

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 2000-096

FINAL DECISION

████████ Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application for correction was docketed on March 22, 2000, upon the BCMR's receipt of the applicant's completed request for correction.

This final decision, dated January 25, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUESTED RELIEF

The applicant, a ██████████; pay grade E-6), asked the Board to remove the marks entered on his Enlisted Performance Evaluation Form (EPEF) for the period ending November 30, 1997, (disputed EPEF). The applicant alleged that these marks were made by his former Officer in Charge (OINC), who served as Supervisor/Marking Official for the disputed EPEF notwithstanding that he had been relieved of this command by November 30, 1997. The applicant made the following allegations about this marking official and the process:

. . . I feel the marking official was prejudice [sic] towards me, due to the fact I made a call to the Group XO informing them of problems with [him] and my concern with the crew's safety These marks continue to follow me as I work toward my OIC certification. I feel this is unjust and request all the marks are [sic] removed for the period. I would also like to point out the marks came to me on Jan 12, 1998 well after the marking period. I had no counseling for this period and did not have the chance to meet with the person who marked me. . . . [The marking

official] should not have been allowed to mark me due to his situation.

VIEWS OF THE COAST GUARD

On November 17, 2000, the Chief Counsel of the Coast Guard recommended the denial of relief to the applicant for lack of merit and lack of proof.

The Chief Counsel said that the applicant alleged bias on the part of his OINC, the marking official. He alleged that the applicant failed to prove that the marking official did not provide a fair and accurate appraisal of the applicant's performance in the disputed EPEF. The Chief Counsel said the applicant had the burden of producing substantial evidence to establish prima facie proof of the alleged errors or injustices. The Chief Counsel said the Government did not have to disprove the applicant's contentions or allegations of error.

According to the Chief Counsel, "Applicant here has failed to provide any (emphasis in original) evidence to substantiate his allegation of bias." The only 'evidence' he offers is the uncorroborated allegation of bias by his OINC, evidence that is insufficient as a matter of law to overcome the presumption of regularity afforded military superiors. Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992). The Chief Counsel also observed that "Applicant failed to exercise the appeals process which was his opportunity to submit documentation in support of his allegation of bias."

The disputed EPEF that was allegedly based on bias was a good report. It contained numerical marks ranging from 3 to 7, on a 1 to 7 scale. It also contained "an above average evaluation" of 5.1 out of 7. The Chief Counsel noted that the applicant also received the highest conduct mark possible with an advancement recommendation from his OINC. From these results the Chief Counsel drew the following conclusions:

Far from the biased evaluation Applicant would have the Board believe he received, the disputed evaluation presents Applicant in a favorable light. Therefore, under the presumption of regularity afforded his military superiors, the Board should conclude applicant received the fair and accurate assessment of his performance contemplated under Coast Guard regulations.

Article 10.B.10. of the Coast Guard Personnel Manual (CGPERSMAN) provides for the appeal of enlisted performance marks. The appeals process, according to Article 10.B.10.a.2. of CGPERSMAN, is designed to review marks

that the member involved believes were based on incorrect information, prejudice, or discrimination or disproportionately low marks for the particular circumstances.

The applicant failed to appeal his disputed EPEF, and he failed to provide a reasonable explanation for not appealing his marks. The Chief Counsel said that reviewing the application of one who fails to make use of an established appeals process would "effectively eviscerate the regulatory scheme implemented by Article 10, CGPERSMAN." The Chief Counsel argued that the Board is without jurisdiction to consider this application in the absence of a completed appeal until the applicant has exhausted "all administrative remedies afforded under existing laws or regulations." 33 CFR § 52.13(b).

The Chief Counsel noted that the applicant received his disputed EPEF marks approximately three weeks late, according to Coast Guard regulations, but found that "Applicant has failed to explain how such a deviation would have adversely affected his EPEF." The Chief Counsel pointed out that he acknowledged receiving performance counselling by signing the EPEF.

The Commander of the Coast Guard Personnel Command (CGPC) alleged that the marking official was not relieved as OINC of Station Boothbay Harbor until March 24, 1998, more than two months after he signed the EPPF.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On November 20, 2000, the BCMR sent a copy of the views of the Coast Guard to the applicant, along with a letter explaining that the applicant could submit a response to those views within 15 days.

The BCMR did not receive any response from the applicant.

FINDINGS AND CONCLUSIONS

The BCMR makes the following findings of fact and conclusions of law on the basis of the submissions and military record of the applicant, the submissions of the Coast Guard, and applicable law:

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code.
2. The application is timely.

3. The applicant asked the BCMR to remove the marks entered on his EPEF for the period ending November 3, 1997, on the ground that they were made by his a supervisor/marketing official who "was prejudice towards [the applicant]." The applicant alleged that the reason for the bias was that the applicant had provided allegedly adverse information to his superior.

4. The applicant did not submit any evidence to substantiate this allegation or any other allegation of error or injustice.

5. Article 10.B.10. of CGPERSMAN provides for the appeal of enlisted performance marks where the marks are allegedly based on prejudice, discrimination, incorrect information, or disproportionately low marks. The applicant did not take advantage of this procedure. He did not appeal the disputed EPEF or state his reasons for failing to do so.

6. The disputed EPEF apparently reached the applicant three weeks late, but the applicant failed to explain how such a deviation would have adversely affected his EPEF.

7. The applicant alleged that his OINC was relieved of the Boothbay command in November 1997. According to CGPC, he was temporarily relieved on March 24, 1998 and permanently relieved on June 25, 1998.

8. The applicant should be denied the relief requested because he has not established the existence of any error or injustice in his EPEF.

9. Accordingly, the applicant's request for relief should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

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

