitted for signature and that all of her work came back with no errors. Also, she stated that her supervisor used examples of her work that were completed prior to her probationary period to justify her reduction in rate.

The applicant submitted an email from Ms. P to Chief Petty Officer T praising the manner in which the applicant filled in while Ms. P on was a nine-week maternity leave during the summer of 2004. Ms. P stated that when she returned to work there was no lag time in catching up on her duties. She stated that she urged the applicant’s supervisor to nominate the applicant for sailor of the quarter, which was never done.

The applicant also submitted an email from Mr. O, a family advocacy specialist, to Chief Petty Officer T, dated April 19, 2005. Mr. O stated that the applicant has consistently and professionally accomplished many different tasks and assignments that support the Work-life Family Advocacy Program. His opinion was that the applicant “has been very helpful and demonstrates a positive, caring attitude in her work.”

SUMMARY OF MILITARY RECORD

The applicant’s military record indicates that she has a history of performance and behavior problems dating back to 1992. Nevertheless, she was advanced to YN1, pay grade E-6, in July 2003.

³ Enlisted members are evaluated in four major categories: They are: (1) military performance which measures a member’s ability to bring credit to the Coast Guard through personal demeanor and professional actions; (2) performance which measures a member’s willingness to acquire knowledge and ability to use knowledge, skill and direction to accomplish work; (3) professional qualities which measures those qualities the Coast Guard values in its people; and (4) leadership which measures a members ability to direct guide, guide, develop, influence, and support others performing work. Article 10.B. of the Personnel Manual.

The applicant's first enlisted employee review as a YN1 is dated November 30, 2003. While she did not receive any below average marks in any of the performance factors, she was not recommended for advancement to the next higher grade, YNC. However on her next two enlisted employee reviews prior to probation, the applicant received below average marks. On the enlisted review dated May 31, 2004, she received below average marks of 3 in the performance category, and on the employee review dated November 30, 2004, she received a 3 in professional qualities and two 3s in performance. She was not recommended for advancement to YNC on either employee review.

A page 7 counseling entry dated February 1, 2005, explained why the applicant was not recommended for advancement on her November 30, 2004 enlisted employee review. The entry stated that the applicant failed to consistently demonstrate that she could satisfactorily perform the duties and responsibilities of the next higher pay grade. It further counseled the applicant:

During this marking period, you repeatedly failed to complete assignments on time, assignments that were completed had to be re-done due to errors, and you did not respond in a timely manner to requests and directions from your supervisor. In addition, your performance during the period varied from poor to outstanding. These negative trends and the "roller coaster" of performance are unacceptable and will not be tolerated. They effect the confidence that has been placed in you and causes questions concerning your ability to handle the increased responsibilities inherent with the next higher pay grade.

In order to gain the commanding officer's recommendation for advancement, you must carefully review the performance dimensions for monitoring work, quality of work, and adaptability, and ensure that you actively uphold and enforce, at a minimum, the standard for a mark of 4 in each of these factors. These are performance expectations of a petty officer, and they must be demonstrated by you over the months ahead.

On April 5, 2005, the executive officer (XO) notified the applicant that she was a candidate for reduction to YN2 due to incompetence. The applicant was placed on performance probation for three months. The page 7, which the applicant refused to acknowledge with her signature, informed the applicant that her performance had been unsatisfactory over the past six months and noted that she had been counseled about the proper and timely completion of routine tasks. The page 7 further stated:

Specific problems have been noted in your preparation of standard Coast Guard letters such as those for the special needs program and the recent letters being sent to ombudsman. Numerous errors were noted and despite specific corrections being provided, errors were again noted in letters that were presented as having been corrected. This resulted in some letters having to be re-done up to three times. Other problems include your not completing assigned tasks such as updating the work life calendar, completion of bi-weekly civilian time card information and the units visited spreadsheet in a timely and accurate manner . . .

Additionally, problem areas are communicating with your supervisor and responding to requests for information and providing the status of projects. It has been noted that requests and direction from your supervisor are not answered or responded to. This requires a follow up request and direction from him before you take any action. This behavior is totally unacceptable and needs to be changed immediately.

During this probationary period your progress will be evaluated. CWO2 [M] has volunteered to serve as a mentor during this period. Consult with her should you have any questions concerning what is being required. If at the end of this period, you have failed to demonstrate a significant improvement you will be recommended for reduction in rank . . . A special enlisted employee review will be completed at that time for the purpose of determining competency.

The applicant received a regular enlisted employee review on May 31, 2005, as required by the Personnel Manual submission schedule. She received several 2s in performance and a mark of 3 in professional qualities and performance. She was not recommended for advancement.

At the end of the probationary period the applicant was given an enlisted employee review dated July 4, 2005. In that evaluation she was given marks of 3 in the leadership, professional qualities, and marks of 2 and 3 in performance. She was not recommended for advancement.

On July 4, 2005, a page 7 was placed in the applicant's record, which she refused to sign, advising her that her three-month probationary period had ended and that she had been determined to be incompetent in the YN1 rate. The CO stated that the applicant had failed to respond to requests for status/updates on assigned projects; that she was late in submitting work and was not proactive; and that her routine paperwork often reflected errors such as incorrect unit address formatting and improper heading information. The CO informed the applicant that he would request that she be reduced in rate to YN2 effective the date of its approval.

On September 9, 2005, the CO requested that the Commander of the Mid Atlantic Region approve his request to reduce the applicant to YN2. The CO stated that the basis for his request was information contained in ISC Miami Memos dated April 4, 2005 and August 11, 2005 that were attached to his letter. However, these documents were not provided to the BCMR. The CO stated that during the three-month probationary period the applicant was mentored and received training and counseling from a warrant officer, a chief yeoman, and a master chief petty officer, but that the applicant failed to make progress on her noted deficiencies. The CO stated that following the probationary period, he met with the applicant's mentors, supervisor, and the command master chief who unanimously recommended that she be reduced in rate for failure to meet the standards expected of a first class petty officer. He also noted and listed the applicant's performance and behavior problems dating back to 1992.

Apparently, the applicant was given an opportunity to comment on the CO's recommendation, as required by the Personnel Manual. The applicant must have complained

about her probation evaluation because the CO wrote the following in his letter: “[The applicant] was marked on 30 November 2004, 31 May 2005, and again on 4 July 2005. Her probation period began on 5 April 2005 and ended after three months on 4 July 2005. Although her final probation marks only covered the final month of her probation, the evaluation dated 31 May 2005⁴ was indicative of her performance prior to and during the probation period and does not vary greatly from the preciously assigned marks.

The applicant was reduced to YN2 effective November 8, 2005.

VIEWS OF THE COAST GUARD

On March 12, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted as advisory opinion recommending that the Board deny the applicant’s request. The JAG argued that the Coast Guard reduced the applicant to YN2 in accordance with the Personnel Manual. In this regard, the JAG stated that Article 5.C.38.c. states, “The reason for the reduction must be solely incompetence as evidenced by the fact that the person is not qualified to perform the duties of his or her rate.” The provision further provides, “If an individual’s evaluation mark for any factor is below a factor average of 2 for any evaluation period, or at any time in the member’s commanding officer’s judgment the member’s competency is questionable, the commanding officer shall make an administrative remarks . . . 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.”

In response to the applicant’s argument that she was never given a 2 in any factor on her enlisted employee reviews as a YN1 prior to being placed on probation, the JAG pointed to the provision of the Personnel Manual which gives the commanding officer the authority to use his judgment in deciding whether a member is to be a candidate for reduction due to incompetence. The JAG also noted that the applicant had a long history of performance issues and that in February 2005 she had received counseling because she was not recommended for advancement on her latest enlisted employee review, which was documented on a page 7.

With regard to the applicant’s argument that the April 5, 2005 page 7 placing her on probation did not state clearly what the requirements were for a successful completion of probation, the JAG disagreed and stated that the page 7 clearly identified the factors involved and the exact areas in which the applicant needed to improve.

The JAG stated that the applicant had not presented any evidence to support her contention that her probation and subsequent reduction in rate were the result of retaliation for having reported her supervisor for sleeping at his desk in March 2005. The JAG noted that a month earlier, on February 1, 2005, the applicant had already been counseled about her unsatisfactory performance. With respect to the alleged discriminatory and gender-Obased emails sent by her supervisor, the JAG stated that they were distributed on June 7, June 21, and July 14, 2005, well after the probationary period began and that one is dated after the end of the

⁴ According to the enlisted employee review submission schedule evaluations for member in pay grade E-6 are due the last day of May. Article 10.B.5.a. of the Personnel Manual.

probationary period. Moreover, the JAG stated that the applicant was recommended for reduction by the commanding officer not the supervisor, which was approved by Commander, Mid-Atlantic Region.

The JAG concluded that the applicant did not present sufficient evidence to overcome the presumption of regularity afforded to government officials in the execution of their duties. The JAG argued that the Board should therefore deny her request.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 15, 2008, the Board received the applicant's reply to the views of the Coast Guard. Attached to her reply were documents that contained significant new information. The applicant was advised that the Board's acceptance of the new information would require an adjustment to the ten-month processing timeline, as required by 33 CFR § 52.26(c). This provision states that if an applicant "significantly amends his or her request for relief or new evidence is received after the application is docketed . . . the applicant shall be considered newly complete as of the date the amended request for relief or new evidence is received."

On April 21, 2008, the applicant informed the Board that she did not wish to have the decision delayed in her case and requested the Board not consider the new information and that it be returned to her. On April 23, 2008, the Board returned the documentary evidence as requested. The applicant's statement in reply to the advisory opinion minus the enclosures is discussed below.

The applicant stated that her reduction in rate constituted an injustice for the following reasons:

- The command held a vote among her mentors to decide if she should be reduced. She stated that asking them to vote on her work habits violated her confidentiality since they were her mentors and supposed to be her sounding board.
- The CO used the fact that she was not recommended for advancement to the next higher grade as a basis for placing her on probation and referenced problems with her performance back to 1993 because he was not able to find examples of mistakes she had made during the probationary period.
- She was evaluated as a YN1 by a new supervisor on her enlisted employee review on November 7, 2005, the day before she was reduced. She stated that she received no marks on the enlisted employee review lower than 4 (however, she was not recommended for advancement), but was still reduced.
- That her probation marks were based on one month of performance rather than her three month probationary period.

The applicant restated her allegations that her probation was, in part, retaliation by the supervisor, because the supervisor was aware that she had filed a formal complaint in April 2005.

The applicant again stated that the sending of the inappropriate emails by her supervisor after she had filed her complaint created a hostile work environment for her. The applicant stated that her supervisor did not give her low marks until she was placed on probation.

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 requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant has not proven by a preponderance of the evidence that the Coast Guard violated the Personnel Manual by reducing her in rate from YN1 to YN2 on the basis of incompetence. Article 5.C.38.c. of the Personnel Manual provides two grounds for a reduction in rate due to incompetence. They are: an evaluation mark for any factor below a factor average of 2, or at any time in the member's commanding officer's judgment the member's competency is questionable. On April 5, 2005, the XO informed the applicant that she was a candidate for reduction due to incompetence because her performance had been less than satisfactory. He pointed out the areas in which the command had problems with her performance, such as problems with preparing standard Coast Guard letters resulting in correspondence being redone several times; not completing assigned tasks in a timely, accurate manner, that required the supervisor to review all of her work for accuracy; and not communicating with her supervisor and responding to his requests for information and status reports. Whether or not the applicant received an average factor mark below 2, the CO acted within his authority to designate the applicant as a candidate for reduction since in his judgment her competence to perform the duties of a YN1 was in question.

4. The applicant's claim that the page 7 placing her on probation did not state clearly the areas of her performance that required improvement to avoid a reduction in rank is without merit. The XO listed the areas in which the applicant's performance was unacceptable, and he informed her that there were errors in the preparation of her standard Coast Guard correspondence, that she failed to complete assigned tasks, and that she failed to communicate with her supervisor. Further, the applicant was advised that her behavior needed to change immediately. The XO also appointed a mentor for the applicant and told her to consult with her mentor if the applicant had any questions about the requirements for a successful probationary period. Moreover, earlier on a page 7 dated February 1, 2005, counseling the applicant because of a non-recommendation for advancement on her November 2004 enlisted employee review, she was told at that time, that in order to gain a recommendation for advancement, she needed to review the performance standards for monitoring work, quality of work, and adaptability, which were essentially the same areas of her performance that were unsatisfactory and resulted in her placement on probation. Therefore, the notice provided in the April 5, 2005 page 7, the assignment of a CWO

and others as mentors, and the February 1, 2005 page 7, provided the applicant with sufficient information about the areas of her performance that required improvement and with the necessary resources for her to improve her performance during the three-month probationary period.

5. The applicant alleged but failed to prove that her placement on probation was in part retaliation against her by her supervisor because she reported him for sleeping at his desk in March 2005 and because the van pool in which she was the driver left without him. Whether or not these events occurred, there is no evidence, except for the applicant's statement, that the supervisor retaliated against her because of them.

6. The applicant alleged that sexist and gender-based emails sent by her supervisor to herself and others were not appreciated and made her uncomfortable, thereby contributing to the creation of a hostile work environment. The three emails were sent from June 7, 2005 through July 14, 2005, and were entitled "when men are in charge of cleaning the house" with a non-discernable picture, "Blonde Joke" with the punch line "So tell me" says the blonde, "How is it that you feel qualified to discuss nuclear power when you don't know s___," and "Words women use." Apparently, the emails were a part of the discrimination complaint she filed against her supervisor, but none of the documents related to that complaint were submitted to the Board.⁵ The evidence available to the Board is insufficient to prove that a hostile workplace existed or provides any basis for relief by the Board.

7. The applicant argued that it was unjust for the CO to decide whether she should have been reduced at the end of her probationary period based upon the votes of her supervisor, her mentors, and two other senior enlisted members of the unit. However, there is nothing in the regulation that prohibits the CO from consulting with members of the command in making a decision of this sort. Moreover, as the CO was not the applicant's day-to-day supervisor, it was reasonable for him to seek the opinions of those responsible for supervising her and who worked closely with her for advice and input on this significant decision.

8. The applicant complained that the CO based his recommendation for reducing her in rate on the fact that she was not recommended for advancement to the higher grade and other performance problems dating back to 1993. While the CO noted the applicant's failure to gain an advancement recommendation and her past performance problems, he made it clear that after a three-month probationary period, the applicant "failed to make progress on her noted deficiencies." These deficiencies were identified in the April 5, 2005 page 7 placing the applicant on probation. Accordingly, the Board is not persuaded that the reduction in rate was based on the applicant's past performance problems. Nor is the Board persuaded that she was reduced in rate because she was not recommended for advancement to the higher grade. The reduction resulted from her inability to perform at the YN1 level. Her prior and current performance history was probably included to assist the approving authority with his decision whether to approve or disapprove the applicant's reduction in rate due to incompetence by providing him with a complete picture of her performance history.

⁵ The applicant may have submitted documents related to this allegation in her rebuttal to the advisory opinion, but she withdrew that information from the Board's consideration.

9. The applicant alleged that it was unjust for the Coast Guard to evaluate her as a YN1 on the day before her reduction by a new supervisor. However, Article 10.B.5.b.4.b. requires that an enlisted employee review be completed the day before the effective reduction rate in the grade from which reduced. Therefore, the enlisted employee review completed prior to her reduction was prepared in accordance with the Personnel Manual. Therefore, the applicant has failed to prove an error or injustice in this regard. Her complaint that she did not receive any below average marks on this evaluation is true, but this was not the evaluation on which the reduction in rate was based. That evaluation occurred on July 4, 2005, at the end of her three month probationary period.

10. All of the applicant's contentions have been considered. Those not discussed within the findings and conclusions are considered not to be dispositive of this case.

11. Accordingly, the applicant has failed to prove error or injustice in this case and it should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

