DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-213

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 application upon receipt of the applicant's completed application on July 21, 2010, and subsequently prepared the final decision as required by 33 CFR § 52.61(c). Although the applicant labeled her brief as a request for reconsideration of BCMR Docket No. 2009-155, the Chair docketed the application as a new case because the relief sought is different from that in BCMR Docket No. 2009-155.

This final decision, dated April 28, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct her record to show that she advanced to YNCM (master chief yeoman; pay grade E-9) on September 1, 2008. The applicant alleged that she would have been advanced on this date were it not for the erroneous and unjust enlisted employee review (EER) that the Board ordered removed from her record in BCMR Docket No. 2009-155.

BACKGROUND

In an earlier proceeding, BCMR Docket No. 2009-155, the applicant asked the Board to correct her record to show that she was advanced to YNCM (E-9) from the 2007 advancement list retroactive to December 1, 2007. She alleged in that application that her then-commanding officer (CO) committed an error and/or injustice against her by withdrawing her recommendation for the applicant's advancement and by removing her name from the 2007 advancement list five days before the applicant was due to be advanced. The applicant argued that the CO took this action without giving the applicant any prior notice or counseling that the CO was displeased with her performance. Nor did the CO inform the applicant's then-rating chain of her concerns

about the applicant's performance. Therefore, the applicant argued that she did not have an opportunity to correct the alleged performance and leadership deficiencies noted by the CO.

The CO was dissatisfied with the applicant's performance as chief of the Servicing Personnel Office (SPO). However, according to the applicant's rating chain supervisor, she was assigned to full-time duty as the command senior chief and he had assigned someone else as chief of the SPO. Prior to filing an application with the Board, the applicant filed an Article 138 complaint against the CO seeking advancement to E-9. The reviewing authority (RA) for the Article 138 sided with the CO, but made the following pertinent statement with regard to the applicant's performance:

> [The applicant's performance was clouded by the] ineffectiveness of the [CO] and other members of your chain of command to communicate performance concerns to you in clear and understandable terms and in a timely fashion. These actions were inconsistent with my strategic direction to all MLC CO's to communicate and manage expectations of performance regularly with our people in order to minimize surprises. These actions were also inconsistent with your [CO's] motto for ISC Alameda of "compassion, courage, and commitment." The poor timing of the [CO's] decision to not recommend you for advancement was very hurtful to you. The situation leaves open the question whether you could have overcome your [CO's] performance concerns if given sufficient time to correct them before the projected advancement date. Regarding this issue, I must remind you that there is no entitlement to advancement. Neither the Coast Guard nor the member is well served if the member is advanced, particularly to the highest enlisted grade, where a [CO] does not judge the member to be ready for advancement. I extend this assertion to cases where a [CO's] judgment is not shared with the member in sufficient time to allow that member an opportunity to correct the deficiency before the end of a marking period or a projected advancement date. When our leaders correctly utilize our performance review process, the process should give our people time to correct performance deficiencies. This is a crucial leadership issue to our service and one that is also very important to me. Though in your case, the process did not work optimally, this does not compel me to change my position on the central issue.

Simultaneously with the removal of her name from the 2007 advancement list, the applicant was due an enlisted employee review (EER) for the period ending November 30, 2007. She was not recommended for advancement on that EER and received two below-average grades of 3 for respecting others and monitoring work.[1] Nor was she recommended for advancement on her transfer evaluation which ended on June 28, 2008, but she received a letter of commendation from the CO for certain accomplishments at the unit.

Although the JAG stated in the advisory opinion in BCMR Docket No. 2009-155 that he recommended relief if the Board found that the applicant suffered an injustice regarding the CO's decision to remove the applicant's name from the 2007 advancement list, the Board denied the

[1] Performance marks range from a low of 1 to a high of 7.

applicant's request for advancement. The Board found that the CO's decision to remove the applicant's name from the E-9 advancement list 5 days prior to her scheduled advancement constituted neither error nor injustice. However, the Board granted the applicant's request for removal of the November 30, 2007 EER and the June 28, 2008 EER. In this regard, the Board stated the following:

> The record is . . . replete with evidence of an improper performance review. While the applicant had no right to be promoted, she does have a right to a fair EER. She is entitled to proper counseling during the period of observation. The EER job performance observations differ from promotion recommendation in that job performance evaluations must be based upon true facts of past history rather than projections of future performance.
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> [T]he Board finds that the CO did not commit an injustice against the applicant by withdrawing her recommendation for advancement. The Board finds that the CO failed in her leadership responsibility to the applicant and the applicant's rating chain by not communicating her dissatisfaction with the applicant's performance to her rating chain.
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> The applicant's request that she be promoted should be denied. The applicant's record should be corrected to remove the EERs dated November 30, 2007 and June 26, 2008. Both EERs are products of injustice and they contain erroneous marks and comments. All of the applicant's allegations have been considered and those not discussed within the findings and conclusions are not considered to be dispositive of the issue in this case.

In light of the above findings, the Board ordered in BCMR Docket No. 2009-155 that the applicant's record be corrected as follows:

a. Remove the EER performance marks dated November 30, 2007, plus counseling receipt and any other associated documents that may be in the military record.

b. Remove the EER performance marks dated June 26, 2008, plus the counseling receipt and any other associated documents that may be in the military record.

APPLICANT'S CURRENT REQUEST AND ALLEGATION
(BCMR 2010-213)

In the instant case, the applicant asked the Board to correct her record to show that she was advanced to master chief petty officer (YNCM; E-9) from the 2008 advancement list retroactive to September 1, 2008, the date on which she alleged she would have been promoted but for the erroneous and unjust 2008 EER. The applicant stated that she has learned that her name was on the 2008 advancement list and that she would have been advanced except for the

erroneous and unjust EERs that were subsequently ordered removed from her record. The applicant further stated the following:

> [The applicant's] name appeared on the 2008 advancement list. She could not advance because of the 2008 EER issued by her [CO], which the Board removed from her record. [The applicant's] EER for 2009 is excellent and recommends advancement. Thus, even if [the CO's] concerns were legitimate and sufficient to warrant withdrawal of [her] advancement recommendation in November 2007, those concerns no longer existed for the period covered by her 2009 EER, which was from July 2008 . . . through November 30, 2009.
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> The BCMR accepted the concerns of [the CO] as sufficient to justify her 2007 advancement withdrawal decision . . .
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> The BCMR directed the removal of the EER closing June 26, 2008 because it contained erroneous marks and comments and therefore was unjust. Because of the 2008 EER, [the applicant] was ineligible for advancement in 2008 and ineligible to take the service wide examination for advancement to E-9 in 2009. . . The 2008 EER, however, contained no "Below Standard" marks, and [the applicant's] performance on the two measures for which she received such marks in 2007 improved to "Above average". Her overall scores also improved notably.
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> The erroneous and unjust 2008 EER had the effect of precluding [the applicant's] advancement for two years despite the fact that her performance marks did not support a non-recommendation for advancement. It is . . . unclear why [the CO] continued to believe that [the applicant] was not ready for advancement as of June 26, 2008 at the latest, when the second EER closed. She did not directly inform [the applicant] of the reasons for her non-recommendation. . . . [The applicant] had enjoyed ample time to improve her performance in the areas [the CO] considered deficient, and in fact did improve her performance in those areas, as the EER reflects.
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> The issue, then, is whether [the CO's] concerns about [the applicant's] duty performance were sufficient to justify depriving [the applicant] of fair and timely opportunities for advancement after 2007. They were not. Not only were the concerns not effectively communicated to [the applicant] as the BCMR . . . found, they were comparatively minor and did not persist into the 2009 evaluation period. Those consequences, certainly when viewed in the light of the Board's reasons for removing the 2008 EER, were excessive, unfair, and highly unjust.

The applicant stated that the Board's removal of the two EERs had one of two legal effects on her promotion eligibility: 1) the voidance of the EERs removed the CO's non-recommendations for advancement making the applicant eligible for advancement or 2) their voidance removed the non-recommendation for advancement, but did not render the applicant eligible for advancement because of the absence of positive recommendation for advancement. The applicant argued that the two unjust EERs prejudiced her advancement opportunities and

that the relief granted by the Board in BCMR Docket No. 2009-155 corrected one injustice while giving rise to a second—her inability to compete for advancement for three years.

The applicant also alleged that the Board did not adequately address her discrimination complaint. However, on page 2 in BCMR Docket No. 2009-155, the Board summarized the applicant's discrimination allegation, as follows:

> The applicant asserted that her race was a determining and improper factor in [the CO's] decision to withdraw her recommendation for the applicant's advancement to master chief. The applicant stated that it is well-established in the professional literature that racial bias exists in the workplace, including the uniformed services. The applicant stated that literature and research have concluded that racial and other forms of discrimination occur in the absence of overtly racist acts or attitudes and that modern racial discrimination is better characterized as a biased cognitive process founded on stereotypical attitudes and beliefs about minority group members rather than consciously held racist views. The applicant asserted that because overtly discriminatory acts and statements are less common today than in decades prior, the courts routinely look at statistics detailing the demographic composition of a work force in determining whether race played a role in a personnel decision. With respect to African-American representation in the highest enlisted ranks of the Coast Guard, the applicant offered that she was one of six African-Americans serving in the Coast Guard in the grade of E-8 and there was only one African-American female serving in grade E-9, while African-Americans comprised over 10% of the total Coast Guard military force. The applicant stated that she should have been the second African-American female serving in pay grade E-9. The applicant contended that "[a]lthough [the CO's] discrimination may have been unconscious nevertheless she intentionally withheld information that has negatively impacted my career."

The Board noted in footnote 9 of the findings and conclusions that "the applicant alleges discrimination but offers no specific facts relating to her case. Moreover, the unrebutted conclusion of the reviewing authority [RA] for her Article 138 complaint against the [CO] is on record." In her current application the applicant disagreed that she had not rebutted the RA's determination of no discrimination. In this regard, the applicant stated that she had no right or opportunity to rebut the RA's findings directly. She also argued that she in fact did rebut the RA's determination by citing the deficiencies in his inquiry and by providing the statistical analyses and supporting evidence. She argued that her discrimination allegation was not frivolous because the statistical evidence developed and published by the Coast Guard supported drawing an inference that race was a determinative factor in her CO's decision to withdraw her advancement recommendation.

VIEWS OF THE COAST GUARD

On December 17, 2010, the Board received an advisory opinion from the Judge Advocate General (JAG) of the Coast Guard who made the following recommendation:

> Based on the unique set of facts and circumstances of this particular case, the BCMR's Final Decision in 2009-155 . . . , and the input provided by CG-PSC [Commander, Personnel Service Center], the Coast Guard does not object to the applicant's retroactive advancement to Master Chief Petty Officer (E-9) effective December 1, 2007. This advisory is based solely on the issues presented in this case; therefore, it should not be viewed as a shift in policy or relied upon as precedent [with respect to] PERSMAN [Personnel Manual] sects 5.C.4.b., 5.C.e.4 & 5.C.25.d.[2]

The JAG stated that the BCMR may correct errors and remove injustices in a serviceman's records pursuant to 10 USC § 1552(a). Error can be defined as either legal or factual. In the instant case, the CO withdrew her recommendation for the applicant's advancement in accordance with Article 5.C.25.d. of the Personnel Manual which states that the only review of the CO's decision to withdraw an advancement recommendation is a complaint under Article 138 of the Uniform Code of Military Justice (UCMJ). Therefore, from a policy standpoint, the applicant's CO acted within her discretion regarding the withdrawal of the applicant's advancement recommendation. However, "'[i]njustice', when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (unpublished) (citing *Yee v. United St*ates, 206 Ct. Cl. 388 (1975)). The JAG stated that viewed in its entirety from a totality of the circumstances, coupled with the Board's findings and conclusions in BCMR Docket No. 2009-155, and PSC's current input, the evidence suggests the applicant suffered a manifest injustice regarding her CO's decision to withdraw her advancement recommendation. The injustice against the applicant has not been cured by the Board's Final Decision in BCMR Docket No. 2009-155.

The JAG noted the Board's finding in the earlier case that the CO failed in her duties and committed an injustice against the applicant, as well as the applicant's rating chain, by not informing them of her concerns about the applicant's alleged leadership deficit and lackluster performance. This apparent failure to communicate performance concerns was also articulated by the RA in the Applicant's Article 138 complaint response. The Coast Guard agreed with the Board that the applicant's CO committed an error in evaluating the applicant's performance as indicated on her 2007 and 2008 EERs. The JAG further stated:

> When viewing the applicant's case from a "totality of circumstances" perspective, the command's failure in leadership with regard to the applicant resulted in the extremely negative consequence faced by the applicant. Moreover, the applicant was led to believe her performance was above standards by receiving favorable endorsements and recommendations for positions of greater responsibility. (e.g. favorable endorsement from the CO for the applicant to attend the Command Master Chief course; favorable endorsement from CO on Applicant's application for membership on the Command's

[2] These two provisions allow for withholding or canceling an advancement when the member loses eligibility because, among other reasons, the CO has withdrawn the member's advancement recommendation.

Diversity Advisory Council; favorable endorsement for special assignment to a Command Master Chief position, selection for a 2008 Command Master Chief assignment; etc.) The mixed messages sent by the applicant's command, coupled with the apparent failure to communicate performance expectations is inconsistent with CG policy as it pertains to performance evaluations and the advancement program's intended purpose.

The JAG noted that COs are "charged with ensuring all enlisted member under their command receive accurate, fair, objective, and *timely* evaluations." (Emphasis in original.) The JAG concluded by stating that it is the Coast Guard's position that the applicant suffered a manifest injustice that was not adequately addressed by the removal of her 2007 & 2008 EERs.

The JAG included a memorandum from the Commander, Personnel Service Center (PSC) with the advisory opinion. PSC did not recommend relief, but recognized that the applicant would have been advanced on September 1, 2008 if she had remained eligible (by not having the mark of not recommended on the EERs). PSC stated to the JAG that "while voiding the EERs removed the CO's non-recommendation for advancement, we cannot presume that a command endorsement then exists."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 8, 2010, the Board sent a copy of the views of the Coast Guard to the applicant. The Board received the applicant's reply through the U.S. mail on April 25, 2011. (Although the applicant indicated that her reply was also faxed to the Board, it was not received.) The applicant stated in her reply that she agreed with the JAG's comments and disagreed with PSC's comments.

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. 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 has established error in her record by virtue of the Board's order in BCMR Docket No. 2009-155 removing the two ERRs for the periods ending November 30, 2007 and June 28, 2008 from her record because they were erroneous and/or unjust. The question before the Board in this case is whether the erroneous and unjust EERs were prejudicial to the applicant's failure to be advanced from the 2008 list i.e., was there a causal connection between her failure to be advanced from the 2008 eligibility list and the errors.

3. The Board finds that the two erroneous and unjust EERs were prejudicial to the applicant's failure to be advanced from the 2008 eligibility advancement list because both contained a mark of not recommended for advancement. In this regard, Article 5.C.4.b.2. of the

Personnel Manual states that the CO's recommendation is required to be eligible for advancement, and Article 5.C.4.e.4. states that the CO's recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. Therefore, because the erroneous EERs did not recommend the applicant for advancement she could not be advanced from the 2008 list. However, because both EERs were the product of error and/or injustice as determined by the Board in BCMR Docket No. 2009-155, they could not and should not have been the basis for not advancing the applicant in 2008. As PSC stated, the applicant would have been authorized advancement on September 1, 2008, had she remained eligible for advancement. The only reason she was not eligible for advancement was because of the mark of not recommended on the erroneous EERS.

4. To remedy the error and injustice suffered by the applicant, the Board finds that her record should be corrected to show that she was advanced to E-9 retroactively to September 1, 2008, which would have occurred if the erroneous EERs had not been in her record. To do less would perpetuate the significant injustice suffered by this applicant at the hand of her prior CO. The Board is aware of no other method by which to cure the error and injustice that would make the applicant whole. Under 10 U.S.C. § 1552, an applicant is entitled to "nothing more than placement in the same position he would have been had no error been made." *Denton v. United States,* 204 Ct. Cl. 188, 199-200 (1974), *cert. denied,* 421 U.S. 963 (1975); *see also Kimmel v. United States*, 196 Ct. Cl. 579, 591 (1971) ("The injustice was removed by placing plaintiff in the same position he would have been had no error been made. This was all that plaintiff was entitled to receive."); *Bliss v. Johnson*, 279 F. Supp. 2d 29, 35 (D.D.C. 2003). Moreover, the applicant has demonstrated that she has the time in service, knowledge, and skill to serve in pay grade E-9 by her placement on the 2008 and 2011 eligibility lists. Erroneous and unjust EERs should not serve as a basis for not advancing her from the 2008 advancement list.

5. In the advisory opinion for the Coast Guard, the JAG recommended granting relief,[3] and, as discussed above, the Board agrees. Although the JAG recommended retroactive advancement to December 1, 2007, the Board finds that the applicant should have relief retroactive to September 1, 2008, the date she would have advanced from the 2008 list, which is the relief she requested in the current application. Apparently, the JAG treated the current application as a reconsideration of BCMR Docket No. 2009-155 for retroactive advancement to December 1, 2007. That approach is understandable since the allegations of error in both applications grew out of the same set of unfortunate circumstances. However, more important than this procedural issue is the fact that, for the second time, the JAG has recommended relief for this applicant. Although the JAG's recommendation for relief in the earlier case could have been stronger, he makes it very clear in this current case that the Coast Guard believes that the applicant has suffered a significant and continuing injustice at the hands of her then-CO that can be remedied only by advancing her to E-9 with a retroactive effective date. In this regard, the JAG stated that the injustice suffered by the applicant due to the failed leadership of the then-CO was not cured by the final decision in BMCR No. 2009-155. The Board notes that because of

[3] PSC, in its memorandum to the JAG, argued that "with EERs containing the non-advancement recommendation removed from the applicant's record, it cannot be presumed that a command endorsement for her advancement exists." The Board notes that the regulation requires a command endorsement for advancement. However, 10 U.S.C. 1552 gives the Secretary or her delegate the authority to correct and remove any error or injustice from a military record.

the erroneous EERs, the applicant's name was removed from the 2008 E-9 advancement list and those same EERs prevented her from competing for advancement from May 2008 until May 2010. As already stated, not retroactively advancing the applicant to E-9 effective September 1, 2008, perpetuates the error and injustice suffered by the applicant because of the two erroneous EERs that were ordered removed from her record by the BCMR.

6. The Board was not persuaded by the applicant's complaint of discrimination in BCMR Docket No. 2009-155, and as stated in that case "issues not discussed within the findings and conclusions [of that case] were not considered to be not dispositive of the issues in the case." The applicant presented no new evidence in this case that would dictate a reconsideration of the discrimination issue.

7. Accordingly, the applicant's record should be corrected to show that she was advanced to YNCM (E-9) retroactive to September 1, 2008, with back pay and allowances.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXX, for correction of her military record is granted. Her record shall be corrected to show that she was advanced to YNCM (E-9) on September 1, 2008. The applicant shall receive all back pay and allowances.