

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2016-044**

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**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 after receiving the completed application on January 14, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 18, 2016, 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, a chief ██████████/E-7) on active duty, asked the Board to correct his record to show that he was appointed a chief warrant officer (CWO) on July 1, 2014, and to award him corresponding back pay and allowances. He alleged that the Coast Guard Personnel Service Center (PSC) arbitrarily removed his name from the final eligibility list “without a proper basis in statute, regulation, or fact.” He stated that his name was removed from the list pursuant to the recommendation of a special board, which considered a negative Enlisted Evaluation Report (EER) that was prepared improperly and contrary to COMDTINST M1000.2, the Enlisted Accessions, Evaluations, and Advancements Manual (hereafter, “Enlisted Manual”).

The applicant stated that in March 2013, when he was assigned to a cutter under the supervision of the ██████████, the commanding officer (CO) of his cutter favorably endorsed his application for appointment to CWO. His application included an evaluation with laudatory comments signed by his CO and a very laudatory endorsement from his prior CO as well. The result of the selection board—the CWO final eligibility list—was published in July 2013, and it included his name. In addition, he had competed for advancement to senior chief (██████/E-8) and placed “above the cut” for advancement.

The applicant stated that in August 2013, he was being transferred to a shore unit, and he submitted input for his transfer EER in the form of a draft EER with excellent marks of 6 and 7 (on a scale of 1 to 7) like those he had received on his prior EER. He completed the transfer to

his new unit before being counseled on the EER. On October 5, 2013, the applicant stated, the command of the cutter sent a completed EER with all marks of 4 and 5, a non-recommendation for advancement, and an EER counseling receipt to a prior supervisor, LT A. In response, LT A advised the command in an email dated October 30, 2013, which the applicant submitted, that she was shocked by the non-recommendation and thought that the marks were “considerably lower than he deserves.”

The applicant stated that in January 2014, the CO of the cutter sent a revised EER, and he signed the counseling receipt for this version on January 9, 2014. The copy of the EER that he submitted shows that his chain of command had raised three of his marks. However, as a result of the non-recommendation mark, his name was removed from the [REDACTED] advancement list.

The applicant stated that on May 1, 2014, he received a memorandum from PSC stating that the Secretary had appointed him a CWO as of July 1, 2014. However, on June 2, 2014, he was notified that his name had been temporarily removed from the CWO final eligibility list and that PSC was convening a special board to consider permanently removing his name from the list. PSC stated that the special board would review his performance record and “documentation associated with” the transfer EER pursuant to the Officer Manual. The applicant argued that there “was no factual basis” for removing his name from the list. Although the special board was to review “all documentation associated with” his transfer EER, dated August 15, 2013, there was no such documentation because he was never formally counseled before the EER was issued. He alleged that his CO had provided him with no verbal or written counseling indicating that his performance had declined, and his supervisors assigned him very high marks. Therefore, he argued, there is no “factual knowledge” that justified the removal of his name from the final eligibility list. He also argued that his CO—by endorsing him for appointment in March 2013 but recommending against his advancement in his transfer EER—had short-circuited the established process for selecting CWOs.

The applicant argued that his CO’s non-recommendation for advancement on the transfer EER cannot be considered “factual knowledge” because it is her opinion only. He alleged that pursuant to Article 1.D.11. of the Officer Manual, to justify removing a member’s name from the final eligibility list, the adverse information must cast doubt on the member’s moral or professional qualifications, and his CO’s opinion did not. He argued that under Article 1.D.11., “adverse information” is supposed to be a disciplinary matter, and so his CO’s withdrawal of her recommendation does not constitute “adverse information” within the meaning of the manual. He argued that while a CO’s opinion should carry weight in the CWO selection process, once a member has been selected for appointment, “there is no legal basis for CG PSC to use that opinion, expressed many months after the selection board,” to remove the applicant from the final eligibility list. Therefore, he argued, PSC had no authority to remove his name from the list.

The applicant argued that “[r]etroactive application of an opinion expressed in an untimely EER is arbitrary and contrary to the procedures established by Coast Guard Instructions.” Under Article 1.D. of the Officer Manual, he alleged, members may only be removed from a final eligibility list based on a “failing,” but he “did not fail and his command at the time chose not to remove him from the list.” He argued that Article 1.D. does not allow PSC “to, in effect, keep the selection board process open indefinitely in order to consider late submitted EERs,” and

that PSC's action in his case "undermines the transparency and regularity essential to maintaining trust in the selection process." In support of these allegations, the applicant submitted many documents, which are included in the summary of the record below.

### SUMMARY OF THE RECORD

The applicant enlisted in 2002, became an [REDACTED] and advanced to [REDACTED] in 2009. In June 2012, the applicant transferred from a Sector Command Center to a large cutter, where he was [REDACTED]. In March 2013, he was still serving aboard a cutter when he applied for an appointment as a CWO. The CO of his cutter favorably endorsed his application for appointment to CWO and signed [REDACTED] an evaluation with laudatory comments about his performance for the prior year, from March 1, 2012, through February 28, 2013. In Block 10 of the evaluation the CO stated that the applicant "is capable of satisfactorily performing & rec'd for CWO in the [REDACTED] specialty. Mbr quickly adapted to afloat [REDACTED] duties despite demanding/influx sched." In the remainder of Block 10, she summarized comments that the applicant's prior CO at the Sector had provided on a Page 7 as follows:

O6 CO at Sector ... for 1<sup>st</sup> 115 days: "Highest" rec for CWO. As CDO, a duty normally held by officers, "I had my best night's sleep when he was on watch." [REDACTED] was resp. for all 11 mission areas in 2 states & 2,000+ CG mbrs, always provided sage advice/recs on events incl. most challenging of CO's career. Mbr is "ready...I unequivocally would seek him out to serve in my unit as a Chief Warrant Officer." [REDACTED] has skills to serve in positions such as [REDACTED]

The applicant also submitted for consideration by the CWO selection board the Page 7 from his prior CO at the Sector with a very laudatory endorsement.

In May 2013, the applicant also competed for advancement to [REDACTED] E-8 by taking the servicewide examination (SWE), and he placed [REDACTED] on the May 2013 [REDACTED] advancement list, which would go into effect in 2014. At [REDACTED] he was "above the cut" for advancement.

On July 12, 2013, PSC issued the results of the CWO selection board in ALCGPSC 081/13, which would be in effect from June 1, 2014, through May 31, 2015. The announcement shows that the applicant placed [REDACTED] on the list, but the "cut" for appointment to CWO was only at [REDACTED] and the "predictor" for how many would actually be appointed was at [REDACTED].

In August 2013, the applicant was transferred from the cutter to a shore unit at his request and so his command prepared a transfer EER dated August 15, 2013. The applicant submitted input for his transfer EER in the form of a draft EER with excellent marks of 6 and 7 (on a scale of 1 to 7) and comments supporting the marks. On October 5, 2013, the CO of the cutter, who was the approving official for the transfer EER, sent the applicant's supervisor a completed EER with all marks of 4 ("standard") and 5 ("above-standard"), a non-recommendation for advancement, and an EER counseling receipt for signature. The non-recommendation mark was supported by the following comment:

[The applicant] continues to season as a CPO. Upon reporting, [REDACTED] quickly adapted to new duties, showed initial promise and was given the benefit of the doubt to receive a recommendation for CWO. However, with additional time, experience and underway opportunities, PSC has not continued to grow and develop as initially indicated. [REDACTED] most noted contributions were primarily within his Division/rating, such as improving pre-boarding targeting of F/Vs during [the cutter's] two [REDACTED] patrols. As [REDACTED] he oversaw clean ups prior to his checklist items, but required supervisor assistance to fully embrace routine [REDACTED] duties, let alone make habitability and cleanliness improvements. As [REDACTED] leader, he met requirements for [REDACTED] and executed drills as required, including incorporating the [REDACTED] into several scenarios. As the inport duty section coordinator, he developed a "draft" to let individuals pick their own duty days, which improved flexibility for crew members. He also improved his own personal fitness by dropping extra weight.

While [REDACTED] performance was good within [REDACTED] he struggled to take an effective leadership role outside of his Division. He seemed most comfortable working on his professional goals and leading junior personnel, especially within his Division, but did not fully engage or work as well with peers or senior personnel. He sometimes struggled to understand and/or embrace policies and decisions of seniors, or realize how his actions would be perceived by or affect others. On occasions, his motives appeared slightly self-focused, rather than selfless. Based on [REDACTED] marks input and demeanor, it appears he sees himself as a top performer (primarily 7s with some 6s), however his performance evaluated against established standards yields marks of 4s and 5s. The basic performance expectation for a CPO [is] high. In order to excel and earn a recommendation for Senior Chief, a Chief must be exceptional and forward leaning across all areas (rating/technical expertise and CPO/leadership ability). In order to earn a recommendation for advancement, [REDACTED] must first learn how to objectively view his performance from an outsider's perspective based on established standards, and from that identify areas for improvement (Self Awareness). While his [REDACTED] skills appear solid, his Chief and leadership skills need additional development, including the Leadership Competencies of Followership, Effective Communications, Influencing Others, Personal Conduct and Team Building. In addition to leading junior personnel, [REDACTED] must learn how to work effectively with peers and seniors, constantly strive for continual improvement and seek innovative/creative solutions to problems or the status quo (Creativity and Innovation).

On October 30, 2013, the cutter's prior [REDACTED] commented on the EER by email and stated that she was shocked by the non-recommendation and thought that the marks were "considerably lower than he deserves." She submitted several paragraphs praising aspects of his performance and stated that she had provided the applicant with performance counseling on an "as needed basis, course corrections were given by both the CO and I, but he left these meetings with a better idea of what the CO was searching for and executed those to the best of all our abilities."

On November 16, 2013, the CO met with the applicant for more than three hours to discuss his complaints about his transfer EER. As agreed during that meeting, on December 2, 2013, the applicant submitted a ten-page memorandum in which he requested higher marks in 13 performance categories and included descriptions of his performance and achievements, which he argued justified higher marks.

Pursuant to the applicant's informal EER appeal, the CO sought additional input from members of the applicant's chain of command during the reporting period for the transfer EER and created a document and table showing their original recommendations for marks for the transfer EER as well as their comments and recommendations after reviewing the additional information that the applicant had submitted on December 2, 2013: [REDACTED]

- The Executive Officer (XO) of the cutter from June 2012 to July 2013 stated that he concurred with the CO's assessment, that the applicant's self-assessment was inaccurate, and that he agreed "with the shortfalls in the leadership competencies. ... [The applicant] did not recognize that there is more to cutter life than [REDACTED]. There is a collaboration and team building that is necessary for success at all levels of our unit. ... I agree that one of [his] significant failings is his ability to collaborate with peers and seniors. My perception of him is that he often took performance critique personally rather than constructively. Because of that, he was not a great collaborator. [He] had multiple opportunities where he could have demonstrated skill of leadership and collaboration ... but rather than step up he was content to be a follower and be directed. Chiefs that are deserving of a star on their anchor don't wait to be asked to help, they see issues and act in the best interest of the crew and command. [The applicant] has potential, but as you articulated he is not ready for E-8." The XO also provided specific comments supporting marks of 4 and 5 in the transfer EER. Regarding the non-recommendation for advancement, the XO stated that it is appropriate and noted that the applicant's "justification is a 'blame my supervisor for not telling me' approach, with no real ownership of his contribution to the performance evaluation."
- The new XO who reported aboard in July 2013 had previously recommended marks of 4 and 5 in many categories with specific comments and a mark of 6 for the performance dimension "Professional/Specialty Knowledge" because of the applicant's "wealth of professional and technical knowledge with CG databases" and use of a training program that [REDACTED]. The XO did not recommend the applicant for advancement despite his professional knowledge, however, because he "lacks desired leadership competencies. Specifically member needs to improve on taking initiative of own accord, demonstrating greater loyalty to command by supporting decisions even if unpopular, setting a better example by promoting and accepting all work even if undesirable, increasing responsibility by holding self to same high standards as subordinates," etc. The XO reviewed the applicant's appeal package and stated that he did not think it warranted higher marks.
- LT A, the cutter's [REDACTED] from June 2012 to April 2013, referenced her email dated October 30, 2013, and described the applicant as "a smart and highly capable [REDACTED] [who] will make a fantastic [REDACTED]. His personnel will benefit from his desire to lead and

develop those around him. I believe the documents that you sent me with his requested bullets are reflective of his performance.”

- The cutter’s interim [REDACTED] from June 2013 to July 2013 had previously recommended mostly marks of 4 and 5 but a mark of 7 for “Professional/Specialty Knowledge.” He explained that the applicant successfully “ran [REDACTED] during several major cases” but that “[w]hile serving as [REDACTED] he required prompting on a number of occasions to engage with the command ... On occasions he produced work that was below the expectations of the command”; that he “[s]ometimes required prompting on required paperwork”; and that his written work for subordinates’ evaluations and award recommendations needed improvement. After reviewing the applicant’s EER appeal, the [REDACTED] wrote that the EER marks were already “a little generous. It was always such a fuss to get anything out of him. I had to spend a lot of time on him, and on his paperwork. I had to hold his hand way more than I should have for a Chief.” He also criticized other aspects of the applicant’s performance.
- The cutter’s new [REDACTED], who reported aboard on July 15, 2013, had previously recommended primarily marks of 4 and 5 but a mark of 6 for “Judgment” and a mark of 7 for “Professional/Specialty Knowledge.” After reviewing the applicant’s EER appeal, he stated that the mark of 4 for “Responsibility” could be raised to a 5 but no higher because the applicant had been “quick to go on the defensive and pushed back after his OOD watchstanding privileges were temporarily suspended” after a [REDACTED] was left open. He stated that the remaining marks should not be changed except that the mark of 5 for “Professional/Specialty Knowledge” could be raised to a 6 although he was not certain that the applicant had met the written standard for a 6.
- The [REDACTED] from June 2012 to May 2013 had originally written that while on patrol “it was sometimes a challenge to get [the applicant] to see the big picture of our goals, and develop effective methods to achieve them. ... I usually worked well with [him], but I also agree that sometimes it was difficult to get him to support command decisions. ... In his favor, he did take over [REDACTED] and get the team certified, as noted, but he could definitely have been more proactive as [REDACTED]. Even ETC took a more active role as [REDACTED]. ... His working with superiors and leadership are probably the areas in which he needs the most improvement, and that’s an area that will become critical as a senior chief or warrant.” Regarding the applicant’s EER appeal information, the [REDACTED] stated that raising the applicant’s marks for “Directing Others,” “Working with Others,” “Developing Subordinates,” “Responsibility,” “Respecting Others,” “Adaptability,” “Initiative,” and “Professional/Specialty Knowledge” by one point each would not be unreasonable in light of the applicant’s new input. Regarding the non-recommendation for advancement, he indicated that the applicant’s self-perception was inaccurate and that “as a CWO or E-8 he needs to do more than improve some processes or stick up for his division, he needs to understand his role in the larger organization and act in ways that look out for the CG as a whole.”
- The [REDACTED] from May through August 2013 had previously recommended mostly marks of 4 and 5 but a 6 for “Judgment” and a 7 for “Professional/Specialty Knowledge.” Based on the applicant’s EER appeal package, he recommended raising the applicant’s marks for “Working with Others” and “Responsibility” by one point each but stated that the remaining marks should stay the same.

- The Command Master Chief from June 2012 to August 2013 had concurred with the marks in the original EER. After reviewing the applicant's appeal, he indicated that he would be "ok" with raising the applicant's marks for "Setting an Example" and "Respecting Others" from 4 to 5 but that the other marks should remain the same.
- The cutter's [REDACTED] had previously stated that the assigned numerical marks in the transfer EER were accurate. After reviewing the applicant's appeal, [REDACTED] stated that he would raise the applicant's marks for "Working with Others," "Developing Subordinates," and possibly "Initiative" by one point each.

On January 3, 2014, pursuant to the applicant's informal appeal of the EER, the CO issued a revised EER with six marks raised. The applicant received a 5, instead of a 4, for "Working with Others," "Initiative," "Professional Development," and "Using Resources," and a 6, instead of a 5, for "Professional/Specialty Knowledge" and "Health and Well-Being." The CO had not changed the non-recommendation for advancement, however, and included the same supporting comment as before. Because of the non-recommendation for advancement, the applicant's name was removed from the [REDACTED] advancement list. The applicant signed the counseling receipt for this revised EER on January 9, 2014.

On January 16, 2014, the applicant formally appealed the EER to the Area Command. He submitted with his appeal information about his performance and achievements, the documentation his CO and prior CO had prepared to recommend him for appointment to CWO in March 2013, his 2012 EER, and marks that had been recommended by a prior [REDACTED]. He argued that his CO had not provided him necessary feedback before changing her recommendation and that his CO's non-recommendation reflected a breakdown in communication about his performance within his chain of command because his supervisors recommended him. He challenged many of the numerical marks in the EER and described performance that, he argued, supported higher marks.

On January 27, 2014, the applicant's CO forwarded the EER appeal to the Area Commander with a memorandum. The CO stated that after requesting and receiving additional input from members of the applicant's chain of command aboard the cutter and, based on that input, his own observations, and verbal comments he had received from the chain of command during the reporting period, he had raised six of the numerical marks. The CO noted that except for the assessment of the first [REDACTED] (who thought that the applicant should get the high marks he had requested), the assessments of the other members of the chain of command were fairly consistent. He also noted that the first [REDACTED] "had previously demonstrated difficulty evaluating personnel against established standards." The CO stated that the applicant's EER input bullets "highlight positive performance, but do not reflect areas that needed work or were less than positive. Some bullets claim a result or impact greater than what was actually achieved, some claim individual credit for results that were earned as part of a team or which other people performed, some claim individual initiative but were driven by tasking from the rating chain, and some were simply inaccurate." The CO provided specific examples of these issues for some of the performance dimensions.

Regarding her previous decision to recommend the applicant for CWO, the CO wrote that she had advised him that the evaluation she had provided to support his selection for CWO—

was written just over halfway through the EER's marking period, and approximately one-third of the time was served at his previous unit, Sector ... As reflected in Block 7 [of the evaluation for CWO], his primary duties on [the cutter] were underway focused, but his rating chain had only been able to observe him underway for just over two months during two short [redacted] patrols and [redacted]. To date, he was doing good work and continuing to season as a CPO. There were a number of problems within the [redacted], including [redacted] but at the time the Executive Officer and I believed them primarily attributable to our struggling [redacted] and therefore I gave [the applicant] the benefit of the doubt regarding his recommendation for CWO. As reflected in Block 10, I relied heavily on the glowing input provided by the former Commanding Officer of Sector ... when recommending [the applicant] for CWO. For [the applicant's] 15 August 2013 EER, his rating chain and I had over five additional months to observe his performance, including over two additional months underway. The transfer of the [redacted] enabled greater insight into the inner workings of the Department. Plus, the input from Sector ... was no longer applicable as it occurred prior to the marking period. ... In accordance with [the Enlisted Manual], the recommendation for advancement is not eligible for appeal. ... In making my decision [not to recommend the applicant for advancement], I considered my observations of [his] performance, his input, and the assessment of each member of his rating chain. While I considered the rating chain's input, ultimately the decision was mine, and it was made in accordance with sections 3.A.4.e.(4) and 5.G. of [the Enlisted Manual]. My decision was not made lightly and I spent a considerable amount of time assessing it. ... [M]y assessment of his performance is that he is not yet ready to perform the additional duties and responsibilities of a Senior Chief Petty Officer. ...

On February 21, 2014, the Area Command advised the applicant that his appeal of his EER had been reviewed and denied because there was "no evidence of incorrect information, prejudice, disproportionately low marks, or discrimination."

On May 1, 2014, PSC sent the applicant a memorandum stating the following:

1. I am pleased to inform you that pursuant to the authority of Section 571, Title 10, U.S. Code, the Secretary of Homeland Security appoints you a chief warrant officer, W2 (permanent) in the United States Coast Guard. The date of appointment is 1 July 2014.
2. Your command shall comply with the provisions of [COMDTINST M1000.3 (hereinafter, "Officer Manual"), Article 1.D.11.] with respect to execution or withholding of this appointment. ...
3. If you are physically and otherwise qualified, acceptance of this appointment shall be made by executing the Oath of Office, but not prior to the date of appointment. ... Pay and allowances will accrue from the date the oath is executed. ...



On May 30, 2014, however, the applicant was notified by memorandum that his name had been temporarily removed from the CWO final eligibility list and that PSC was convening a special board to consider permanently removing his name from the list. PSC stated that the special board would review his performance record and “documentation associated with” the transfer EER pursuant to the Officer Manual. PSC advised him that he had a right to submit a written communication for consideration by the board. The applicant acknowledged this notification on June 2, 2014, and indicated that he would submit a statement.

In a statement for the special board dated June 10, 2014, the applicant wrote that the non-recommendation had surprised him and his immediate supervisors and that he had not been properly counseled. He claimed that the CO’s perception had been [REDACTED] by input from other members who were “under investigation that directly questions their integrity. This information was not found out till after my appeal was complete, unfortunately due to the ongoing investigations, I am unable to speak to whom they are nor the specifics of the investigation.”

The applicant attached to his statement to the special board the documentation prepared for the CWO selection board in March 2013 and three officers’ statements:

- The applicant’s new CO wrote that the applicant “embodies and possess[es] the personal characteristics and leadership talents that we expect within our officer corps. He is a highly valued member of my staff and has made substantial contributions ... [His] caring and genuine leadership style has made him an integral member on multiple staff committees. ... [He] has demonstrated the ability to lead in diverse conditions and work with junior personnel and senior leadership for mission accomplishment and success. I am absolutely confident that he can and will serve with distinction and honor as a Chief Warrant Officer.”
- An officer who had supervised the applicant at a Sector Command Center from June 2005 to July 2008, when the applicant was an [REDACTED] stated that the applicant is “one of the best [REDACTED] that I have had the pleasure of serving with. ... As the Command Center Chief, I relayed [sic] heavily upon [him] to help transform the Command Center from a legacy group to a Sector Command Center responsible for all Sector mission areas. As my most trusted senior First Class Petty Officer, his leadership, knowledge, and experience led to the implementation of a Sector Command Duty Officer and Situation Unit Watch positions ... [His] ability to meet challenges and find solutions was highlighted during the implementation of Rescue 21 ... [His] performance, professionalism, and integrity distinguish him as an excellent leader and mentor ... He has unlimited potential and should be reinstated on the 2013 Active Duty Warrant Officer Final Eligibility List.”
- A captain who had been the Deputy Commander of the applicant’s Sector from 2009 to 2012 strongly recommended that the applicant be reinstated on the CWO final eligibility list. He wrote that through the applicant’s “leadership, tenacity and drive, he influenced change leading to improvements” in Sector operations, that he had shown initiative others lacked, and that he mentored and coached junior officers qualifying for watches, especially after the watch supervisor was removed from his position due to loss of confidence.

The applicant had also stepped up to fill another highly responsible position that was “gapped” and thus provided “much needed continuity.”

The special board convened on July 9, 2014, to consider whether the applicant’s name should be removed from the CWO final eligibility list or returned to the list. The special board report states that after reviewing “all relevant documents, it is the opinion of at least a majority of the members of the Board that the Commandant should remove [the applicant] from the 2013 Final Eligibility List for Appointment to Chief Warrant Officer in accordance with Article 1.D.10.1., Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3.” The special board found that the CO of the cutter had—

provided thorough documentation justifying [the applicant’s transfer EER] and reasoning for not recommending the member for advancement. The command cadre, including both the unit Command Chief and [the Area] Command Master Chief, considered and denied the member’s appeal. After reviewing the member’s record and all relevant documentation, the board concurred with the Command’s determination of “not recommended” on the 15 August 2013 [EER]. The board determined that the member displayed exceptional professional competence as an but while onboard [the cutter], his leadership skills required additional development. Specifically, [he] struggled to understand and embrace policies and decisions of seniors, or realize how his actions would be perceived or affect others. One of [his] significant failings was his inability to effectively collaborate with peers and seniors.

Notwithstanding the member’s performance at his current unit, Chief Warrant Officers must be capable of performing in a wide variety of assignments that require strong leadership and management skills as per the Commandant’s Guidance to Officer Selection Boards and Panels.

The recommendation of the special board was approved by Commander, PSC, and on September 2, 2014, PSC advised the applicant that his name had been removed from the CWO final eligibility list but that he could submit a new request for appointment to a future CWO selection board and that no information about his previous selection, the special board, or his resulting removal from the list would be made available to any future CWO selection board. The applicant acknowledged receipt of this notification on September 3, 2014.

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

On July 5, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum on the case prepared by PSC.

PSC reviewed the applicable policies about removing a member from a CWO final eligibility list and argued that the applicant has not shown that his removal was erroneous or unjust. PSC stated that appointment to CWO is not a reward for service and that even “[m]eeting the minimum standards for advancement as an enlisted member should not be enough to earn mem-

bers the commanding officers' recommendation to apply for appointment to warrant grade." PSC stated that the applicant's CO had "concluded that the applicant did not possess the necessary leadership skills to advance and provided sufficient justification in the rationale for this recommendation." PSC noted that when the applicant appealed the EER, the Area Commander found "no evidence of incorrect information, prejudice, disproportionately low marks or discrimination in the assigned marks."

PSC stated that a CO's recommendation is required for appointment to CWO and if that recommendation is removed or if PSC receives other adverse information any time prior to the member's appointment, PSC is authorized to take action to remove the member's name from the final eligibility list. PSC stated that Article 1.D.10.a.(2) of the Officer Manual provides a non-exhaustive list of examples of adverse information that warrants such action and that a decision by one's CO not to recommend one for advancement "aligns with the intent of the list, and is a clear indicator that the member should not be appointed as a warrant officer."

PSC noted that the special board convened to consider the applicant's removal had determined that despite the applicant's "exceptional professional competence as an [REDACTED]," he "lacked the leadership skills required to be a Chief Warrant Officer" and so recommended removing him from the list. PSC stated that the special board's report was reviewed by Coast Guard counsel and "found in accordance with the law and policy, before it was approved by the Commandant."

Therefore, PSC recommended denying relief. PSC claimed that the decision to remove the applicant's name from the 2013 CWO final eligibility list "has no lasting derogatory impact on the member, as no documentation of the Board's decision will ever be made part" of the member's permanent record and he remains eligible to compete for appointment to CWO in the future.

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

On August 11, 2016, the applicant responded to the views of the Coast Guard. He argued that, contrary to PSC's claim, the loss of a CO's recommendation for advancement does not align with the examples of reasons for PSC taking action to remove a member from a CWO final eligibility list because the reasons listed in Article 1.D.10.a.(2) of the Officer Manual refer exclusively to misconduct, and there "is no misconduct in this case." Therefore, the applicant argued, PSC's action to convene a special board and remove his name from the CWO final eligibility list was "arbitrary and not based in any statute or regulation." The applicant argued that nothing in the manuals gives PSC "unfettered authority to remove a member" from the list.

#### **APPLICABLE REGULATIONS**

The Enlisted Manual in effect in 2013 and 2014, COMDTINST M1000.2, contains the following provisions regarding advancement within the enlisted ranks:

Article 3.A.4.e.(4) states the following about an advancement recommendation:

The CO/OICs recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. A recommendation for advancement shall be based on the individual's qualities of leadership, personal integrity, adherence to core values, and his or her potential to perform in the next higher pay grade. Although minimum performance factors have been prescribed to maintain overall consistency for participation in SWE, the commanding officer shall be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation.

Article 3.A.5.a. states that “[i]ndividuals recommended for advancement to senior chief petty officer and master chief petty officer must be superior in leadership, military characteristics, technical knowledge, and performance of duty. They must be professionally qualified to fill any chief petty officer billet of their rating.”

Article 3.A.19.d., “Cancellation of Advancement,” states the following:

If at any time prior to effecting an advancement, a commanding officer wishes to withdraw his or her recommendation because an individual has failed to remain eligible and it appears that eligibility will not be attained prior to expiration of the current eligibility list, the commanding officer shall advise Commanding Officer (CG PPC) by message with Commander (CG PSC-EPM), as an information addressee, to remove the individual's name from the eligibility list.

Article 5.G. states the following about choosing an advancement mark on an EER:

1. Basis for the Advancement Recommendation. While the rating chain must consider past performance, it must also consider and base the recommendation on 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.

2. Guidelines for the Advancement Recommendation. When completing this part of the employee review, the rating chain should focus on the guidelines in Chapter 3.A. on advancement recommendations and then select one of the following choices.

a. **RECOMMENDED.** The member is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade. The rating chain should choose this entry regardless of the member's qualification or eligibility for advancement. If the member has met all eligibility requirements, choosing this value constitutes an official recommendation for advancement. Personnel, E-6 and above, must receive a supporting remarks entry clearly documenting their present and future leadership potential for greater responsibility in accordance with Article 5.B.1.e. of this Manual.

b. **NOT RECOMMENDED.** The member is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.

Required Counseling. If the Approving Official marks "Not Recommended," they must ensure the member is properly counseled on the steps necessary to earn a recommendation and prepare supporting remarks in accordance with Articles 3.A.4.b.(2)., 3.A.4.e.(4)., and 5.B.2. of this Manual.

4. Finality of the Advancement Recommendation. The Approving Official's decision on the advancement recommendation is final and may not be appealed.

Regarding performance feedback, Article 5.B.2.i of the Enlisted Manual states the following:

No specific form or forum is prescribed for performance feedback. Performance feedback, formal or informal, actually occurs whenever an evaluatee receives any advice or observation from a rating official on their performance or any other matter on which they may be evaluated. Performance feedback can occur during a counseling session, particularly during a mid-period session, through on-the-spot comments about performance, or at the end of the enlisted employee review period. Each evaluatee must be continuously alert for the "signals" received in one of these ways from the rating chain. If the signals are not clear, the evaluatee must ask the rating chain for clarification.

Article 5.D.2. of the Enlisted Manual states that an evaluatee "is ultimately responsible for ... b. Finding out what is expected on the job [and] c. Obtaining sufficient feedback or counseling and using that information in adjusting, as necessary, to meet or exceed the standards." Article 5.D.3.b.(6) states that a supervisor must counsel an evaluatee on the EER after it is approved.

The Officer Manual in effect in 2013 and 2014, COMDTINST M1000.3A, states the following about recommending a member for appointment to CWO and removing a member from a CWO final eligibility list:

Article 1.D.1.a. defines the role of a CWO as follows:

Chief warrant officers (CWOs) are commissioned officers of the Coast Guard who serve in grades established by law and have authority commensurate with this status. CWOs are mature individuals with appropriate education and specialty experience who have shown through demonstrated initiative and past performance they have the potential to assume positions of greater responsibility requiring broader conceptual, management, and leadership skills. While administrative and technical specialty expertise is required in many assignments, CWOs must be capable of performing in a wide variety of assignments that require strong leadership skills.

Article 1.D.3.a. states the following about a CO's recommendation:

The commanding officer's well-considered, affirmative recommendation is the most important eligibility requirement in the warrant officer appointment process.

Regardless of how much time in service or time in grade a member may have or the existence of other personal considerations, they must earn the commanding officer's recommendation. Commanding officers shall base recommendations for appointment to warrant grade first on the member's qualities of leadership, personal integrity, and potential to perform successfully as a warrant officer. Commanding officers must never permit technical competence and ability to perform in a warrant specialty to overshadow the member's potential to perform successfully as a warrant officer. Appointment as a warrant officer is not another step in the enlisted promotion process and shall not reward enlisted members for faithful or extended service or completion of minimum service requirements. Meeting the minimum standards for advancement as an enlisted member should not be enough to earn members the commanding officer's recommendation to apply for appointment to warrant grade. [Emphasis added.]

Article 1.D.3.b. states the following:

In view of Article 1.D.3.a. of this Manual, commanding officers may recommend members for appointment to warrant grade if they meet all the eligibility requirements of Article 1.D.2. of this Manual. In addition to these minimum eligibility requirements, commanding officers shall consider these factors before recommending a member for appointment to warrant grade:

(1) Commanding Officer's Recommendation. Commanding officers shall recommend personnel for appointment to warrant grade only if they are fully qualified to hold warrant grade. By making this recommendation, the commanding officer affirms the member recommended can perform the duties of the specialty as defined in Article 1.D.13. of this Manual. Commanding officers shall thoroughly evaluate members seeking their recommendation for appointment to warrant grade to ensure they possess the qualities of character and leadership required of warrant officers. Perfunctory personnel administration in this area may allow poor performers and military offenders to be appointed, which reflects poorly on the command and the service.

(2) Commanding Officer's Responsibility. The recommendation process used by the commanding officer assists the service in affirming the candidate's mental, moral, physical, and professional qualifications for appointment to commissioned status. Commanding officers shall review the applicant's unit personnel data record prior to making the recommendation.

Article 1.D.10.a. states the following about removing a member from a final eligibility list:

(2) Removal from the Final Eligibility List. A candidate's name shall be removed from the final eligibility list upon receipt of adverse information by a commanding officer within the candidate's chain of command or Commander (CG PSC-C), which casts doubt on a candidate's moral or professional qualifications for appointment as a chief warrant officer. When adverse information is received that casts doubt on a candidate's moral or professional qualifications for appointment

as a chief warrant officer, a candidate's current commanding officer, any commanding officer in the candidate's chain of command, or Commander (CG PSC) has the authority to remove the candidate's name from the final eligibility list by notifying Commander (CG PSCOPM) to remove the candidate's name from the final eligibility list. The removal from the final eligibility list may be initiated via memo or message to Commander (CG PSC-OPM). Conviction by a court martial, conviction by a civil court, receipt of non-judicial punishment, or receipt of an unsatisfactory mark in conduct after the candidate has been recommended by the chief warrant officer appointment board is normally to be considered adverse information which casts doubt on the candidate's moral or professional qualifications for appointment as a chief warrant officer. ...

(3) Initiating a Special Board. Upon receipt of the commanding officer's request to remove the candidate from the final eligibility list or when initiated by Commander (CG PSC-OPM), the candidate's name will be temporarily removed without conducting a special board. The candidate shall have an opportunity to review the recommendation and shall be permitted to make such comments as desired by endorsement to the commanding officer's request. If Commander (CG PSC-C) initiates this action, the candidate shall be advised in writing of the contemplated actions and the reasons therefore and given the opportunity to provide comments as desired via the chain of command.

(4) Special Board Review. After the candidate has been temporarily removed from the final eligibility list, the case shall be reviewed at the CG PSC by a special board of senior officers. The special board shall consist of at least three officers in the grade of commander or above. The membership shall include a representative from the Headquarters or Commander (CG PSC-OPM) division having cognizance of the candidate's specialty. After a thorough review of the candidate's EI-PDR and associated documents, the special board shall recommend to the Commandant either that the candidate be reinstated on the final eligibility list or that the candidate not be reinstated on the final eligibility list.

(5) Reinstatement Authority. The recommendation of the special board to reinstate the candidate's name to the final eligibility list shall be forwarded to the Commandant (CG-1) for approval, modification, or disapproval. Commandant (CG-1) may determine that special circumstances exist which warrant final action be taken by the Commandant. In the event of such a determination by Commandant (CG-1), the recommendation of the special board shall be forwarded to the Commandant for action.

## 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 10 U.S.C. § 1552. The application is 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.<sup>1</sup>

3. The applicant asked the Board to correct his record to show that he was appointed a CWO on July 1, 2014, because his name was erroneously and unjustly removed from the CWO final eligibility list. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>2</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."<sup>3</sup>

4. The applicant argued that his name was erroneously and unjustly removed from the CWO final eligibility list in 2014 because his CO had erroneously and unjustly not recommended him for advancement on his August 15, 2013, EER after recommending him for appointment to CWO in March 2013. The evaluation that the applicant's CO signed in March 2013 to support his request for appointment shows that it covers the period March 1, 2012, through February 28, 2013, during much of which the applicant was serving in his prior billet at the Sector. In addition, the CO based her recommendation for his appointment to CWO in Block 10 of the evaluation in large part on his prior CO's "highest" recommendation on the Page 7, which was based on the applicant's work at the Sector. The August 15, 2013, EER, however, covers only the applicant's service aboard the cutter. The input received from all but one of the members of the applicant's chain of command aboard the cutter during the marking period—including two XO's, two [REDACTED], two [REDACTED], the Command Master Chief, and an [REDACTED] support the relatively mediocre marks of 4 and 5 that the applicant received on the EER, as well as the CO's non-recommendation for advancement. The comments in the record indicate that their concern regarding his readiness for advancement lay primarily with the applicant's struggle to take an effective leadership role and to fully engage and work with peers and seniors aboard the cutter, not with his expertise as an [REDACTED]. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the August 15, 2013, EER is an inaccurate assessment of his performance.

5. The applicant argued that the non-recommendation for advancement was unjust because he was not counseled about it before his transfer from the cutter. However, LT A, the cutter's [REDACTED] for the period June 2012 to April 2013, stated in her email dated October 30, 2013, that both she and the CO had provided the applicant with feedback in the form of "course corrections" as needed. Moreover, the applicant was an experienced chief petty officer, and the Enlisted Manual does not require formal or written counseling for chief petty officers concerning their eligibility for advancement except at the end of a marking period. The manual notes that performance feedback "occurs whenever an evaluatee receives any advice or

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<sup>1</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>2</sup> 33 C.F.R. § 52.24(b).

<sup>3</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).



observation from a rating official on their performance or any other matter on which they may be evaluated.”<sup>4</sup> In addition, it states that evaluatees are “ultimately responsible” for discovering what is expected of them and obtaining sufficient performance feedback to adjust their performance as necessary and meet or exceed the standards.<sup>5</sup> Therefore, and in light of the EER input received by the CO from the members of the applicant’s chain of command, the Board finds that the applicant has not proven by a preponderance of the evidence that his CO’s decision not to recommend him for advancement on his August 15, 2013, EER is erroneous or unjust.

6. The applicant argued that his name was erroneously and unjustly removed from the final eligibility list for appointment to CWO in 2014 because of his CO’s non-recommendation for advancement. He argued that once he had been selected for appointment by the CWO selection board in 2013, he should not have been removed because (a) there was no basis in statute or regulation for his removal; (b) there was no basis in fact or documentation supporting his removal for the special board to review and his CO’s opinion cannot be considered a factual basis for his removal; and (c) his CO’s non-recommendation for advancement does not constitute “adverse information” or a failing warranting removal action under the provisions of the Officer Manual. The Board disagrees with these assertions and will address them in turn:

- a. Under Article 1.D.10.a.(2) of the Officer Manual, COMDTINST M1000.3A, Commander, PSC must remove the name of a candidate for appointment to CWO from a final eligibility list upon receipt of “adverse information ... which casts doubt on a candidate’s moral or professional qualifications for appointment as a chief warrant officer.” The applicant cited no statute or regulation that contradicts or disallows this provision and the Board knows of none. The Commandant’s rules and procedures for removing a member’s name from a final eligibility list for CWO are spelled out in Article 1.D.10., and the applicant has not shown that they are contrary to law or that the procedures therein were not properly followed.
- b. The record before the special board contained ample documentation for the special board to review as it included the applicant’s military record; his August 15, 2013, EER; his informal and formal EER appeals; the recommended marks and comments submitted by nine members of his chain of command aboard the cutter; and the CO’s own memorandum about the appeal. These documents and the CO’s decision not to recommend the applicant for advancement to [REDACTED] are all facts that PSC and the special board could review and consider in deciding whether to temporarily and permanently remove the applicant’s name from the CWO final eligibility list pursuant to Article 1.D.10. of the Officer Manual. In fact, Article 1.D.3.a. of the Officer Manual indicates that a member’s eligibility for advancement, which requires one’s CO’s recommendation for advancement, “should not be enough” to earn a CO’s recommendation for appointment to CWO, which indicates that a recommendation for advancement is a minimum requirement for recommendation for appointment to CWO. Therefore, the appli-

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<sup>4</sup> COMDTINST M1000.2, Article 5.B.2.i.

<sup>5</sup> COMDTINST M1000.2, Article 5.D.2.

cant has not proven by a preponderance of the evidence that there was no factual basis for his removal or documentation for the special board to review.

- c. Article 1.D.10.a.(2) of the Officer Manual states that PSC shall remove a member's name from a CWO final eligibility list upon receipt of "adverse information ... which casts doubt on a candidate's moral or professional qualifications for appointment as a chief warrant officer. ... [Instructions for correspondence redacted.] Conviction by a court martial, conviction by a civil court, receipt of non-judicial punishment, or receipt of an unsatisfactory mark in conduct after the candidate has been recommended by the chief warrant officer appointment board is normally to be considered adverse information which casts doubt on the candidate's moral or professional qualification for appointment as a chief warrant officer." Because of the latter sentence, the applicant argued that only misconduct can justify the removal of a candidate's name, but the Board disagrees. The first sentence in this quotation, which is followed by the instructions on how to initiate removal of a candidate's name, is clearly the standard, and it requires only "adverse information ... which casts doubt on a candidate's moral or professional qualifications for appointment as a chief warrant officer." Article 1.D.3.a. shows that eligibility for advancement, which requires a CO's recommendation for advancement, is a minimum professional qualification for appointment to CWO, and Articles 1.D.1.a., 1.D.3.a., and 1.D.3.b. of the Officer Manual clearly show that excellent leadership is a primary consideration in whether a member is professionally qualified for appointment to CWO. Because the CO's decision not to recommend the applicant for advancement, the supporting comment in the EER, the other officers' EER input, and the CO's memorandum forwarding the EER appeal criticize the applicant's leadership aboard the cutter, the Board finds that PSC had substantial "adverse information ... which casts doubt on a candidate's ... professional qualifications for appointment as a chief warrant officer," as required to initiate removal action under Article 1.D.10.a.(2) of the Officer Manual. The fact that the end of this paragraph states that misconduct and civil or military convictions should normally be considered "adverse information" does not mean that other types of adverse information about a candidate's professional qualifications do not warrant removal action.

7. The applicant has not proven by a preponderance of the evidence that he was denied due process or that the removal of his name from the [REDACTED] advancement list or the CWO final eligibility list was erroneous or unjust. Therefore, his request for relief should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

**ORDER**

The application of [REDACTED] [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

November 18, 2016

