

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-210

 MK3

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. After receiving the completed application on June 27, 2017, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 18, 2018, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

THE APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a third class petty officer on active duty (MK3/E-4), asked the Board to correct an Enlisted Employee Report (EER) dated March 31, 2014, in his record by raising four low marks in the performance dimensions Communicating, Responsibility, Setting an Example, Judgment, and Conduct; by changing his advancement mark from not recommended (N) to recommended (R); and by changing his conduct mark from unsatisfactory (U) to satisfactory (S). He also asked that the Board correct his record to show that he advanced from MK3/E-4 to MK4/E-5 on August 1, 2014, because he would have been advanced on that date had he not lost the recommendation for advancement of his commanding officer (CO).

The applicant claimed that all of the contested marks on the disputed EER (enclosed) resulted from him being one day late in paying off his Government Travel Credit Card (GTCC) and that by policy, such a single minor infraction should not have resulted in an unsatisfactory conduct mark. He alleged that he lost his recommendation for advancement and was removed from an advancement list only because of the unsatisfactory conduct mark.

Regarding his low EER marks, the applicant stated the following:

- **Communicating:** The applicant stated that the supporting comment for the low mark of 3 (out of 7) is erroneous because he did understand what he was being asked to do, but the yeoman (YN1) who counseled him was unclear about the expectations. He also com-

plained that the EER comment stating that to receive a standard mark of 4 or higher he “must consistently demonstrate the ability to listen to, understand, and follow basic instructions” is erroneous because the word “consistently” does not appear in the description for a numerical mark of 4 for the dimension Communicating and instead appears in the description for a mark of 6 in that dimension. The applicant also complained that the comment that he should ask for clarification until he understood instructions is unjust because the “person giving the instructions was not clear, and I was unable to understand the intent of the instructions.”

- Responsibility: The applicant noted that the comment supporting the low mark of 3 in this dimension faults him for being a day late in paying his GTCC bill. He stated that he was only late because his most recent charge on his GTCC, a \$59.08 fuel bill, did not appear on his statement until after he paid the balance of \$132.38. He noted that at the time, he was on temporary duty in pre-deployment training and had difficulty accessing a computer.
- Setting an Example: The applicant denied the comment supporting the low mark of 2 in this dimension, which states that he had failed to accurately follow GTCC policy, his travel orders, and instructions from senior members.
- Judgment: The applicant alleged that the low mark of 2 he received in this dimension is erroneous and unjust because under GTCC policy, he should have received documented counseling because he paid his GTCC balance fewer than 31 days after the due date. Instead, they conducted an investigation and considered filing charges against him, and there is no Page 7 in his record documenting counseling.
- Conduct: The applicant stated that his unsatisfactory conduct mark is erroneous and unjust because the comment states that his failure to follow military regulations and acceptable standards of conduct warranted a Page 7, but there is no Page 7 in his record. In addition, he noted that the instruction for this mark on an EER states that a one-time infraction, such as being late for work, in insufficient grounds for awarding an unsatisfactory conduct mark and argued that his once being ten days late in paying off his GTCC was therefore insufficient grounds for assigning him an unsatisfactory conduct mark. The applicant also attributed his delay to the fact that on January 8, 2014, he had requested a \$1,437.70 mutual assistance loan, which should have resulted in \$718.85 being taken out of two paychecks, but instead that amount was taken out of four paychecks. He stated that he was reimbursed \$1,437.70 during the investigation but after his transfer orders had already been canceled. The applicant further noted that his GTCC statement shows that he paid his balance only 19 days late, on January 28, 2014, on a statement with a due date of January 9, 2014. He further alleged that his bank statement showing that the charge was withdrawn from his account on February 19, 2014, proves that he was only 10 days late. Therefore, the applicant argued, he should have received only informal counseling, rather than documented counseling, and there is no Page 7 or Report of Offense, CG-4910, in his record.

- Not Recommended for Advancement: The applicant noted that COMDTINST M1000.2A (hereinafter “Enlisted Manual”) states that a CO should consider withdrawing the advancement recommendation of a member who receives an unsatisfactory conduct mark, non-judicial punishment (NJP), or a civil or court-martial conviction. He alleged that his advancement recommendation was withdrawn only because of his unsatisfactory conduct mark. At the time his CO withdrew his recommendation for advancement, the applicant was #51 on an advancement list for advancement to MK2/E-5, and the members who placed #50 and #52 on the list were advanced on August 1, 2014. He submitted the advancement list and advancement announcements showing these facts. Therefore, he argued, because his one-time infraction did not warrant assigning him an unsatisfactory conduct mark, he should not have lost his CO’s recommendation for advancement, his name should not have been removed from the advancement list, and he should have been advanced on August 1, 2014.

The applicant also argued that the disputed EER, which was his regular EER for the period ending March 31, 2014, was submitted late on July 11, 2014, because his supervisor waited until the investigation had been completed to finish drafting the EER. He submitted a database printout showing that the Last Update Timestamp on this EER is July 11, 2014. Because his EER was late, the applicant argued, his command should have prepared a disciplinary EER instead. He argued that the EER was written as if he had received NJP, but he did not as it was a one-time infraction. And he alleged that as a result of his command’s errors, his eligibility period for a Good Conduct Medal had ended, and instead of deploying overseas on a cutter, he was assigned to shore duty and did not gain the sea duty he would need to advance further to MK1/E-6.

The applicant concluded by respectfully requesting that the Board grant his request for relief by raising the numerical dimension marks on the disputed EER to marks of 4; correcting the conduct and advancement recommendation marks from U to S and from N to R, respectively; retroactively advancing him to MK2/E-5 as of August 1, 2014; and awarding him back pay and allowances. The documents he submitted to support his claims are included in the summary below.

SUMMARY OF THE RECORD

The monetary amounts stated below have been rounded to the nearest dollar amount.

Bank Statements

The applicant’s GTCC bank statement issued on December 12, 2013, with a due date of January 9, 2014, shows a previous balance of \$28, purchases of \$164, cash advances of \$88, cash advance fees of \$9, a payment by the applicant of \$99 on November 25, 2013, no late payment charges, and a new balance of \$191, with no past due balance. The final purchase shown on this statement is a \$59 purchase on December 4, 2013, that was posted on December 6, 2012.

The applicant’s GTCC bank statement issued on January 12, 2014, with a due date of February 9, 2014, shows a previous balance of \$191, no purchases, cash advances, cash advance

fees, or late payment charges, a payment by the applicant of \$132 on December 13, 2013, a new balance of \$59, and a past due balance of \$59.

The applicant's GTCC bank statement dated February 12, 2014, with a due date of March 12, 2014, shows a previous balance of \$59, purchases of \$155, no cash advances, cash advance fees, or late payment charges, a payment by the applicant of \$59 on January 27, 2013, which posted the next day, a new balance of \$155, and no past due balance.

The applicant's personal back statement dated March 17, 2014, shows that he actually paid the \$59 towards his GTCC balance on February 19, 2014.

Orders

On November 1, 2013, the applicant received orders to transfer to a cutter for a year beginning on June 1, 2014.

On December 19, 2013, the applicant received authorization for 48 days of temporary duty to attend pre-deployment training beginning on January 21, 2014, and ending March 9, 2014.

On January 14, 2014, the applicant received orders to attend additional pre-deployment training from March 10 to 21, 2014. A rental car was not authorized but local travel by taxi or public transportation was authorized.

On January 24, 2014, the applicant's transfer orders were amended to have him report for duty aboard the cutter no later than April 22, 2014.

Travel Vouchers

The applicant submitted travel vouchers showing the following:

- The applicant traveled from his unit in Virginia to Baltimore, Maryland, on October 27, 2013, and traveled back to his unit on November 2, 2013.
- The applicant traveled from his unit in Virginia to Baltimore on November 12, 2013, and traveled back to his unit on November 16, 2013.
- The applicant traveled from his unit in Virginia to North Carolina on December 1, 2013, and traveled back to his unit on December 5, 2013.

Disputed EER

On the disputed semiannual EER for the period ending March 31, 2014, the applicant received the following numerical marks in the performance dimensions: one "superior" mark of 7, eleven "excellent" marks of 6, three "above average" marks of 5, five "standard" marks of 4, three "below standard" marks of 3, and two "poor" marks of 2. He also received a U for unsatis-

factory conduct and an N for not recommended for advancement. The mark of 7 and low marks are supported by written comments, as required by the Enlisted Manual:

- Mark of 7 for Professional/Specialty Knowledge: “MK3 [applicant] is a heavily relied upon NED asset for critical gauge calibrations. He has consistently demonstrated exceptional technical knowledge in calibrating a myriad of critical gages of many types and pressures. Because of this skill, he has become the go-to-guy person to provide refresher training to qualified personnel who are required to re-certify in calibrations every six months. Because of his patience and expertise he was relied upon to introduce 2 new members to the Cal Lab Team. Also because of his gauge calibration experience and ability to work independently with little more than initial instruction, the Cal Lab has the capacity to perform gauge cal on multiple cutters simultaneously. Additionally, MK3 [applicant] has proven indispensable in performing 270[WMEC maintenance and repairs completing over 400 hours of preventative maintenance on complex auxiliary and propulsion machinery this evaluation period. He also led junior Petty Officer on the recent replacement of both Lube Oil Coolers onboard CGC NORTHLAND, a task that required close supervision because of the potentially dangerous nature of this work done in restricted work space, hot work and extremely heavy components.”
- Mark of 3 for Communicating: “During this marking period, MK3 [applicant] displayed instances of poor communication skills. Due to his failure to listen to and follow clear guidance from a YN1 and his immediate supervisor regarding use of the GTCC, an additional administrative burden was placed on departmental management personnel in conducting investigation into potential violations of CG policy. During the investigation into alleged offences, MK3 [applicant] indicated multiple times during the investigation that he did not understand what he was asked or tasked to do by the YN1 or his supervisor, and he also stated that he did not request clarification on items he claims not to have understood. The lack of proper two-way communication by him ultimately resulted in cancellation of his PCS orders to PATFORSWA in addition to delay in receiving financial counseling he desperately needed. In order to receive a mark of 4 or higher, MK3 [applicant] must consistently demonstrate the ability to listen to, understand, and follow basic instructions when given. In cases where instruction given is not understood, he must ask for clarification until all doubt has been removed.
- Mark of 3 for Responsibility: “During this reporting period, despite numerous reminders, MK3 [applicant] failed to pay his government travel card both on time and in full. While in pipeline training for PATFORSWA, MK3 [applicant] was contacted by his supervisor and reminded to pay his government travel card balance because it was coming past due, risking his orders to PATFORSWA being cancelled if the balance was not paid immediately. As a result of the balance being paid one day late and concerns about his personal finances, his orders to PATFORSWA were canceled. In order for MK3 [applicant] to earn a mark of 4 or higher, he is required to show appropriate responsibility in taking care of personal finances and in managing his GTCC without having to be frequently reminded to do so.”

- Mark of 2 for Setting an Example: “As a result of MK3 [applicant]’s actions, a formal investigation took place surrounding alleged UCMJ offences and other questionable personal behavior in handling family responsibilities. The investigation opened questions of integrity and it was determined that elements for at least one of the charges were met. He failed to accurately follow government travel card policy, he did not following written travel orders, and he disregarding instruction from more senior CG members. As a result of his actions, his orders to PATFORSWA were cancelled at the end of the overseas training deployment cycle, wasting thousands of training dollars and a critical billet has gone unfilled. These actions are an extremely poor example for an experienced Petty Officer to reflect, especially so at a department where dozens of new and junior technician are witness.”
- Mark of 3 for Integrity:¹ “MK3 [applicant] answers in response to questions surrounding an investigation of alleged UCMJ violations cast serious doubt on his integrity. He acted in an evasive manner when asked questions about his finances, about not following directions resulting in his deviation from travel orders, and the response he provided regarding uniform issues he claimed that occurred while TDY also did not add up.”
- Mark of 2 for Judgment: “An investigation into MK3 [applicant]’s alleged USMJ offences uncovered poor judgment in his managing the GTCC, in his handling of family responsibilities, and by electing to deviate from written and verbal instructions giving regarding a TDY period. His extremely poor judgment has cost the Coast Guard thousands of training dollars and expenditure of valuable Base personnel hours investigating and documenting the poor decisions he has made. At this time MK3 [applicant] lacks the level of judgment necessary to effectively lead junior personnel”
- Unsatisfactory Conduct Mark: “MK3 [applicant] has failed to meet the minimum standard of conduct required of a CG Member. As a result of his personal actions an investigation was conducted into allegations of UCMJ violations and other undesirable behavior. The finding of the investigation warranted a negative Page 7 entry regarding his failure to follow military rules, regulations, and acceptable standards of conduct.”
- Not Recommended for Advancement: “As a result of the factors surrounding cancellation of his orders to PATFORSWA and the determination of findings in an investigation into Petty Officer [applicant] actions this evaluation cycle, it is clearly evident that he lacks the integrity, maturity, and responsibility required of a Second Class Petty Officer. At this time he does not meet the performance standard required to earn positive CO endorsement for the next higher pay grade.”

VIEWS OF THE COAST GUARD

On November 16, 2017, a Judge Advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

¹ The applicant submitted no arguments expressly addressing this below-standard mark for Integrity.

The JAG stated that the applicant “has provided no evidence to dispute the marks he received.” With regard to his specific complaints, the JAG noted the following:

- Requiring the applicant to consistently show that he can listen, understand, and follow basic instructions to receive a mark of 4 or higher in Communicating is not the same as requiring him to meet the standard for a mark of 6 in this dimension, which requires that the member “consistently display[] an outstanding ability in verbal expression.”
- The applicant’s GTCC statement dated December 12, 2013, shows a balance of \$191 due on January 9, 2014, and it was his responsibility to know this balance and pay it by the due date, but he made an incomplete payment and his account was past due from January 10 to February 14, 2014.
- The applicant did not follow GTCC policy because he did not pay his statement on time.
- Table 3-1 of COMDTINST M4600.18, which the applicant relies on to claim that he should have received at most documented counseling, shows the “minimum action required” by an overdue GTCC balance, not the maximum action.
- The applicant received an unsatisfactory mark pursuant to Article 4.D.4.b. of the Enlisted Manual not because of a “one-time infraction” but because of “financial irresponsibility,” which was justified because he had failed to pay his GTCC balance, attempted to pay it with a bad check, and made a subsequent late payment.

The JAG also submitted a memorandum on the case prepared by the Personnel Service Center (PSC), which recommended denying relief. PSC stated that under Chapter 1.E.4.c.(12) of the GTCC policy manual, COMDTINST M4600.18, a GTCC statement must be paid in full on or before the due date, and partial payments are not authorized. PSC stated that the applicant had underpaid his GTCC balance, as shown on his December 12, 2013, statement, by \$59. He then tried to pay the remaining balance on January 27, 2014, but his “payment was kicked back due to non-sufficient funds.” PSC stated that the applicant finally made the payment 36 days late.

PSC stated that the applicant received an EER “with adverse remarks stemming from a late payment and investigation of his GTCC despite numerous reminders to do so. Questionable handling of family matters and responsibilities are also mention [in the EER], but no specifics are provided.” PSC noted that the EER mentions a Page 7 prepared by the command, but that it was not entered in his official record. PSC stated that as a result of these issues, the applicant’s transfer orders to PATFORSWA were canceled after he had completed the prerequisite training.

PSC recommended that the Board deny relief because the applicant has not shown that his command failed to abide by policy. PSC stated that the comments in the EER show that his command found a pattern of irresponsible behavior, including his GTCC payments and other concerns, which warranted the unsatisfactory conduct mark, regardless of whether a Page 7 was entered in his record. PSC noted that as a result of his irresponsible behavior, the Coast Guard wasted “considerable training dollars” for orders to PATFORSWA that had to be cancelled, and another member had to be trained and transferred in his stead.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 4, 2018, the applicant submitted his response to the Coast Guard's advisory opinion with new evidence.

The applicant alleged that the disputed EER held him to too high a standard given his E-4 rank and that the comments are not sufficiently specific "to convey the entire performance picture during the marking period" as they addressed only the delinquent GTCC payment.

The applicant noted that the Coast Guard was unable to produce the Page 7 mentioned in the EER and also complained that it failed to submit a copy of his command's investigation. He argued that the Coast Guard exaggerated the evidence against him and failed to establish a pattern of irresponsibility. The applicant complained that he "cannot disprove a negative"—i.e., that he cannot disprove the alleged pattern of irresponsible and unsatisfactory conduct.

The applicant repeated his allegation that he was unaware of the \$59 charge when he paid his December 12, 2013, GTCC bill and did not deliberately intend to fail to pay his debts or to be financially irresponsible. He attributed the mistake to his training schedule and needing to move his family. He explained that he had decided to move his pregnant wife and kids before he attended pre-deployment training so that she would not be moving the household later in her pregnancy. Because he was moving, he had his GTCC bill forwarded to their new home. He claimed that he was therefore unaware of "when or even if" the bills arrived. He stated that he went to pre-deployment training on January 21, 2014, not knowing about the past due \$59 bill. He was called about the bill by a member of his command in late January and paid it by phone on January 27, 2014, but he did not have "good access" to his bank account. He stated that he did not intentionally write a bad check and did not learn until February 13, 2014, that the payment had not been made. Then he promptly paid it.

The applicant stated that beginning with his mid-February paycheck, he had deductions of \$718.85 taken from his paycheck for four consecutive paychecks even though the deduction was supposed to be made from only one paycheck, which created a hardship for his family. He could not pay his bills on time and he lost their new home. While he was under investigation, he had to support two separate households: his own and the house where his wife and children were living, which set him back further. Finally, he had to pay to move his family with him to his next unit.

The applicant alleged that the positive comments that support the mark of 7 he received on this EER for Professional/Specialty Knowledge show that his low marks for Communicating, Responsibility, Setting an Example, and Judgment. He also alleged that, contrary to the EER comment for Responsibility, which states that he had to be frequently reminded, he was "contacted once regarding my travel card bill" during the rating period.

The applicant also argued that the EER comments show that he was unjustly marked down for the command's overreaction to his late GTCC payment by initiating an investigation and canceling his transfer orders. He stated that one late payment did not prevent him from serving overseas, and the cancelation of his orders was not required by policy.

The applicant stated that the comments for Judgment in the EER reference his command's instruction not to take a taxi at some point during his travel. He stated that the orders allowed him to take a taxi and so the fact that he did should not have resulted in a low mark for Judgment.

The applicant claimed that his command should not have waited until their investigation was finished to complete his EER and should, instead, have prepared his regular EER timely and subsequently prepared a disciplinary EER. He also alleged that he was not properly counseled on the steps necessary to earn his CO's recommendation for advancement.

The applicant stated that the disputed, erroneous EER unjustly caused the removal of his name from the advancement list and cost him a substantial amount of money exceeding \$10,000. He stated that others who have made late payments have not been fined this amount of money. He argued that the EER should have been based on his entire performance throughout the evaluation period instead of "once incident that took place immediately prior to the end of the marking period."

The applicant submitted with his response several certificates showing his qualifications and training and a statement signed by the MK Rating Force Master Chief, who strongly recommended the applicant and asked that his appeal be considered. The master chief stated that he had worked with the applicant from 2010 to 2013 and saw him demonstrate "outstanding technical competence and leadership ability," as well as initiative to gain new expertise. The master chief stated that he is not contesting the applicant's delinquency in paying his GTCC but that the pattern has not continued and that the applicant has unlimited potential. The applicant also submitted some documents which are included in the Summary of the Record above.

APPLICABLE LAW AND POLICY

GTCC Policy

COMDTINST M4600.18, which governs GTCC use, shows minimum required actions for overdue GTCC payments in Table 3-1. The table shows that if an account is one day past due, the member shall receive at least informal counseling; if 31 days past due, the member shall receive at least documented counseling; if 61 days past due, the member shall receive at least a Page 7; and if 91 days past due, the command shall consult their legal office, investigate, and "inquire into UCMJ accountability."

Article 2.D.4.d. of COMDTINST M1600.2 states that if a command receives repeated complaints about a member's indebtedness and there is no satisfactory progress toward establishing an acceptable financial status, the command should prepare a Page 7 concerning the member's unreliability for failure to pay debts.

Assignment Policy

Article 1.H.2. of the Assignments Manual states that before being assigned out of the continental United States (OCONUS), a member must complete a financial assessment, review a financial assessment checklist with his spouse, and certify that they meet certain financial criteria. Ten days after receiving the transfer orders, the command should interview the member to determine his suitability for OCONUS duty, which is based on an assessment of “character traits that reflect favorably on the United States and any medical, moral, financial, or physical attributes that would preclude their conducting themselves as worthy representatives of the United States abroad.”

EER Policies

Article 5.A.2. of the Enlisted Manual (COMDTINST M1000.2) in effect in 2014 states that “[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely enlisted employee reviews.”

Article 5.B.1. states, “Supporting remarks are required to be submitted along with the enlisted employee review, through the marking chain, to address the future leadership potential of all enlisted personnel, E-6 and above, and for any recommended marks of 1, 2, or 7, ... when a member receives an unsatisfactory conduct mark, or not recommended for advancement.”

Article 5.B.1.a. explains that an unsatisfactory conduct mark must be supported by an “adverse entry” for NJP, court-martial, civil conviction, financial irresponsibility, not supporting dependents, alcohol incidents, or “not complying with civilian and military rules, regulations, and standards.” Article 5.B.1.b. states regarding “noncompliance with civilian and military rules, regulations, and standards,” that “a one-time, minor infraction (e.g., late to work) is insufficient to be classified as an adverse remarks entry.” Article 5.H.2. states that the rating chain must assign an unsatisfactory conduct mark whenever an individual meets any of the criteria listed in Article 5.B.1.a.

Article 5.D.1.d. states that the unit is responsible for ensuring that an EER is completed no later than 21 days after the end of the evaluation period. Article 5.E.1.b. states that regular EERs “may not be delayed. The unit rating chain is responsible for ensuring complete reviews are acknowledged by the evaluatee and completed within Direct Access not later than 30 days after the enlisted employee review period ending date.”

Article 5.D.3. states that a member is evaluated by a “rating chain,” including a supervisor who drafts the EER with any required supporting comments, a marking official who reviews the EER and may return it to the supervisor for further justification or support, and an approving official (often the CO) who ensures that the marks are consistent with the member’s actual performance, behavior, and output.

Article 5.F.1.b. provides this guidance for assigning marks on an EER:

(1) Performance Standards. Each competency is defined in terms of three performance standards: low, middle, and high. These standards are not the same for each pay grade group. The higher the pay grade group, the higher the standards become, as should be expected considering their

increased training and experience. All raters shall mark each evaluatee against the written standards, not against others in the same rate or rating.

(2) Mark of 2, 4, or 6. For a mark of 2, 4, or 6, the member must meet these standards and no others in the next higher performance standard. A mark of 4 represents the expected performance level of all enlisted personnel. Normally, a single, isolated event, either positive or negative, should not drastically affect the marks assigned during the employee review period. However, the rating chain must consider the overall positive or negative impact of the event.

Article 5.F.2.a. states the following about EER comments:

(2) Specificity of Supporting Remarks. Specific comments that paint a succinct picture of the evaluatee's performance and qualities allow the reader to determine WHAT or HOW they exceeded or failed to meet the standards and may reduce or even eliminate subjectivity and interpretation.

(3) Responsibility of Rater. The rater's challenge is to convey to the reader the performance picture observed daily. This is difficult because the reader does not "see" the evaluatee in action and cannot read into a general comment what the evaluator sees every day and takes for granted. If the reader cannot form a clear performance picture, the human tendency is to disregard or assign a lesser value to the comments. This "collective group of words" could be the deciding factor in today's competitive environment for choice assignments.

Article 5.G.1. states that in making an advancement recommendation on an EER, "[w]hile 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."

Article 5.G.3. states, "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."

Article 5.G.4. states that the "Approving Official's decision on the advancement recommendation is final and may not be appealed. However, if the Approving Official learns new information and decides to change the recommendation, they should follow the procedures in Article 5.J.2. of this Manual."

Article 5.I. provides procedures for members to appeal their EER marks (except the recommendation for advancement) to an Appeal Authority above the CO based on incorrect information, prejudice, discrimination, or "disproportionately low marks for the particular circumstances." Article 5.J.2. notes that Approving Officials (normally the CO) may change any mark they have assigned to a member as long as the member is still attached to the unit.

Advancement Policies

Article 3.A.4.b.(3) of the Enlisted Manual states that the CO's recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system.

Article 3.A.19.c., titled “Cancellation of Advancement,” states that a CO may advise PPC prior to effecting an advancement if the CO has withdrawn his advancement recommendation because the member has failed to remain eligible. The CO will advise PPC to remove the member’s name from the eligibility list, will state the reasons for the action, and include a statement that the member understands why his name is being removed.

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 was timely because the applicant has continued serving on active duty since he received the disputed EER.²

2. The applicant alleged that his semiannual EER dated March 31, 2014, and his consequent removal from an MK2 advancement list are erroneous and unjust because the adverse EER marks were unjustified under the circumstances and because the EER was submitted late. When 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/her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties “correctly, lawfully, and in good faith.”⁴ To be entitled to removal or correction of an EER, the applicant cannot “merely allege or prove that an [EER] seems inaccurate, incomplete or subjective in some sense,” but must prove that the disputed EER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁵

3. The applicant argued that the disputed EER held him to too high a standard of conduct and performance for an MK3/E-4. The applicant could have timely appealed the EER on this basis to the Appeal Authority or applied to the PRRB for correction of the EER within a year of receiving it but apparently failed to do so. The applicant’s failure to exhaust these potential administrative remedies does not remove the Board’s jurisdiction pursuant to 33 C.F.R. § 52.13 because the remedies have lapsed and are no longer available to him. His failure to exhaust them, however, may be considered evidence of how he perceived the EER at the time he received it.

4. The applicant has submitted records showing the following facts:

² *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).

³ 33 C.F.R. § 52.24(b).

⁴ 33 C.F.R. § 52.24(b).

⁵ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

- On November 1, 2013, the applicant received orders to report for duty aboard a cutter deployed overseas as of June 1, 2014.
- The applicant traveled from his unit in Virginia to Baltimore during the periods October 27 to November 2, 2013, and November 12 to 16, 2013, and he traveled to North Carolina from December 1 to 5, 2013.
- On December 12, 2013, the applicant was issued a GTCC bank statement showing that he had begun the billing month with an unpaid balance of \$28; he had used his GTCC for several expenses during the month, including a \$59 purchase on December 4, 2013; he had paid \$99 on November 25, 2013, which was before his \$59 purchase and before the bank statement was issued; and he owed \$191 by January 9, 2014.
- On December 13, 2013, the applicant paid \$132 toward the \$191 balance, as shown on his next GTCC statement.
- On December 19, 2013, the applicant received orders to begin a 48-day pre-deployment training beginning on January 21, 2014.
- On January 12, 2014, the applicant was issued a GTCC bank statement showing that he had not used his GTCC for any travel during the billing month and he had paid \$132 on December 13, 2013, which was \$59 shy of his \$191 balance.
- On January 14, 2014, the applicant received orders to attend additional pre-deployment training from March 10 to 21, 2014. These orders authorized use of a taxi during this period.
- On January 21, 2014, the applicant left his unit for 48 days of pre-deployment training.
- On February 12, 2014, the applicant was issued a GTCC bank statement showing an unpaid balance of \$59, an attempted payment of that amount on January 27, 2013, and a new balance of \$155, due by March 12, 2014.
- The applicant ultimately paid the \$59 overdue balance on February 19, 2014, although it was due on January 9, 2014. His transfer orders were canceled in part based on this overdue payment.
- The evaluation period ended on March 31, 2014, and the disputed EER was finalized on July 11, 2014.
- The applicant would have advanced to MK2 on August 1, 2014, had his CO not withdrawn his recommendation for advancement and removed his name from the advancement list.

In addition, the Board notes that the applicant alleged that sometime before his pre-deployment training, he moved his family to Georgia; in mid-January 2014, he took out a \$1,437.70 mutual assistance loan, which was to be repaid by two pay deductions of \$718.85 beginning in mid-February 2014; and instead of two such consecutive deductions, four consecutive deductions were made. He attributed the loss of his family's new home to this error.

5. Based on the evidence of record, the Board finds that the applicant has not proven by a preponderance of the evidence that the contested marks and comments in the EER or his removal from the MK2 advancement list are erroneous or unjust, as explained below:

a. In assigning the applicant a mark of 3 for Communicating, the command provided specific comments regarding his failure to follow the guidance of a YN1 regarding his GTCC and his failure to request clarification on guidance he claimed not to understand. In his statement to the Board, the applicant claimed both to have understood the YN1 and to not have understood the YN1. The fact that the comment includes the word “consistently” does not prove that the applicant was held to too high a standard, and he has not shown that he was held to too high a standard for his rate. Nor do the comments supporting the high mark of 7 that he received for Professional/Specialty Knowledge in the EER rebut the mark or supporting comment for Communicating. The EER mark and comment are presumptively correct, and the applicant has submitted insufficient evidence to prove that either is erroneous or unjust.

b. In assigning the applicant a mark of 3 for Responsibility, the command provided specific comments regarding his failure to pay his GTCC balance on time and in full. The record shows that the applicant had at least two unpaid balances during the evaluation period—the first was \$28 and the second was \$59—and the latter was due by January 9, 2014, and was not paid until February 19, 2014. The applicant claimed that he was unaware of the \$59 balance but it appeared on both his December 12, 2013, and January 12, 2014, GTCC bank statements during a period when he was not traveling. Any erroneous deductions made from the applicant’s pay in March 2014 cannot have affected his ability to pay these balances. The EER comment also states that he had to be reminded several times about paying his GTCC during the evaluation period and that there were other concerns about his personal finances. The comments that he received supporting the high mark of 7 for Professional/Specialty Knowledge in the EER do not rebut this mark or the supporting comment for Responsibility. The EER mark and comment are presumptively correct, and the applicant has submitted insufficient evidence to prove that either is erroneous or unjust.

c. In assigning the applicant a mark of 2 for Setting an Example, the command provided specific comments concerning the fact that an investigation had shown that the applicant had committed an offense under the UCMJ. The applicant complained that the Coast Guard failed to provide a copy of this investigation, but the applicant could have requested a copy through a FOIA request and submitted the report himself. The comment cites his failure to follow GTCC policy, travel orders, and instructions from senior members as justification for this mark and notes that his behavior resulted in the cancelation of his transfer orders and a significant waste of training dollars. Financial responsibility is a known prerequisite for OCONUS duty pursuant to Article 1.H.2. of COMDTINST M1000.8A, and the evidence submitted by the applicant is insufficient for the Board to conclude that the Coast Guard erroneously or unjustly canceled to transfer orders. The comments supporting the high mark of 7 for Professional/Specialty Knowledge in the EER do not rebut this mark or the supporting comment for Setting an Example. The EER mark and comment are presumptively correct, and the applicant has submitted insufficient evidence to prove that either is erroneous or unjust.

d. In assigning the applicant a mark of 2 for Judgment, the command provided specific comments regarding his poor management of his GTCC and family responsibilities and his deviation from written and verbal instructions during the evaluation period. The command noted that his mismanagement of his finances while he was in receipt of OCONUS transfer orders had caused the cancelation of those orders and a waste of training dollars. Given that, while in receipt of OCONUS sea duty orders, the applicant made late payments on his GTCC, attempted to pay his GTCC with insufficient funds, and needed a mutual assistance loan, the Board finds that the applicant has not proven by a preponderance of the evidence that the mark of 2 for Judgment is erroneous and unjust because he has not shown that, contrary to the EER comment, his finances were sound and managed responsibly as required for an OCONUS assignment. The comments supporting the high mark of 7 on the EER for Professional/Specialty Knowledge do not rebut the mark of 2 for Judgment or the supporting comment. The EER mark and comment are presumptively correct, and the applicant has submitted insufficient evidence to prove that either is erroneous or unjust.

e. In assigning the applicant an unsatisfactory conduct mark, the command noted that it had convened an investigation into “allegations of UCMJ violations and other undesirable behavior.” The applicant did not submit a copy of this investigation to show that it was unjustified. Moreover, other EER comments show that he had attempted to pay a bill with insufficient funds, responded evasively to the investigator’s questions, and failed to follow GTCC policy, travel orders, and instructions from superior members. Although the comment mentions that his conduct had “warranted a negative Page 7,” the fact that conduct may warrant (merit) a negative Page 7 does not necessarily mean that one was actually prepared or, if prepared, entered in his record. There is no corresponding Page 7 in his official record, but this does not contradict the evidence of his unsatisfactory conduct during the evaluation period. The comments supporting the high mark of 7 on the EER, which he received for Professional/Specialty Knowledge, do not rebut the unsatisfactory conduct mark or the supporting comment. The conduct mark and comment are presumptively correct, and the applicant has submitted insufficient evidence to prove that either is erroneous or unjust.

f. Given the findings above, the Board also finds that the applicant has not proven by a preponderance of the evidence that his CO unjustly assigned him a mark of not recommended for advancement. Pursuant to Article 5.G.1. of the Enlisted Manual, the CO must consider both a member’s past performance and a 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” in deciding whether to recommend a member for advancement. The EER marks and comments provide sufficient evidence to support the CO’s decision not to recommend him for advancement. And pursuant to Article 3.A.19.c. of the Enlisted Manual, if a CO does not recommend a member for advancement, the member’s name is removed from an advancement list.

6. The applicant has proven by a preponderance of the evidence that the EER was not submitted within 21 days of the end of the evaluation period, March 31, 2014, as the unit is supposed to ensure happens in accordance with Article 5.D.1.d. of the Enlisted Manual. A printout the applicant submitted indicates that the EER was entered in the Coast Guard’s database on July 11, 2014, more than two months after the deadline. The Board has long held, how-

ever, that delay in the completion of an otherwise valid EER does not warrant correction or removal of the EER. The applicant has not shown that the delay of this EER prejudiced him; he has not shown that it was the delay in the completion of this EER (rather than his conduct) that caused the cancelation of his transfer orders, or that the delay (rather than the content of the EER) caused his removal from the advancement list and failure to advance to MK2 on August 1, 2014.

7. The Board finds that the applicant has not proven by a preponderance of the evidence that the marks or comments in the disputed EER or the removal of his name from the advancement list in July 2014 constitute an error or injustice. His request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of MK3 [REDACTED], USCG, for correction of his military record is denied.

May 18, 2018

