

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2001-080

FINAL DECISION

██████████ Deputy Chair:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was commenced on April 25, 2001, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated May 16, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to remove a form CG 3307 (page 7), dated March 27, 199x, that contains negative criticism of his job performance from his military record.

The applicant alleged that the page 7 was erroneous and unjust and had blocked his appointment to the rank of chief warrant officer (CWO). He alleged that he was not aware that the page 7 was in his record until after he was ranked quite low on the CWO appointment list and checked his record to discover why. He alleged that, at the time the page 7 was presented to him for acknowledgment and signature, he was promised that it would not be placed in his permanent record.

The applicant alleged that on March 14, 199x, his supervisor¹ asked him to explain the status of various work that had previously been assigned to him on a work

¹ Enlisted members are evaluated by a rating chain, which consists of a supervisor, who recommends evaluation marks; a marking official, who assigns the marks; and an approving official, who approves the EPEF. All three members of the rating chain also indicate on the EPEF whether they recommend the member for advancement to the next pay grade. Personnel Manual, Article 10-B-4.d.

various performance categories.² He was recommended for promotion by all three members of his rating chain.

Prior to the applicant's transfer on April 2, 199x, a second and final EPEF dated March 20, 199x, was prepared by the same rating chain. This EPEF has five marks of 6, four marks of 5, nine marks of 4, and two marks of 3 in the categories "Monitoring Work," which is described as the "degree to which this member identified what needed to be done, set priorities, and kept supervisor informed," and "Directing Others," which is described as the "effectiveness of this member in influencing and guiding others in the completion of tasks." The applicant received a mark of "not recommended" for advancement from his supervisor and marks of "progressing" from his marking official and approving official, the CO. The approving official also noted that the applicant had been formally counseled regarding the two performance categories for which he received marks of 3. The page 7 disputed in this case documents that counseling. There is no evidence in the record that he appealed the EPEF.

The applicant submitted the "xxxxxxxxx Worklist" mentioned in the page 7. Of the total 64 xxxxxxxx tasks listed, 40 are marked complete and 24 are not.

The applicant's subsequent record reflects outstanding dedication and job performance. He has received several marks of 7 on his EPEFs and highly laudatory page 7s. On July 1, 1997, over a year after the disputed page 7 was entered in his record, he was advanced to chief petty officer. He received an Achievement Medal for his work at another unit from June 1997 through April 2000. However, a CWO Appointment Board that convened on June 19, 2000, rated the applicant among the bottom one-sixth of all the candidates for a xxxxxxxxxx CWO position.

IEWS OF THE COAST GUARD

On September 25, 2001, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The Chief Counsel alleged that to prove his case, the applicant must overcome a strong presumption that his rating officials acted correctly, lawfully, and in good faith in making their evaluations. *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). To overcome the presumption of regularity, he alleged, the applicant must provide "clear, cogent, and convincing evidence to the contrary." *Muse v. United States*, 21 Cl. Ct. 592, 601 (1990).

The Chief Counsel stated that the applicant's rating chain was required to prepare and submit the disputed page 7 under Articles 10-B-7.a(4) and 5-C-16.a of the Personnel Manual. Those articles, he argued, require a page 7 entry in the record to document counseling whenever the member has been marked "not recommended" for

² Enlisted members are marked on a scale of 1 to 7 (7 being best) in various categories of performance.

advancement or “progressing” by the approving official of the EPEF. Moreover, he stated, under Article 10-B-10.a(3), the approving official’s mark regarding advancement is not appealable. Therefore, the inclusion of the page 7 in the applicant’s record was required whether or not he signed it or appealed the EPEF.

The Chief Counsel stated that there is no evidence to support the applicant’s allegation that his marking official promised him that the page 7 would not be entered in his record. Moreover, he stated, even assuming the applicant’s allegation is true, his marking official had no authority to prevent the page 7 from being entered in the applicant’s record as it was required by regulation. The Chief Counsel further stated that the applicant was not obligated to sign the page 7 and that he could have registered his disagreement with its contents by refusing to sign it.

The Chief Counsel also stated that, although the applicant discussed the EPEF with members of his rating chain, he never submitted a formal appeal to the Appeal Authority under the provisions of Article 10-B-10.b(1)(b). He stated that the applicant’s explanation as to why he failed to complete the work on the list should have been included in a formal appeal of the EPEF to give his rating chain the opportunity to reconsider the evaluation and the page 7.

The Chief Counsel observed that both the marking official, who was the applicant’s department head, and the approving official, who was the CO, apparently agreed with the supervisor’s evaluation of the applicant. He concluded that the applicant had failed to overcome the presumption of regularity.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 26, 2001, the BCMR sent a copy of the Chief Counsel’s advisory opinion to the applicant and invited him to respond within 15 days. In response to a request from the applicant, the BCMR granted him a 90 day extension of the time to respond. However, no response was ever received.

RELEVANT REGULATIONS

Article 10-B of the Personnel Manual (COMDTINST M1000.6A) governs the preparation of EPEFs. Article 10-B-1.b. states that “[e]ach commanding officer must ensure all enlisted members under their command receive accurate, fair, objective, and timely evaluations.”

Under Article 10-B-4.d(3), when preparing an EPEF, the supervisor assigns recommended performance marks for each performance category, indicates whether he or she recommends the member for advancement, and forwards the draft EPEF to the marking official. Under Article 10-B-4.d(4), the marking official reviews the draft EPEF and discusses with the supervisor “any recommendations considered inaccurate or

inconsistent with the actual performance of an evaluatee.” The marking official then assigns the final performance marks, indicates whether he or she recommends the member for advancement, and forwards the EPEF to the approving official.

Under Article 10-B-4.d(5), the approving official reviews the EPEF to ensure “overall consistency between assigned marks and actual behavior/output” and to ensure that “evaluatees are counseled and advised of their appeal procedures.” The approving official may return an EPEF for revision if he or she thinks any marks are inaccurate. Otherwise he or she signs the EPEF, concurring in the marks assigned by the marking official, and indicates whether he or she recommends the member for advancement.

Under Article 10-B-7.a(4), “[i]f the decision of the Approving Official is “Not Recommended” or “Progressing,” the member must be counseled on the steps necessary to earn a recommendation. See section 5-C-16a. for guidance on the requirements for completing [a page 7].” Article 5-C-16.a. provides that “[w]hen a member otherwise eligible for advancement is not recommended by his/her commanding officer, that action shall be supported by a [page 7] entry in the enlisted Personnel Data Record.” Commandant Instruction 1000.14A, which governs the preparation of page 7s, provides that page 7s prepared “to document counseling related to enlisted evaluations ... must be placed inside the original Enlisted Performance Evaluation Form ... and forwarded to [the Military Personnel Command] for review.”

Under Article 10-B-7.a(5), the “Approving Official’s decision on the advancement recommendation is final.”

Under Article 10-B-10.b., a member dissatisfied with an EPEF should first “request an audience with the rating chain to verbally express the concerns which could lead to a written appeal.” If the member is still not satisfied, he may appeal the performance marks on an EPEF (but not a negative recommendation for advancement) within 15 days of receiving a copy of the approved EPEF. Upon appeal, a member’s commanding officer may raise assigned marks as requested by the member. Otherwise, the appeal must be forwarded to the Appeal Authority with an endorsement containing “specific examples of demonstrated performance that warranted the assigned marks.” Article 10-B-10.b(2)(e).

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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant alleged that the content of the disputed page 7 was erroneous and unjust. Although the work list he submitted shows that 40 of 64 tasks had been completed, this does not prove that his rating chain was wrong to have expected him to have completed more or all of the tasks. The applicant also alleged that some of the incomplete tasks mentioned on the page 7 had been assigned to his supervisor before he came on board. However, he did not prove that his supervisor erred or committed any injustice in delegating those tasks to him. Furthermore, he did not prove that his supervisor did not take into account unexpected delays when he prepared the EPEF and page 7.

3. If the applicant's other work truly prevented him from completing the tasks cited on the work list and page 7, the quickest and most effective avenue of redress was a written appeal through his rating chain. However, the record indicates that he failed to exercise his right to appeal under Article 10-B-10 of the Personnel Manual.

4. Absent strong evidence to the contrary, the Board must presume that the applicant's rating officials acted correctly, lawfully, and in good faith in making their evaluations. *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The applicant has failed to provide sufficient evidence to overcome the presumption of regularity. Moreover, although he made many allegations, he has not submitted sufficient evidence to prove by a preponderance of the evidence that the content of the disputed page 7 was erroneous or unjust.

5. The applicant alleged that his marking official promised him that the page 7 would not be included in his record. However, he submitted no evidence to support the allegation. Moreover, as the Chief Counsel pointed out, Articles 10-B-7.a(4) and 5-C-16.a. of the Personnel Manual required that the page 7 be placed in his military record with the EPEF as a result of the "progressing" mark he received from the approving official, his CO.

6. Accordingly, the applicant's request should be denied.

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

