

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-081

XXXXXX, XXXXXX X.
XXX XX XXXX, XXX

FINAL DECISION

██████████ Attorney-Advisor:

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 docketed on April 2, 2002, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated February 19, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to restore his rank to yeoman first class (pay grade E-6), with a corresponding adjustment to his pay and allowances for time lost; to remove from his record all enlisted performance evaluations and negative page 7s dated from May 31, 19XX until the date the "Board returns a [f]avorable decision"; and to increase his assignment priority from "3" to "4" or in the alternative, to allow him to choose his next assignment from a "[s]hopping list within reason."

APPLICANT'S ALLEGATIONS

The applicant alleged that he was unjustly reduced in rank from yeoman first class (YN1) to yeoman second class (YN2). He alleged that while he held the position of YN1, his command sought to have him replaced with another YN1. To that end, the applicant alleged, enlisted personnel management (EPM) advised his command that in order to obtain a replacement YN1, the applicant must be demoted, thereby making the YN1 position vacant for a replacement.

The applicant alleged that on July 2, 19XX, his command permanently reduced his rank, for the purpose of bringing in another YN1 to replace him. He alleged that the reduction was unjust because EPM could have given his command "other options or means to resolve the [command's] issues with [the applicant]." The applicant further alleged that prior to his permanent reduction and subsequent transfer", [he] did not receive evaluation[s] by yeoman and/or personnel other than [his assigned cutter] members."

SUMMARY OF THE RECORD

On February 15, 19XX, the applicant enlisted in the Coast Guard for four years. He was advanced to a yeoman third class (YN3) (paygrade E-4) on May 10, 19XX.

On February 1, 19XX, the applicant received non-judicial punishment (NJP) from his commanding officer for unauthorized absence. As punishment, he received a six-month suspended reduction in pay grade to E-3, and extra duties for 14 days. The applicant had his period of eligibility for his first Coast Guard good conduct award terminated due to the NJP and a court memorandum was entered in the applicant's service record documenting the receipt of NJP.

On November 2, 19XX, a negative page 7 entry on his marks for the period ending September 30, 19XX was made in the applicant's service record. The page 7 states that he was counseled on the following factors and topics: "team factor," "work factor," "leadership," "representing the Coast Guard," and "human factor."

On January 16, 19XX, the applicant was counseled as to his unsatisfactory performance as a YN3. His performance resulted in the disapproval of his request to participate in the March 19XX service wide exam. A negative page 7 was entered into his service record stating that "[a]s reflective in [the applicant's] semi-annual marks for the period ending 9/30/XX, [he was] marginal in [his] yeoman abilities and continually made the same error over and over. ... Recently, your performance has improved significantly. Continued improvement in your work and attitude commensurate with that of a petty officer will result in recommendation for advancement."

On March 1, 19XX, the applicant was advanced to a yeoman second class (YN2) (pay grade E-5). On November 15, 19XX, he reenlisted for three years. On February 16, 19XX, he extended his enlistment agreement for one year in order to obligate service for transfer orders. On September 16, 19XX, the applicant reenlisted for three years.

On April 30, 19XX, the applicant had a favorable page 7 entered into his record for being assigned a mark of 7 on his Enlisted Performance Evaluation Form (EPEF) dated April 30, 19XX in the following dimensions: "quality of work," "monitoring

work," "using resources," and "stamina." On June 1, 19XX, he was advanced to YN1, pay grade E-6. On February 24, 19XX, the applicant reenlisted for three years.

On May 31, 19XX, the applicant was assigned to a cutter to fill an independent duty E-6 billet.

By memorandum dated September 27, 19XX, the applicant's executive officer (XO) informed the supply officer (SUPPO) (apparently the applicant's supervisor) that he concurred with the SUPPO's written comments and performance marks on the applicant, as they "very accurately reflect [the applicant's] performance." The memorandum detailed that the XO wanted the identification of "all issues of poor performance for [the applicant] related to a [yeoman (YN)] practical factor. Specifically, when [the applicant's] marks [are] due, [the XO wanted] administrative remarks to reference YN1/E-6 practical factors and then state performance." The XO concluded that the performance results were to be the focus of the applicant's performance evaluation.

On November 30, 19XX, the applicant had a negative page 7 entered into his service record, which assigned marks of 1 or 2 in the "professional/specialty knowledge," "quality of work," and "monitoring work" dimensions of his November 30, 19XX EPEF. He acknowledged receipt of this document on December 28, 19XX. By letter dated January 10, 19XX, the applicant submitted an appeal to his November 30, 19XX performance evaluation.

On December 26, 19XX, a negative page 7 was entered into his record stating that he was a candidate for a reduction in rate by reason of incompetence per Article 5.C.38 of the Personnel Manual. He was advised that he had three months from the date notified (December 26, 19XX) to demonstrate satisfactory progress and meet the requirements of Article 5.C.38 in order to retain his present rate. He was further advised that failure to do so would result in his reduction in rate to YN2. A special performance evaluation would be completed at the end of the three-month probation for the purpose of determining competency.

On March 26, 19XX, a negative page 7 was entered into the applicant's record, which states that his three-month observation period to satisfy the requirements of Article 5.C.38. of the Personnel Manual was complete and that he had been determined to be incompetent in the rate of YN1. The required special evaluation was completed on this date as well. It recommended that he be reduced in rate to YN2.

On April 24, 19XX, a negative page 7 was entered into his record, which states that the entry was made for an "unsatisfactory" conduct mark due to low factor marks as defined in Article 10.B.9.a. of the Personnel Manual. The applicant received a total factor mark of 18 in the performance factors, a total of 18 in the leadership factor, and a

total of 18 in the professional qualities factor on his EPEF dated March 26, 19XX. He was assigned a mark of not recommended due to incompetency and counseled on the steps necessary to earn a mark of recommended.

On April 30, 19XX, the applicant was assigned marks of 2 in the performance factors "professional/specialty knowledge," "quality of work," "monitoring work," and "using resources" on his EPEF dated March 26, 19XX. On May 21, 19XX, the applicant submitted a letter in appeal of his March 26, 19XX EPEF. By memorandum dated June 7, 19XX, the CO forwarded his endorsement to the applicant's March 26, 19XX EPEF appeal. In his endorsement, the CO explained the marks given for the special evaluation and stated that "[he] intend[s] to grant [the applicant's] request for an evaluation at another unit."

On July 2, 19XX, the applicant was reduced in rate to YN2. On August 31, 19XX, the applicant was transferred to a new Coast Guard station.

VIEWS OF THE COAST GUARD

On October 17, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion to which he attached a memorandum on the case prepared by CGCP. In concurring with CGCP's analysis, the Chief Counsel recommended that the Board deny the applicant's request for relief because the Coast Guard committed no error or injustice by reducing the applicant's rate.

The Chief Counsel argued that prior to the applicant's reduction in rate, he was properly counseled that he would be evaluated during the following three-month period beginning on December 26, 19XX. He argued that the applicant acknowledged the notification of the evaluation period. See Page 7 dated December 28, 19XX and Article 5.C.38.c. of the Personnel Manual.

The Chief Counsel stated that although the applicant's record reveals that his command sought his transfer because of his incompetence, the command was advised that personnel transfers based on incompetence alone did not satisfy Coast Guard policy. He asserted that the command was instructed to document the applicant's performance and follow the proper procedures for reducing the applicant's grade if it appeared that the applicant was not performing at the level for which he was rated. He argued that the applicant's command followed Coast Guard policy, accordingly, and that the applicant was determined to be incompetent for his rate, appropriately reduced, and subsequently transferred.

The Chief Counsel argued that the applicant's performance after his reduction in rate is irrelevant to the Board's evaluation of this case. He argued that the applicant's EPEF dated January 31, 19XX, and a letter, dated June 12, 19XX, from his CO relate to the applicant's performance after the documented incompetence that resulted in his rate reduction and therefore are irrelevant. He contended that because the applicant's record demonstrates that he is capable of performing well when he is so inclined, no error or injustice resulted in this case when the Coast Guard held the applicant accountable for his poor performance.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 21, 2002, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. On October 29, 2002, the applicant responded to the Coast Guard's advisory opinion.

The applicant argued that his November 30, 19XX performance evaluation demonstrates that his XO inappropriately influenced a junior officer (the SUPPO). He argued that in a memorandum dated September 27, 19XX, his XO instructed the junior officer to provide poor performance feedback and remarks on his evaluation. He contended that the XO's action "clearly shows intent to discredit and unjustly evaluate [his] performance."

The applicant argued that contrary to the actions taken, his command did not have grounds to consider him a candidate for a reduction in rate. He stated that under Article 10.B.2.b.6. of the Personnel Manual, individual performance standards are grouped in blocks ranging from 2 to 7, which represent "factor areas." He argued that upon his calculation, his factor area scores for the evaluation period ending November 30, 19XX ranged from 2.42 to 4.00, yielding an average of 2.86. He contended that although his CO documented that he became a candidate for reduction "based on [his] receiving a factor average below 2 ...," he never should have been considered for a rate reduction for incompetence because he actually had no factor mark below 2.

The applicant argued that CGPC's memorandum, submitted in attachment to the Coast Guard's advisory opinion, contains numerous errors that mischaracterize his military record. He argued that regarding his February 1, 1990 NJP, he was charged with "unauthorized absence," not being absent without leave (AWOL), and that the punishment associated with his unauthorized absence was a suspended reduction in pay that was imposed but not effected. With respect to this NJP, the applicant maintains that he should not have gone to mast for poor performance because at the time of the offense, he had not been qualified to perform the job. He also argued that between February 19XX and November 19XX, he received "only two negative [page 7s]" He argued that contrary to the Chief Counsel's view, his record shows that he

received more than “only one positive [page 7]”. He contended that he has received numerous positive page 7s, medals, awards, and letters of appreciation for his work.

The applicant alleged that there were substantial errors in the processing of his November 30, 19XX and March 26, 19XX evaluations. He stated that in accordance with Article 10.B.10.b.1.d. of the Personnel Manual, he submitted an appeal to his November 30, 19XX evaluation within 15 calendar days. He stated that the Coast Guard regulations mandate that his CO endorse and submit his appeal to the appeal authority within 15 days of receiving it, and that the appeal authority must review and take action within 15 days of receiving the same. He alleged that although his CO endorsed his appeal on February 9, 19XX (31 days after receiving it), and the appeal authority endorsed his appeal on March 9, 19XX (25 days after its receipt), no corresponding delay in the start of his new evaluation period was made. He argued that had the entire evaluation process been completed, prior to “moving to the next step,” the earliest he could have been placed on the three-month evaluation for rate reduction was March 10, 19XX.

The applicant argued that action taken by his CO and the appeal authority on his March 26, 19XX performance evaluation similarly fell outside the time requirements of Coast Guard regulations. He alleged that although he timely appealed his March 26, 19XX performance evaluation, his CO took action 18 days after he received the applicant’s appeal, and the appeal authority took action 20 days after its receipt of the same. The applicant argued that because both his CO and the appeal authority failed to meet their respective 15-day deadlines, any additional action should also have been delayed. He argued that had the foregoing delays been taken into account, the earliest date on which his CO could have submitted a letter recommending the applicant’s reduction in rate would have been June 27, 19XX. The applicant asserted that his command “[sped] through” the entire process prior to the change of command in mid-June to ensure that the incoming CO would be unable to stop his rate reduction and unaware of the XO’s inappropriate influence on the applicant’s November 19XX evaluation. The applicant argued that contrary to his command’s actions, “the entire evaluation process is required to be completed before moving to the next step.”

The applicant pointed out that in his appeal to the April 30, 19XX performance evaluation, he requested an evaluation at another unit, prior to effecting any rate reduction. In response to this request, the applicant alleged that his CO indicated by memorandum that he would “grant [the applicant’s] request for an evaluation at another unit,” but took action to the contrary. He argued that in granting the applicant’s request for evaluation by a different unit, the CO obligated himself to providing the requested performance evaluation, prior to effecting the applicant’s reduction in rate. He contended that the CO’s failure to provide the promised evaluation at a different unit demonstrates that the command to which he was assigned intended to unfairly judge his performance in an effort to have him replaced.

The applicant alleged that according to the CGPC's memorandum, the appeal authority's resubmitted recommendation that the applicant be reduced in rate included a statement by the applicant, which subsequently could not be located. He asserted that his statement could not be located because it had never been forwarded. The applicant argued that the appeal authority's letter dated July 2, 19XX, referencing only his CO's letter, dated May 14, 19XX, clearly indicates that the letter was not forwarded.

The applicant alleged that his request for temporary active duty (TAD) on another cutter was denied even though other members aboard his assigned cutter were afforded that opportunity. He argued that his XO did not allow him to go TAD because he would have been found fully competent. Although the applicant primarily agreed with the Chief Counsel's assertion that his performance after the reduction is irrelevant to the issue currently before the Board, he argued that such subsequent performance shows that he is capable of performing competently in a YN1 position aboard a Coast Guard cutter.

Along with his response, the applicant submitted several certificates, qualification, designation, and course completion letters, letters of appreciation, employee review summaries, honors, and awards that he earned during the course of his Coast Guard career.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 5.C.38. sets forth the process for evaluating members who are considered for, among other reasons, a reduction in rate due to incompetence. Article 5.C.38.c.1.a. mandates that "[t]he reason for reduction in rate must be solely incompetence as evidenced by the fact that the person is not qualified to perform the duties of his or her rate."

Article 5.C.38.c.2. provides that "[i]f an individual's evaluation mark for any factor is below a factor average of 2 for any evaluation period, ... the commanding officer shall make [a page 7] entry in the Personnel Data Record [PDR] stating that the individual is a candidate for reduction in rate by reason of incompetence and the following three-month period will constitute a formal evaluation of his or her competency." At the end of the three-month period of probation, the member's performance is reevaluated. If during the three-month probation period, the member fails to show the level of professional competency required for the his or her rate, a reduction in rate shall be recommended by the member's command.

Article 5.C.38.f.2.a., entitled “Effective Date of Reduction Rate,” provides that “[w]hen [the] ... district commander authorizes a reduction in rate, the individual’s commanding officer will effect the reduction upon receipt of such authorization.”

Article 10.B. of the Personnel Manual governs 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.” Article 10.B.4.d., entitled “The Rating Chain,” states that an enlisted member’s performance is assessed by a supervisor, a marking official, and an approving official. Articles 10.B.3.e. and 10.B.3.f. provide that the supervisor “[s]ubmits the appropriate EPEF ... with recommended evaluation marks to the Marking Official for each subordinate assigned,” and “[p]rovides written comments for any recommended marks of 1, 2, or 7 ...” The draft EPEF, along with written comments when required, are forwarded to the marking official not later than nine days before the end of evaluation period.

Under Article 10.B.4.c., the marking official reviews the recommended marks and “[d]iscusses any recommendation considered to be inaccurate or inconsistent with the member’s actual performance, paying special attention to recommended 1s, 2s, 7s, ... or low factor marks. ... The Marking Official has the authority to return the evaluation form to the Supervisor for further justification or support for any marks.” After selecting the best description block of the member’s performance, the marking official assigns the final performance marks by filling in the appropriate spaces.

Under Article 10.B.5.a.1., members in pay grade E-6 receive semiannual evaluations at the end of each May and November. Article 10.B.5.b.4.d. states that special evaluations are to be completed at the end of a three-month probationary period for incompetency.

Article 10.B.10.b.2.d. states that “[c]ommanding officers shall endorse and send the appeal letter to the Appeal Authority within 15 calendar days of receiving it from the member.” Article 10.B.10.b.3.a. provides that the “[a]ppeal authority must review and act on the appeal within 15 calendar days after receiving it.”

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 10 U.S.C. § 1552. The application was timely.

2. The applicant alleged that his XO instructed a junior officer by memorandum dated September 27, 19XX to provide poor performance feedback on his November 30, 19XX EPEF. The Board notes that the XO's memorandum to the SUPPO fails to specifically reference the applicant's November 30, 19XX EPEF. However, because the record shows that the applicant was assigned to a new cutter on May 31, 19XX (the last day of his regularly scheduled semiannual evaluation period), the Board finds that the September 27, 19XX memorandum and the references made therein related to the applicant's performance for the period ending November 30, 19XX. Personnel Manual, Article 10.B.5.a.1.

3. Under the facts presented, the applicant has not proved that the XO's September 27, 19XX memorandum improperly influenced a supervising junior officer, and thereby the results of the applicant's November 30, 19XX EPEF. Article 10.B.4.c. provides that the marking official selects and assigns the final performance marks on a member's EPEF. In the applicant's case, the XO, as the marking official, was charged with this duty. Insofar as the September 27, 19XX memorandum was drafted by the same officer authorized to make final performance marks and comments, the applicant has failed to prove by a preponderance of the evidence that that memorandum improperly influenced the applicant's EPEF for the period ending November 30, 19XX.

4. Furthermore, the record shows that on or prior to September 27, 19XX, the SUPPO submitted to the XO a draft EPEF with recommended performance marks and written comments in accordance with Article 1.B.4.d. of the Personnel Manual. Under Article 10.B.4.c., the XO, as the marking official, reviewed the recommended marks and written comments for inconsistencies between the marks and comments suggested by the supervisor and the applicant's actual performance. The XO's September 27, 19XX, memorandum indicates that in response to the SUPPO's draft marks and comments, the XO "concur[red] with [the SUPPO's] written comments and marks," and felt that "the marks and comments very accurately reflect performance." The September 27, 19XX memorandum also indicates that the XO required the SUPPO to identify "all issues of poor performance for YN1 related to a YN practical factor," and specifically to have "administrative remarks to reference YN1/E-6 practical factor and then state performance." Article 10.B.4.c. grants the marking official the authority to return the evaluation form to the supervisor for "further justification or support for any marks." The Board finds that the applicant has not proved by a preponderance of the evidence that the XO's request of the SUPPO fell outside the purview of seeking "further justification or support" for the marks given.

5. The applicant alleged that his command erred in taking subsequent administrative action on his performance evaluations when the appeals against those performance evaluations had not been completed. However, no provision in the Personnel Manual states that a member's appeal of an EPEF operates as a stay of further administrative action. Moreover, in accordance with Article 5.C.38.c.2. of the Personnel

Manual, the applicant's command advised him that he was a candidate for reduction in rate by reason of incompetency and that the following three months from the date of his notification would constitute a formal evaluation period of his competency. Contrary to the applicant's allegation, there are no provisions that would require his command to stay the start of his three-month probation merely because he appealed his November 30, 19XX EPEF. Article 10.B.5.b.4.d. similarly provides that special evaluations are to be completed at the end of a three-month probationary period for incompetency with no provisions for appeal stays. Thus, the Board finds that the applicant has not proved that his command committed any error or injustice by proceeding in accordance with Articles 10.B.5.b.4.d and 5.C.38.c.2. to complete a special evaluation and recommend his rate reduction, despite his appeals.

6. By memorandum dated June 7, 19XX, the applicant's CO indicated, among other things, that he intended to "grant [the applicant's] request for an evaluation at another unit." The applicant alleged that had the CO allowed him to perform and thereby receive an evaluation for temporary active duty at another unit, he would have been able to demonstrate competency for his rate. Although the CO's statement is unambiguous as to the CO's intent, the statement by itself fails to support a finding that the applicant was entitled to receive an evaluation at a different unit during his probation or prior to the date of his reduction. Consequently, the Board finds that the applicant has not presented persuasive evidence that the Coast Guard committed an error or injustice in not assigning him temporary active duty on another cutter.

7. The applicant alleged that his CO and the appeal authority failed to take appropriate action within the time limits prescribed by the Personnel Manual regarding his appeals to his November 30, 19XX and March 26, 19XX performance evaluations. Articles 10.B.10.b.2.d. and 10.B.10.b.3.a. of the Personnel Manual contain clear, mandatory language specifying that, when a member submits an appeal, unless an extension is granted, the CO must endorse and forward the appeal within 15 days of receipt, while the appeal authority must review and act on an appeal within 15 days of receipt. There is no evidence in the record that any extensions were granted nor is there evidence establishing the dates that the CO and appeal authority received either of the applicant's appeals. Upon the Board's questioning about the command's alleged delay in taking necessary action on the applicant's performance evaluation appeals, the Chief Counsel stated that (a) he had no record of the November 19XX appeal, and (b) he had no record of the exact dates when the CO or appeal authority received the March 19XX appeal. Therefore, the applicant has failed to prove by a preponderance of the evidence that action on his appeals occurred more than 15 days after their receipt by the appropriate authorities. The Board strongly encourages the Coast Guard to fully comply with the mandatory provisions of the foregoing regulations in the future by maintaining thorough records. Absent clear evidence of material error or injustice, the actions taken by the applicant's command in addressing his performance should stand.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

