

**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. 2013-175**

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**FINAL DECISION**

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 Chair docketed the case after receiving the applicant's completed application on September 14, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 29, 2014, 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 his advancement recommendations dated January 25, 2011, and May 25, 2011, so that he will be recommended for advancement and retroactively advanced to ██████ E-5 retroactively as of September 1, 2011. He alleged that the marks were erroneous and unjust.

The applicant stated that on or about January 5, 2011, upon returning to his unit in Florida from several days of leave, he received permanent change of station (PCS) orders to transfer to another unit in California in mid February. Therefore, he went quickly to his unit's Servicing Personnel Office (SPO) to start completing all the PCS paperwork and plan his move. The paperwork required him to identify what vehicle he would use to drive to his new unit if he intended to drive. He told a yeoman at the SPO that he would be driving and that his current vehicle was a ██████ but he was trying to sell the ██████ and if he did, he would be buying another vehicle. The SPO told him that he should fill out the paperwork to reflect his current intention to drive the ██████ but that he could change the information up until the point that he filed his travel claim.

A couple of days later—on or about January 8, 2011—he found a potential buyer for his ██████. The potential buyer told him that he would be out of town for two weeks but would buy the ██████ when he got back. The applicant stated that he really believed he had found a buyer and in the course of casual conversation, “got a little ahead of himself” and told two chief petty offic-

ers (CPOs) that he had sold his [REDACTED]. The next day, one of these CPOs told him to go to the SPO to check [REDACTED] the paperwork. At the SPO, a yeoman told him his orders were ready to sign. The applicant was confused because, to his knowledge, he was not supposed to sign the paperwork until he got to his next unit. However, he agreed to sign it but before his pen reached the paper, the yeoman asked him twice, very emphatically, if everything on the form was correct. Because he had not yet actually sold the [REDACTED] and had not yet purchased a replacement vehicle, he went ahead and signed the paperwork, which had been prepared to show that he would be driving his [REDACTED] to his new unit.

On January [REDACTED], 2011, the applicant stated, he and two other memb[REDACTED]veled in a Government vehicle to a station to perform standard maintenance on some small boats. As they were leaving, the Officer in Charge (OIC), another chief, came out of his office to talk to them about their work. Although the OIC primarily spoke to one of the other two members, an E-5, the OIC directed a several questions to the applicant. The applicant alleged that during that conversation, he responded to the OIC's questions appropriately but "on occasion responded 'Yeah' and 'Okay'." The OIC seemed satisfied with their answers, and they left.

The applicant stated that he and the E-5 were told to return to the same station the next day to complete some additional work on other boats. While they were working on one that was on a trailer in the station parking lot, an MK2 from the station came out to chat with them and smoke a cigarette. When the applicant and the E-5 had finished their work, the two of them also lit cigarettes. As they were standing beside their Government vehicle, another member came outside and told them they could not smoke in that location, so they put out their cigarettes. Then they went inside the office to "check out" with the Office of the Day on duty. As they were walking past the break room, they heard someone chuckling about "those guys" being "in trouble" and he worried that the person was referring to them.

The applicant stated that about a week later, on January 18, 2011, he and the E-5 were called into their chief's office and given negative Page 7s about how they had responded to [REDACTED] OIC's questions. The applicant stated that this action surprised him because they had not been disrespectful to the OIC and their conversation with him had been quite typical. The chief also instructed them to get into tropical blue uniforms and deliver letters of apology to the OIC, which they did.

The applicant stated that the very next day, his chief called him into the office again and told him he was in a lot of trouble. The chief asked him why he had told the SPO that he would be driving his [REDACTED] to California when he had already sold it and advised him that defrauding the Government was a serious offense. The applicant was confused but quickly realized the misunderstanding and told the chief that he had not actually sold the [REDACTED] yet. The chief yelled at him, "You had better stop and choose your words [REDACTED] carefully before you lie to me again!" The applicant then went into detail and explained that the sale had not been finalized because the buyer had not yet returned to town. The chief became very angry with him then because, he alleged, the chief had already reported the matter to the Executive Officer of their unit to initiate an investigation. The chief then started telling him that the preponderance of the evidence would show that the applicant was attempting to defraud the Government by flying to California but claiming that he was driving his [REDACTED] which would make him entitled to per diem. The appli-

cant alleged that he had no idea [REDACTED] the chief thought this since he intended to drive whether he sold the [REDACTED] or not, and the travel advance would be the same no matter what vehicle he drove. The chief refused to believe that the applicant had not intended to defraud the Government and continued to scold him. The applicant alleged that he remained respectful, answering with “Yes Chief” or “Roger Chief” during this conversation. When he asked the chief what evidence he was basing his assumptions on, [REDACTED] chief responded, “I don’t need any hard evidence, all I need is what I think and that is the preponderance of the evidence. Welcome to the Coast Guard.” [REDACTED] applicant stated that his remaining time at this unit “got worse every day” and attributed this to the fact that the chief had had to admit to the Executive Officer that the applicant had not actually sold his [REDACTED] [REDACTED]

The applicant stated that the chief called him into his office again the next day and had another CPO present as a witness. The applicant was given two Page 7s, one for smoking at the wrong time and another for smoking in an unauthorized zone. Both Page 7s concerned the one cigarette he had lit in the parking lot of the unit where he had been fixing boats. He explained that the members of his own command had been told that they could no longer smoke on base except during their lunch breaks but they had not known that the new policy also applied at the other unit, which was a two-hour drive away. He alleged that the E-5 who had been smoking with him did not receive any Page 7s for the alleged infractions. The applicant alleged that he told the chief that he did not agree with the Page 7s but signed them after the chief told him that his signature indicated only acknowledgement of receipt, not agreement with the content. Later, the applicant alleged, he asked the CPO who had witnessed this meeting why he had not helped the applicant, and the CPO said he had to “stay out of it” and was sorry but he could not stop what the applicant’s supervisor was doing.

The applicant stated that he was called into his chief’s office again just a few days later. The applicant requested a witness and the same CPO joined them. Although the applicant asked for a different witness, his chief refused. His chief then presented him with another Page 7 accusing him of lying to two CPOs because the applicant had told them he had sold his [REDACTED] when he had not yet actually sold it.

The applicant stated that he began to feel like he was on the verge of a nervous breakdown because his chief was creating a negative paper trail that would harm his career, and his chief had also begun yelling across the office at him about common behaviors that no one else was yelled at for, such as hanging his sunglasses from his pocket when he came indoors. Several of his fellow members supported him and told him that what the chief was doing was not right. The applicant [REDACTED] noted that the chief had previously tasked someone with drafting a Letter of Commendation for him, summarizing the applicant’s accomplishments at that unit, but then never processed it. [REDACTED]

The applicant stated that the last documentation he recalls receiving from the chief is his transfer Enlisted Employee Review (EER) dated January 25, 2011. His marks were significantly lower than those he had received just a few months earlier. For example, whereas he had previously received high marks of 6 for integrity and loyalty, the chief assigned him marks of 2 in [REDACTED]

those categories and otherwise mostly 3s and 4s.<sup>1</sup> In addition, the chief gave him an unsatisfactory conduct mark and a mark of not recommended for advancement (N) instead of recommended for advancement (R), which prevented him from being advanced on September 1, 2011.

The applicant stated that after receiving this EER, he realized that he might lose his chance for advancement even though he had scored quite high on the servicewide examination. Therefore, on January 27, 2011, he sought the help of his unit's chaplain, who recommended that he go to the Command Master Chief (CMC) immediately. When he submitted a request to speak to the CMC through his chain of command, his chief told him it was not a good idea to do so. When the CMC advised him to appeal his marks, his chief told him it was too late<sup>2</sup> and that the EER had already been entered in the system. And when the applicant told him that the CMC had said he could appeal the EER, his chief called the CMC and told him that he was "trying to tell [the applicant] that he is unable to appeal his marks at this time." After the CMC told his chief that it was not too late to appeal the EER and that the EER had not yet been entered in the system, his chief turned red in the face and ordered the applicant to get out of his office.

The applicant stated that because of the time constraints, the meeting for his appeal was scheduled as a conference call for the next afternoon. That morning, he realized that his chief had not told their division head the truth and had turned the division head against him because the division head still believed that the applicant had sold his [REDACTED]. Therefore, the applicant brought the title to the [REDACTED] with him that afternoon. However, the appeal resulted in only four of his marks being slightly raised and his unsatisfactory conduct mark being changed to satisfactory. His advancement mark remained N. When he asked the CPO what effect the N would have, the CPO told him not to worry because he would not be advancing until later in the year and could get advanced as long as the command at his new unit recommended him for advancement. The CPO also told him he could not appeal a mark of N.<sup>3</sup>

The applicant stated that after transferring to his new command, he waited several weeks and then asked them to recommend him for advancement. His new command advised him that because his name had been removed from the list, it could not be returned. He then consulted the CMC for his new unit, who contacted his prior command and convinced them to reinstate his recommendation for advancement. Even though his old command reinstated his recommendation for advancement, however, his name was not returned to the advancement list.<sup>4</sup> He "begged

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<sup>1</sup> Coast Guard enlisted members are evaluated in a variety of performance categories on a scale of 1 (worst) to 7 (best). They also receive marks for conduct (satisfactory (S) or unsatisfactory (U)) and for advancement (recommended (R) or not recommended (N)).

<sup>2</sup> U.S. Coast Guard, COMDTINST M1000.6A, Personnel Manual (Change 42, 2010) (hereinafter PERSMAN), Article 10.B.9.d. and e. provide that appeal an appeal "must" be submitted within 15 days of receiving the EER and that if an appeal is submitted after 15 days have passed, the member must explain the circumstances that prevented him from submitting his appeal within 15 days.

<sup>3</sup> PERSMAN Article 10.B.9.a.3. states, "The recommendation for advancement portion on the employee review may not be appealed."

<sup>4</sup> PERSMAN Article 10.B.10.b. states that an EER Approving Official may "change any mark they assigned to members *still attached to the unit* if the Approving Official receives additional information that applies to the particular [evaluation] period." (Emphasis added.) Normally, the member's current Approving Official may only adjust marks assigned at a previous command if a judicial proceeding has been set aside, but "[a]ny Approving Official who has reason to believe marks assigned by another commanding officer are erroneous shall write to

and pleaded to various sources and everyone told [him] ... there was nothing [he] could do.” Finally, an officer at the Personnel Service Center told him he could apply to the BCMR.

In support of these allegations, the applicant submitted the following documents:

- The EER that the applicant previously received on September 30, 2010, contains two highest possible marks of 7, fifteen marks of 6, seven marks of 5, one middle mark of 4, a satisfactory conduct mark, and a recommendation for advancement (R).
- The disputed EER as originally prepared contains one mark of 5 for “Stamina”; eighteen marks of 4; low marks of 3 for “Setting an Example,” “Customs and Courtesies,” “Loyalty,” and “Judgment”; “poor” marks of 2 for “Responsibility” and “Integrity”; an unsatisfactory conduct mark; and a mark of N—not recommended for advancement.
- The disputed EER after the appeal contains the mark of 5 for “Stamina”; twenty marks of 4; four low marks of 3 for “Responsibility,” “Setting an Example,” “Customs and Courtesies,” and “Loyalty”; a satisfactory conduct mark; and a mark of N.
- A database printout shows that on May 25, 2011, the Florida command corrected the applicant’s advancement recommendation mark to R.
- A Page 7 dated January 18, 2011, counsels the applicant about undermining an OIC with disrespectful replies of “Yeah, yep, and OK” to his questions on January 10, 2011. (Although the applicant submitted a copy of this Page 7 and the five summarized below, they do not appear in the copy of the applicant’s electronic Headquarters record that PSC provided to the Board.)
- Another Page 7 dated January 18, 2011, counsels the applicant about failing to obey a lawful order of his shop chief by smoking a cigarette at another unit at an unauthorized time in an unauthorized place on January 10, 2011. The Page 7 states that smoking breaks may only be taken on one’s lunch hour and “off base.”
- A Page 7 dated January 31, 2011, states that on January 24, 2011, the applicant “knowingly misrepresented [his] means of travel by listing [his] 1973 [REDACTED] as a mode of travel” to his new unit after telling two CPOs two weeks earlier that he did not intend to drive the [REDACTED] to California and had sold it. The Page 7 accuses the applicant of intending to defraud the Government out of more than \$1,500 in per diem, lying to a CPO in violation of Article 134 of the UCMJ, warns the applicant about wrongfully appropriating Government money in violation of Article 121 of the UCMJ, and advises him that his name will be removed from the advancement list.
- Another Page 7 dated January 31, 2011, documents the mark of N on the disputed EER and counsels him about not blaming others for his own actions, setting a poor example for other members, showing more respect to senior members, “curb[ing] [his] appetite for monetary gains by accepting travel policy and avoid[ing] the temptation of defrauding the government by falsifying his travel plans,” not following smoking policies, and making

“better decisions when [redacted]ing with financial encounters ... and not attempt[ing] to d[redacted] the government for personal gain.”

- A Page 7 dated February 9, 2011, states that the applicant had “yet to obtain the necessary skills and work ethics to be recommended for advancement” and counsels him about accepting responsibility for his actions, setting a poor example for other members, showing more respect to senior members, and supporting command policies whether he agrees with them or not.
- Another Page 7 dated February 9, 2011, accuses the applicant of “project[ing] false information to [redacted] Chief Petty Officers regarding the sale of your 1973 [redacted] failing to “articulate your intentions sufficiently to alleviate any misconceptions regarding your travel plans”; displaying “a serious lack of respect” to the OIC of another unit; smoking at an unauthorized time in an unauthorized place at that unit; and lying to a CPO. It also advises him that his name would be removed from the advancement list.
- The CMC of the applicant’s Florida unit stated that because the applicant had consistently been a top performer, he was surprised when he saw the disputed EER. When he contacted the applicant’s chief, the chief told him that the applicant had misrepresented a vehicle sale in conjunction with his PCS entitlements. He reminded the chief that the low marks had to be supported by documentation, and the chief sent him a bunch of Page 7s for minor deficiencies. Therefore, he brought the situation to the attention of the Acting Commanding Officer. When they contacted the division head, however, the division head said he fully supported the EER. In the wake of the conference call for the applicant’s EER appeal, the CMC and Acting CO discussed it and agreed that the applicant “had successfully made his case for the appeal.” However, they did not change the mark of N because “the advancement recommendation is based on the supervisor’s belief that the member in question is fully capable of performing at the next higher pay grade”; the advancement mark is not subject to appeal; “we did not have enough evidence to overturn the advancement recommendation given the fact that both his direct supervisors had stated he should not receive a positive recommendation for advancement”; and neither the CMC nor the Acting CO had any first-hand knowledge of the applicant’s performance. Later, they did change the mark of N to an R based upon the recommendation of the applicant’s new command. The CMC also noted that the Florida command “came to realize that [the chief] was lacking many of necessary qualities expected of a good leader and Chief Petty Officer and his judgment came into question on numerous occasions following this incident.”
- The C [redacted] who witnessed some of the applicant’s meetings with the chief and worked with the applicant frequently stated that the applicant was a dedicated member with a strong work ethic and that he never believed that the appli [redacted] had intended to defraud the Government. However, the chief re [redacted] to believe him and the situation “spiraled out of control.”
- A retired member who now works as a civilian at the Florida unit stated that the applicant “was singled out because of personal feelings that had nothing to do with his eligibility for advancement.” He described the applicant as an energetic technician who “exhibited exceptional professionalism from the wearing and maintenance of his uniform to the customs and courtesies he rendered to senior Coast Guard personnel.” He also stated that the

applicant “has a very u[REDACTED], honest and open personality, and has nothing to hide and s[REDACTED] times tells more than needs to be told, which is why [the chief] and he had their differences. I do not have first-hand knowledge of his Page 7s but I do know he was targeted and singled out by [the chief, who] ... seemed to need to have a scapegoat in the shop, and when the present person would move on he would find another ...”

- A former assistant head of the division, who transferred to another unit in 2010, stated that the applicant was a “good member of the team,” who also volunteered for community outreach projects. He stated that the disputed EER is unjust and based only on the chief’s belief that there was a possibility that the applicant might try to defraud the Government.
- Another member who transferred to another unit in 2010 stated that at that time the applicant was already “performing at a higher pay grade than expected and displayed superior professional knowledge. He was always eager to teach others, and take the lead on projects,” and is “one of the hardest workers I have encountered.”
- A member of the Florida command stated that sometime before the applicant’s departure he had been tasked with drafting a Letter of Commendation for the applicant, that he has the highest respect for the applicant, and that the applicant should have been recommended for advancement. He included a copy of the draft Letter of Commendation, which highly praises the applicant’s performance.

### **VIEWS OF THE COAST GUARD**

On January 29, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC) and recommended that the Board grant relief in this case.

PSC submitted an email from the applicant’s prior commanding officer at the Florida unit, who stated that based on his review of the record, he would not object to changing the advancement recommendation on the applicant’s 2011 transfer EER and that, in retrospect, he should have changed it when the applicant appealed the EER. In light of this email and the evidence submitted by the applicant, PSC concluded that the applicant’s supervisor’s judgment was “at fault regarding the EER marks” and recommended that the Board grant relief by—

- Correcting the advancement recommendation mark on the EER dated January 25, 2011, to R, recommended for advancement;
- Removing the correction of that mark in the database dated [REDACTED] 25, 2011; and
- Retroactively advancing the applicant to [REDACTED] E-5 as of September 1, 2011, and awarding him all appropriate back pay and allowances.

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

On February 4, 2014, the applicant responded to the views of the Coast Guard. He agreed with them and also asked the Board to remove the Page 7s pertaining to this case from his

record because “they were also unjust and under normal circumstances I would not have received them.” He also noted that if possible he would like to be retroactively advanced but have the bad EER prepared by the chief removed from his record.

### 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 over this matter under 10 U.S.C. § 1552(a). The application is considered timely because the applicant has been serving on active duty.<sup>5</sup>

2. Under Article 10.B.1.b. of the Personnel Manual in effect in January 2011, “[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely employee reviews.” The applicant alleged that his January 25, 2011, EER with the mark of not recommended for advancement is erroneous and unjustly prevented his advancement to E-5 on September 1, 2011. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.<sup>6</sup> For the reasons discussed below, the Board finds the applicant has met this burden of proof.

3. The applicant has submitted substantial evidence showing that during a three-week period in January and February 2011, his supervisor entered multiple duplicative Page 7s in his record documenting minor infractions and allegations of felonies based only on his supervisor’s suspicion and a miscommunication about whether the applicant had already sold his [REDACTED]. In light of the high marks in the applicant’s prior EER and the fact that a colleague had recently been tasked with drafting a Letter of Commendation for him, it is clear that the supervisor’s suspicion also caused the applicant’s performance marks in his transfer EER dated January 25, 2011, to be significantly reduced from primarily marks of 6 to primarily marks of 4 with four low marks of 3 and a mark of not recommended for advancement even after the applicant appealed the EER. The Coast Guard has admitted and the preponderance of the evidence shows that the applicant’s supervisor’s judgment was “at fault regarding the EER marks.”

4. The Coast Guard recommended granting relief by correcting the applicant’s record to show that he was recommended for advancement on the disputed EER and so his name was not removed from the advancement list so that he would be advanced on September 1, 2011, in the way that he would have been had he originally been recommended for advancement on the EER. This relief, however, would leave the EER with low marks, which the Coast Guard has admitted was prepared by a supervisor with faulty judgment, in the applicant’s record. It is not necessary to leave the EER in the applicant’s record for the Board to retroactively advance the applicant as of September 1, 2011. The Board has authority under 10 U.S.C. § 1552 to back date

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<sup>5</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

<sup>6</sup> 33 C.F.R. § 52.24(b).



the applicant's date of rank whether the erroneous EER is in his record or not, and the Board is duty bound to correct errors and injustices in an applicant's record.<sup>7</sup> Therefore, the Board finds that the disputed EER should be removed from the applicant's record, his date of rank as an [REDACTED] E-5 should be backdated to September 1, 2011, and he should receive corresponding back pay and allowances. In addition, the corrective database entry of a mark of recommended for advancement dated May 25, 2011, should be removed since there will no longer be an EER requiring that correction.

5. In his response to the advisory opinion, the applicant asked the Board to remove from his record the negative Page 7s that his supervisor prepared in January and February 2011. The Page 7s are not in the copy of the applicant's Headquarters electronic record that PSC provided to the Board, and PSC did not address them in the advisory opinion. Whether PSC did not address them because the applicant did not specifically request their removal in his application (although he repeatedly claimed that they were erroneous and unjust), or because the Page 7s have not officially been entered in his record is unknown. While the applicant's SPO apparently has not submitted the Page 7s to Coast Guard Headquarters, they may well be in the SPO's local copy of his record, and the Board will address the issue because the applicant complained at length about them in his application and because fully correcting the errors and injustice identified in this case requires it.<sup>8</sup>

6. Of the six Page 7s submitted by the applicant, four address the fact that he was not being recommended for advancement and his name was being removed from the advancement list. These four and any others that mention or resulted from the disputed EER should clearly be removed from his record since the EER with the mark of not recommended for advancement is being removed. Because the Page 7s have not been entered in his Headquarters record, it is not clear how many there are because marks of 1 or 2 on an EER, unsatisfactory conduct marks, and the termination of a member's eligibility for a Good Conduct Medal that often results from an unsatisfactory conduct mark are normally documented in EER comments or

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<sup>7</sup> *Sanders v. United States*, 594 F.2d 804, 814 (Ct. Cl. 1979) (holding that under 10 U.S.C. §1552, the Board has "a duty as well as the power to afford servicemen proper relief."); *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (holding that the Board "is obligated not only to properly determine the nature of any error or injustice, but also to take 'such corrective action as will appropriately and fully erase such error or compensate such injustice,'" quoting *Caddington v. United States*, 147 Ct. Cl. 629, 632 (1959)); *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008) ("When a board does not act to redress clear injustice, its decision is arbitrary and capricious and must be overturned upon review by this court."); *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975) (finding that "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate"); see *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."); *Hamrick v. United States*, 120 Ct. Cl. 17, 25, 96 F. Supp. 940, 943 (1951) (holding that "full correction of the error would require plaintiff's being put in the same position he would be in had the erroneous determination not been made," cited in *Ramsey v. United States*, 123 Ct. Cl. 504, 506 (1952), cert. denied, 345 U.S. 994 (1953)); *Bonen v. United States*, 229 Ct. Cl. 144, 149 (1981) ("The 'half-a-loaf' doctrine normally applies where a corrections board grants plaintiff's claim, but stops short of awarding the full appropriate relief," citing *Denton v. United States*, 204 Ct. Cl. 188, 195, cert. denied, 421 U.S. 963 (1975)); see also *Caddington*, 147 Ct. Cl. at 634 ("equity delights to do justice and not by halves"); *Boyer*, 81 Fed. Cl. at 197 n3 (noting that "a correction board possesses a greater level of discretion when it is asked for equitable relief regarding a putative injustice, than when relief related to factual or legal error is requested.").

<sup>8</sup> See generally note 7, above.

Page 7s in a member's record, although this documentation may have been removed pursuant to the EER appeal.<sup>9</sup>

7. Two of the Page 7s submitted by the applicant, both dated January 18, 2011, do not mention or result from the EER or the mark of not recommended for advancement. One addresses the applicant's violation of smoking policy and the other, overly casual replies to an OIC without the expected military courtesy. The incidents apparently occurred during consecutive work trips to another unit the week before and could easily have been documented on a single Page 7. The supervisor who signed the Page 7s was the division head who signed the other Page 7s and who assigned the marks on the disputed EER, which the Coast Guard stated was prepared by a supervisor with "faulty judgment." The record indicates that the division head based his opinion of the applicant during this period largely on what the applicant's chief told him. Therefore, and because the division head supported the January 25, 2011, EER, which the applicant has proven to be erroneous and unjust, the Board finds that the fairness of the two Page 7s dated January 18, 2011, is doubtful.

8. The division head's authority to sign adverse Page 7s is also in significant doubt because he was not the applicant's CO. In its advisory opinion for BCMR Docket No. 2013-131, PSC recommended the removal of adverse Page 7s dated July 7, 2011, September 9, 2011, and March 30, 2012, from another applicant's record. PSC stated that the supervisor who signed those Page 7s did not have authority to do so because he was not the applicant's CO.<sup>10</sup> In light of PSC's claims in this regard and the division head's apparent reliance on the faulty judgment of the applicant's chief, the Board finds that the preponderance of the evidence in the record casts sufficient doubt on the fairness of the two Page 7s dated January 18, 2011, to overcome the presumption of regularity and warrant removing them from the applicant's record along with the other Page 7s addressed in finding 6, above.

9. Accordingly, relief should be granted. The applicant's record should be corrected by—

- Removing the EER dated January 25, 2011, and all associated remarks and comments;
- Removing the corrected advancement mark entered in the database on May 25, 2011;
- Removing the adverse ("performance and discipline") Page 7s dated from January 18, 2011, through February 9, 2011; and
- Backdating his [REDACTED] E-5 date of rank to September 1, 2011, and paying him all due back pay and allowances.

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<sup>9</sup> PERSMAN Articles 10.B.2., 10.B.4.b.5.b., 10.B.6.b., and 10.B.8.

<sup>10</sup> The Coast Guard based the claim that only a CO could sign the 2011 and 2012 adverse Page 7s on Chapter 1.4.3. of the Personnel and Pay Procedures Manual, COMDTINST M1000.2B, which states that "[o]nly the CO [or an acting CO] may sign Adverse Administrative Remarks (CG-3307) entries." Although COMDTINST M1000.2B was not published until October 2012, the previous version of this manual published by the Coast Guard on its website in August 2009 included at the top a draft copy of Change 14 to the manual, which amended the manual by prohibiting COs from delegating the authority to sign adverse Page 7s.

**ORDER**

The application of [REDACTED], USCG, for correction of his military record is granted. The Coast Guard shall correct his record by—

- Removing his EER dated January 25, 2011, and all associated remarks and comments;
- Removing the corrected advancement mark entered in the database on May 25, 2011;
- Removing his adverse (“performance and discipline”) Page 7s (CG-3307s) dated from January 18, 2011, through February 9, 2011; and
- Backdating his [REDACTED] E-5 date of rank to September 1, 2011, and paying him all due back pay and allowances.

May 29, 2014

