

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2020-133**

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OS2

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on June 25, 2020, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 21, 2023, 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 Second Class Operations Specialist (OS2/E-5) on active duty, asked the Board to correct his military record by restoring his rank from E-5 to E-6. The applicant alleged that the Coast Guard erroneously cut short his three-month probationary period, as provided in a negative CG-3307 (“Page 7”) dated July 18, 2018, which stated the applicant had until October 15, 2018, to obtain his necessary qualifications.

The applicant further alleged that the Coast Guard failed to provide him with a “progression” Enlisted Employee Review (EER) which would have provided the applicant with notice of any progression that was made. According to the applicant, this was in direct violation of the Enlisted Evaluations and Accessions Manual, COMDTINST M1000.2C.<sup>1</sup>

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on March 9, 2002.

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<sup>1</sup> Although the applicant alleged that that the Coast Guard violated COMDTINST M1000.2C, he did not provide an article or specific regulation the Coast Guard violated. Furthermore, the manual cited by the applicant was not in effect until January 2020, and was therefore not applicable to the applicant at the time of his probation.

On July 21, 2017, the applicant was assigned to a Sector Command Center as an Operations Specialist.

On July 5, 2018, a Sector Chiefs' Council was convened, at the request of the applicant's Command Center supervisor, because the applicant had failed to qualify as an Operations Unit (OU) watchstander in the time prescribed by his Sector's Command Center job requirements.<sup>2</sup>

On July 12, 2018, the Chiefs' Council issued a memorandum, "Chiefs' Council Recommendations," wherein the council recommended that the applicant avail himself of Coast Guard Support, make his OU qualifications a top priority, and be placed on a three-month performance probation in accordance with Article 3.A.31.c. of the Enlisted, Evaluations, and Advancements Manual, COMDTINST M1000.2B.

On July 18, 2018, a Lieutenant Commander (LCDR) from the applicant's Sector issued a memorandum, "Unsatisfactory Performance," wherein he counseled the applicant on his poor performance and informed him of his performance probation. The contents of the memorandum are as follows:

1. This is to inform you that during your Operations Unit (OU) qualification period, your performance has been unsatisfactory compared to peers in your pay grade. You are considered to be on performance probation. You must take stock of your actions that have caused this situation to develop and take corrective action. Your performance must improve over the next three months or you will be considered for discharge.
2. The reason you are being placed on performance probation is due to your lack of progression while breaking in as an OU, failing to meet your anticipated qualification date of 01 JUN 2018 as outlined in reference (c). The OU position is the watch position you are billeted for which is commensurate of your grade.
3. As noted during counseling with the [redacted] Supervisor on 1 June 2018, you were advised that during a watch with the [redacted] Assistant Chief, you demonstrated that you were not yet ready to take a pre-board due to your below par briefing skills and situational awareness while on watch. On 26 June 2018, during a preliminary oral board consisting of the [redacted] Assistant Chief and [redacted] Supervisor, you demonstrated an inability to answer basic Sector construct questions, and needed prompting for a large portion of the Search and Rescue fundamentals.
4. On 4 July 2018, you were subject to a Chiefs Council that afforded you an opportunity to outline your deficiencies and offered counsel on how to overcome them. During the Chiefs Council, you were advised that failure to qualify could result in a reduction of rank, causing you to be below your Professional Growth Point (PGP) and subject to a High-Year Tenure (HYT) discharge before becoming eligible for retirement.
5. In order to successfully complete this performance probation, you must satisfactorily complete the following in the order listed below:
  - a. Continue standing break-in watches on a more aggressive, three on two off, duty rotation under the supervision of a qualified OU in accordance with reference (c).

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<sup>2</sup> The applicant's Sector required that the applicant be qualified as an OU within 16 weeks of obtaining his Situation Unit (SU) qualification. The applicant received his SU qualification on October 23, 2017, giving the applicant until approximately February 12, 2018.

- b. In the course of your break-in watches, you must demonstrate an ability to properly prosecute and brief cases across all missions under the supervision of a qualified OU. You must demonstrate sound judgment and properly communicate all information during all cases.
- c. You must demonstrate that you are ready to assume the duties and responsibilities of the Sector [redacted] Operations Unit watch, by sitting on a preliminary oral board consisting, at a minimum, of the [redacted] Assistant Chief, [redacted] Supervisor and one qualified OU watchstander.
- d. You are to pass an OU qualification board meeting the qualification board composition requirements outlined in reference (b) within one month of the date of this memo.
- e. You will meet with the Command Center Chief prior to receiving your OU certification letter.
- f. During the remainder of performance probation period, maintain qualification as an OU watchstander, standing a proper watch as per reference (b) and the [redacted] Roads Job Qualification Requirements.
- g. Satisfactorily perform all collateral duties.

6. As a First Class Petty Officer, you are expected to set an example for junior members. You must demonstrate that you possess the ability and confidence to meet these expectations. You will meet with the Command Center Supervisor every two weeks of this probation period to discuss and document your progress.

7. You are being placed in this three-month probationary period to afford you the opportunity to become a productive, contributing member of the Coast Guard. However, should you fail to make a conscientious effort to overcome your documented deficiencies, or should you violate the conditions of your probation in any way, I am authorized to recommend administrative action at any time prior to the expiration of this probation, including but not limited to reduction in rank.

On July 18, 2018, in conjunction with the LCDR's memorandum, the applicant was formally counseled and informed of his performance probation via a negative CG-3307 ("Page 7"). The contents of the Page 7 are as follows:

18 July 2018: This is to inform you that during your Operations Unit (OU) qualification period, your performance has been unsatisfactory compared to peers in your pay grade. On this date, you are formally counseled and placed on performance probation in accordance with reference (a) due to your inability to qualify as an OU watchstander.

This Administrative Remarks Form CG-3307 is to provide you the proper guidance to succeed. It also provides you notice that you are on performance probation for a period of three months, to begin 18 July 2018 and to end on 15 October 2018. Given your poor performance, you must demonstrate that you possess the required performance qualities of an OU watchstander, a watch position that you are billeted for as an Operations Specialist First Class. In order to successfully complete your probation, you must satisfactorily complete the following:

- a. Certify as an OU within one month of the date of this CG-3307. [Emphasis added.]
- b. During the remainder of performance probation period, maintain qualification as an OU watchstander, standing a proper watch as per reference (b).
- c. Satisfactorily perform all collateral duties.

You must take stock of your actions, and recognize that you are being provided this last chance to improve your performance and succeed as a member of the U.S. Coast Guard. Should you need assistance in dealing

with problems with mental or emotional well-being, communication, or performance of duties, please utilize the resources available, including but not limited to CG SUPRT, your Command Master Chief, the Chaplain or your Chain of Command. Communication with your support structure is key to your successful completion of probation. If you fail to meet the milestones listed above, you will have failed to meet the terms of your probation and administrative separation or reduction in rank may be initiated.

On September 17, 2018, the applicant was again formally counseled by CDR M in a negative Page 7 for failing to make satisfactory progress as required by his performance probation. The contents of the Page 7 are as follows:

17 Sep 2018: you have failed to make satisfactory progress toward achieving the goals identified in your performance probation (of 19 Jul 2018). Based on the information provided to me, I find that the SCC staff has been more than accommodating in supporting your needs and do not believe additional probationary time will be of any benefit. I will recommend to the District Commander that you be reduced in rank due to your inability to perform at the E-6 level.

Despite having stood 81 OU break in watches since February 2018, and standing a more aggressive 3 on 2 off schedule since 04 July 2018, you have failed to perform at the level expected and have not qualified at your primary duty position.

On 04 July 2018, H chiefs council was conducted on your behalf. This [was to] provide you the opportunity to outline your performance deficiency with suitable recommendations on how to overcome them and improve. The chiefs council advised you of the severity of your situation. They advised you that failure to qualify may result in a rank reduction, causing you to be below your professional growth point (PGP) and subject to a high-year tenure (HYT) discharge prior to retirement eligibility. The council strongly advised you to direct your primary focus towards qualifying.

During a second OU pre-board on 23 Aug 2018, you showed minimal knowledge improvement and required prompting for basic SAR fundamentals and SAR chain of command, Search Patterns (implementation on, type, orientation) and taking flare reports over the phone. Instead of a pre board for qualification as intended the venue quickly turned into a remedial training session.

On 31 August, you stood watch with the assistant SCC Chief to assess your progress. You worked a case involving a report of an unknown object in [redacted]. You were unable to run the case without significant guidance from other qualified watchstanders. You failed to recognize a search asset in the immediate area and needed prompting to use Watchkeeper to locate assets. Throughout the case, you failed to issue an urgent marine information broadcast and made recommendations inconsistent with policy. The missteps made were significant and demonstrate your inability to stand the OU, retain technical knowledge, and exercise the required judgment in an operational setting.

Your performance at the OU desk has consistently ranked far below that of your peer group. You do not possess the knowledge or decision making skills required to perform the duties commensurate with your grade.

On September 17, 2018, the applicant received his Probationary EER for the rating period of June 1, 2018, through September 17, 2018. On a scale from 1 (worst) to 7 (best), the applicant received two 2s for "Self-Awareness" and "Technical Proficiency," four 3s, and seven 4s in the various performance dimensions. The EER stated that applicant had future potential but was not recommended for advancement at that time. Regarding future potential, his commanding officer stated, "OS1 lacks the qualities that a seasoned first class petty officer should display. He has a methodical way of analyzing a task, but in order to continue to take on greater responsibilities, he needs to work on his ability to multi-task, be assertive and think outside the box." Regarding "Advancement Potential" the applicant commanding officer stated, "OS1 [applicant] is not

recommended for advancement. A First Class Operations Specialist at a Command Center is expected to qualify as an Operations Unit watchstander. Despite an extended break-in period and multiple mentoring sessions he was unable to do so, and is currently recommended for reduction in rank.”

On October 19, 2018, a Sector Commander (CDR) issued a memorandum, “Recommendation for Reduction in Rate Due to Incompetency,” wherein the CDR requested that the applicant be reduced in rank because the applicant had been provided with ample opportunity, counsel, and given clear expectations regarding his duties and performance in the Sector Command Center, but his performance continued to be substandard and his ability consistently fell short of expectations. The CDR also stated that the applicant failed to make satisfactory progress toward achieving the goals identified in his performance probation. Finally, the CDR stated that the applicant did not possess the specialty knowledge, decision-making ability, or the judgment required of an Operations Specialist, First Class. According to the CDR, following a lengthy process by his peers, supervisors, and others to help the applicant succeed, the applicant continued to show a lack of progress and ability. The CDR stated that the applicant remained unqualified to perform his duties and should be reduced in rate as a result of his inability to be qualified.

On November 21, 2018, the District’s Rear Admiral (RADM) issued a memorandum, “Recommendation for Reduction in Rate Due to Incompetency,” wherein he informed the applicant that after careful consideration of all of the facts and evidence provided, his Sector’s request for the applicant’s reduction in rate had been approved and would take effect immediately. The RADM explained to the applicant that his substandard performance and the inability to meet qualifications at his Sector’s Command Center were not in keeping with policy set forth in U.S. Coast Guard Command Center Manual, COMDTINST M3120.20A.

On November 21, 2018, in conjunction with the RADM’s memorandum, the applicant was issued a negative Page 7, wherein his reduction in rate from OS1 to OS2 due to the applicant’s unsatisfactory progress was documented. The negative Page 7 informed the applicant that his reduction to E-5 would take place on November 21, 2018.

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

On January 22, 2021, a judge advocate (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 prepared by the Personnel Service Center (PSC).

The JAG argued that while the Coast Guard did commit error in the curtailing of the applicant’s probationary period, it should be considered a harmless error in light of the applicant’s demonstrated skillset. The JAG explained that in reducing the incompetency probationary period from three months to two months and twelve days, the Coast Guard acted contrary to policy outlined in Article 3.A.31.C. However, the JAG argued that such administrative error should be considered harmless when viewed in the totality of the circumstances. For example, the JAG explained that while the applicant was granted only ten weeks and four days of his 12-week probation to achieve his OU qualification, by September 17, 2018, he had already been working toward his qualification for roughly 47 weeks, which is roughly three times longer than the

required 16-week OU timeline mandated by policy. The JAG further argued that the applicant's 81 break-in watches, 3-on-2-off duty rotation, and the applicant's August 23, 2018, pre-board failure, provide further basis for CDR M's September 7, 2018, comment, "[I] do not believe additional probationary time will be of any benefit." Given this information, the JAG claimed that while the probation was indeed less than that prescribed by policy, it was a reasonable and harmless reduction given the applicant's assessed performance and the operational necessity of a mission-oriented, intensive command center.

The JAG further argued that the applicant has not met his burden to overcome the presumption of regularity afforded to the Coast Guard that its administrators acted correctly, lawfully, and in good faith.<sup>3</sup> According to the JAG, it is feasible to conclude that the applicant's chain of command acted in a good faith belief that it would be unreasonable to continue the probation, which would have included additional duty and break-in watches, when the applicant had demonstrated he was not ready for the role. The JAG stated that prima facie, the applicant's record is an accurate assessment of his skill level based on his administrative notice and acceptance of his foreshortened probation and reduction in rate. The JAG argued that the record does not reflect, and the applicant did not provide, any evidence that he objected to his reduction through his chain of command, requested mast via Article 138 of the Uniform Code of Military Justice (UCMJ), appealed his enlisted evaluations, or otherwise found fault with the process until his application to this Board. The JAG claimed that the applicant's failure to timely complain and avail himself of the remedies available to him leads to an inference that, when he received the reduction, he accepted it as valid even if he did not agree with it. Accordingly, the JAG stated that the applicant's abbreviated probationary period and reduction in rate were reasonable and accurate consequences based on the applicant's demonstrated level of skill, and therefore, does not shock the sense of justice. For the reasons outlined above, the JAG argued that the Board should deny relief in this case.

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

On February 12, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. As of the date of this decision, no response was received.

### **APPLICABLE LAW AND POLICY**

Article 3 of the Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, provides the relevant guidance on the Coast Guard's rate reduction procedures. The pertinent articles are as follows:

#### **3.A.31. Reduction in Rate.**

- a. General Provisions. Reason for Reduction in Permanent Rate. Reduction in a permanent rate may result from and of five reasons:

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<sup>3</sup> *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

(2) Incompetency

...

c. Reduction for Incompetence.

(1) Governing Conditions. In effecting a reduction in rate for incompetence, these conditions will govern:

(a) Based Solely on Incompetence. The reason for the reduction must be based solely on incompetence as evidenced by the fact that the member is not qualified to perform the duties of their rate.

(b) Required Documentation When Factor Average is Below Two or Competency is Questionable. If a member has a factor average of two or below in any factor on any EER, or at any time, in the commanding officer's judgment, the member's competency is questionable, the commanding officer will make an Administrative Remarks, Form CG-3307, entry in the Personnel Data Record stating that the member is a candidate for reduction in rate by reason of incompetence and the following three-month period (six months for members of the SELRES during which time they must complete a minimum of 24 IDT drills) will constitute a formal evaluation of their competency. The entry will clearly identify the factor(s) involved and the exact area(s) that need improvement. The member will acknowledge this entry by signing the Administrative Remarks, Form CG-3307, entry. A reevaluation EER will be performed at the end of the three month period (six months for SELRES members) with a comment made in the recommendation field of the EER indicating progress (or lack of) during the three-month period with one of the following outcomes:

[1] If the member responds to counseling and improves their evaluation(s), no further action is required.

[2] If the member fails to demonstrate the required level of professional competency at the end of the three-month period (six months for SELRES members), the reduction will go into effect or be recommended to higher authority as befits the member's rate in accordance with Reference (c), Military Separations, COMDTINST M1000.4 (series)).

[3] If the member's factor averages meet the minimum requirements to eliminate the need for reduction of the member by reason of incompetence at the end of the three-month period (six months for SELRES members), but still falls short of the minimum requirements for reenlistment eligibility, the provisions of Reference (c), Military Separations, COMDTINST M1000.4 (series), may apply.

Note: In all cases where a reevaluation EER has been performed, the next regularly scheduled evaluation will be performed at the prescribed date.

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g. Effective Date of Reduction in Rate.

(1) Reduction in Rate Due to Punishment. Reduction in rate as a punishment will be effective as specified in the Manual for Courts-Martial, 1998 and Reference (n), Military Justice Manual, COMDTINST M5810.1 (series).

(2) Reduction in Rate Due to Incompetency. The effective date of a reduction in rate for incompetency or at the request of the member concerned will be as follows:

(a) By Authority of Commander (CG PSC). When Commander (CG PSC), commanders of logistics/service center, or district commander authorizes a reduction in rate, the reduction will be effective on the date of the authorizing official's decision.

(b) By Authority of the Commanding Officer. When the commanding officer, acting within their own authority, authorizes a reduction in rate, the reduction will be effective immediately.

(3) Reduction by Reason of Fraudulent Advancement. When a fraudulent advancement is proven, the effective date of reduction is the date of the original advancement and the difference in pay and allowances will be recouped.

h. Personnel Data Record Entries on Reduction in Rate. When a member has been reduced in pay grade by reason of incompetency, own request, or punishment, an Administrative Remarks, Form CG-3307, entry will be made to document the reduction and filed in the member's Personnel Data Record.

## FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application was timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that the Coast Guard's abrupt ending of his performance probation was erroneous and unjust. 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 the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.<sup>4</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>5</sup>

4. The Board's review of the applicant's record shows that the applicant was assigned as an OS1 to a new unit on July 21, 2017. After his arrival the applicant obtained his Situation Unit

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<sup>4</sup> 33 C.F.R. § 52.24(b).

<sup>5</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).

(SU) qualification on or about October 23, 2017. Upon this date, the applicant was required to obtain his Operations Unit (OU) qualification within sixteen weeks, or by February 12, 2018. The record shows that he failed to do so. The record further shows that instead of immediately taking disciplinary or corrective action, the applicant's command sought a more lenient approach to the applicant's training, believing that the applicant would eventually be able to successfully obtain his OU qualification. Unfortunately, five months later, the applicant had still been unable to secure the necessary qualification commensurate with his rate and his command was forced to take a more aggressive approach.

On July 5, 2018, the applicant's command requested a Chiefs' Council to convene and provide recommendations to the applicant's command on how to proceed with the applicant. The Chiefs' Council recommended that the applicant be put on a three-month performance probation and formally counseled regarding his unsatisfactory performance. Within the applicant's written counseling, he was informed that he had to obtain his OU qualification within one month from the date of the Page 7, or by August 18, 2018. The record shows that once again, the applicant failed to obtain the required qualification by the established deadline. As a result of the applicant's continued inability to obtain the required qualifications for his rate, on September 17, 2018—approximately 28 days shy of the end of his performance probation—CDR M, the CO of Military Personnel, recommended that the District Commander reduce the applicant's rank from E-6 to E-5.

The record further shows that in addition to being fully informed that he was required to obtain his OU qualification by August 18, 2018, the applicant was also informed by LCDR K in paragraph 7 of his July 18, 2018, memorandum that, “[s]hould you fail to make a conscientious effort to overcome your documented deficiencies, or should you violate the conditions of your probation in any way, I am authorized to recommend administrative action at any time prior to the expiration of this probation, including but not limited to reduction in rank.” Although Article 3.A.31.c. of COMDTINST M1000.2B requires a three-month performance probation, the applicant was notified in writing that failure to meet the stipulations of the performance probation could result in his probation being terminated early.

Furthermore, although CDR M notified the applicant via a Page 7 on September 17, 2018, that he would recommend that the applicant be reduced in rank prior to the end of the performance probation period, the record shows that CDR M did not file the official recommendation until October 19, 2018, four days after the applicant's performance probation expired. Finally, the record shows that the applicant was not officially reduced in rank until November 21, 2018, over a month past the expiration of his three-month performance probation. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard's decision to end his three month performance probation early was erroneous or unjust.

5. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.<sup>6</sup> He has not proven, by a preponderance

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<sup>6</sup> *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

of the evidence, that his performance probation was terminated prematurely. Accordingly, the applicant's request should be denied.

ORDER

The application of OS2 [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

July 21, 2023

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