

**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. 2008-035**

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**FINAL DECISION**

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 Chair docketed the case on December 7, 2007, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 14, 2008, 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 first class port security specialist (PS1; pay grade E-6) in the Coast Guard Reserve, asked the Board to expunge his performance marks in the Enlisted Employee Reviews (EERs) he received for the periods ending May 31, 2004, and November 30, 2004. The applicant stated that he discovered the errors in his record in 2004 but that the Board should excuse his delay in filing his application because he only recently learned that he could appeal his marks through the BCMR and "justice delayed should not be justice denied."

The applicant alleged that in the summer of 2002, he asked the detailer for the [REDACTED] [REDACTED] rating about serving on EAD because he had learned that there was an open first class BM billet at the [REDACTED] which administers [REDACTED]. Although he was not a [REDACTED] he knew he could do the work without difficulty because of his "solid administrative background." The detailer said he could do the work and contacted the REC, which decided that the applicant was suitable for the position. However, shortly before he was to begin EAD in the fall of 2002, he injured his right shoulder and had to undergo surgery. When he was fit for duty again in the spring of 2003, the [REDACTED] detailer told him that the billet at the REC was still open, so he resubmitted his application for a two-year EAD contract and was issued orders to report to the REC on June 15, 2003.

The applicant stated that shortly after he gave up his residence and arranged to move his personal possessions to [REDACTED] LCDR G of the REC informed him that the billet he was supposed to fill had already been filled with someone else and that he had been reassigned to

another first class billet in the [REDACTED]. However, this new billet required particular skills and knowledge that the applicant did not have. Therefore, he contacted the [REDACTED] detailer, who told him “that there was nothing he could do.” The applicant then faxed his resume to LCDR M, the deputy chief of the [REDACTED], to show him that he “had no experience of any kind pertaining to [REDACTED] yet [LCDR M] stated that there would be no difficulty in finding suitable work for [the applicant].” Since the applicant’s possessions were already in transit to [REDACTED] and canceling the EAD contract was not a feasible option, he “resolve[d] to make the best of the situation.”

The applicant reported to the [REDACTED] on June 15, 2003. However, within the first week it was clear that he “lacked the necessary skills and background for the billet.” He told his first supervisor, LCDR Z, that he would call Headquarters to have his EAD contract rescinded, but LCDR M asked him not to leave, said he would “work things out” for the applicant, and persuaded him to stay on. For several months, “things went reasonably well” despite his lack of [REDACTED]-related experience. His supervisor during those months, LT P, found his work and conduct satisfactory and assigned him fairly good performance marks on his evaluation dated November 30, 2003. The applicant alleged that the marks he received in this first EER at the [REDACTED] Division show that his next two sets of marks from that command were inaccurate and unfair.

In January 2004, the applicant stated, ENS G became his supervisor and they did not “get along.” He knew his marks from ENS G would not be very good, but he was not unduly concerned because he already had more than 28 years of active service and so was not eligible for advancement. He did not realize how any poor marks ENS G might give him would adversely affect his eligibility for future active duty assignments. The applicant alleged that in June 2004, after the EER was presumably prepared, his rating chain<sup>1</sup> did not show him or counsel him about his marks. Instead, ENS G and LCDR M showed him only a memorandum prepared by ENS G and signed by LCDR M in which they claimed that his performance had been unsatisfactory ever since his arrival in the [REDACTED] the year before. The applicant noted that their claim contradicted the EER he had received from LT P and LCDR M on November 30, 2003.

The applicant alleged that he was not shown the May 2004 EER or informed of his right to appeal the marks until November 2004, at the end of the next evaluation period. LCDR M called him to his office in November and counseled him about the marks only because the Coast Guard Personnel Command had inquired about the lack of an acknowledgment of EER counseling in the applicant’s record. LCDR M refused to explain to him why he had not timely counseled him about his May 2004 marks or why he had accepted ENS G’s evaluation without question. Therefore, the applicant addressed caustic remarks to LCDR M—“e.g., ‘If waiting six months to inform a petty officer of his right to appeal unsatisfactory marks is an actionable offense, you won’t be wearing silver collar devices anytime soon!’” The applicant alleged that he was later advised by another officer that LCDR M did not timely counsel him about the EER because he did not want the applicant to appeal the marks and thereby inform LCDR M’s own chain of command that he had filled a [REDACTED] billet with someone who had no appropriate

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<sup>1</sup> 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 EER. All three members of the rating chain also indicate on the EER whether they recommend the member for advancement to the next pay grade. A member cannot be advanced if his Approving Official does not recommend it. Personnel Manual, Articles 10.B.2.b., 10.B.4.c.

skills or experience. (The applicant's specific allegations about the marks and comments in this EER are summarized in another section below.)

The applicant stated that after speaking with LCDR M, he quickly decided to appeal the marks and arranged to meet with the Command Master Chief. However, the day before they were to meet, the chief of the [REDACTED] Division, CDR F, summoned him to his office and informed him that he was to be charged with disrespectful and threatening behavior toward a superior officer—LCDR M. However, CDR F told the applicant that if he agreed to drop his appeal of the EER and request early termination of the EAD contract, CDR F would drop the charges. The applicant stated that his feelings had changed from “burned up” to “burned out”; he was chagrined about having “lost it” with LCDR M; and he did not want to spend any more time with people “who clearly had no compunction about ‘screwing [him] over.’” Therefore and because he did not understand the effect of the disputed EER on his future eligibility for active duty orders, he gave into the pressure, agreed to CDR F's deal, withdrew his appeal of the EER, and asked that his EAD contract be terminated early.

The applicant stated that after his meeting with CDR F, he was transferred to the [REDACTED] [REDACTED] which was “like transiting from Hell to Heaven.” The [REDACTED] chief assigned him an important project appropriate to his skills and experience and was so impressed with the applicant's work that he asked Headquarters not to release the applicant early from the contract. The request was denied, however, because there was no empty billet in the [REDACTED]. The applicant alleged that because his EAD contract was terminated, he “had no opportunity to appeal the NOV 04 marks.”

The applicant stated that he has been performing periods of active duty for special work (ADSW) for 25 years and has received letters of appreciation and awards. He stated that his 2004 EER marks stand out as an anomaly, and he should not be denied future ADSW and EAD opportunities because of them. He stated that he may have made mistakes at the [REDACTED] [REDACTED] but he “was ‘sinned against’ far more than [he] ‘sinned.’” Had he known the effect of the low marks on his eligibility for future ADSW, he would not have dropped his appeal. He is now being denied opportunities to serve on active duty because of the substandard marks in the disputed EERs.

## **SUMMARY OF THE RECORD**

On October 16, 1972, the applicant enlisted in the Coast Guard Reserve. Since that date he has drilled regularly while on inactive duty and performed many periods of ADSW and EAD. He advanced to PS1 on January 1, 1984, and has remained in that rate. Over the years, the applicant has received several letters of appreciation, medals, and awards but also two negative counseling entries (“Page 7s”) criticizing him for slow learning of new work, inability to manage multiple tasks, and need for supervision when filling in as an operations center watchstander in 1997 and at a cutter logistics and support desk in 1999.

On September 30, 2000, while assigned to the Coast Guard's [REDACTED] as a temporary physical fitness instructor and security watchstander, the applicant received an EER with ten “average” marks of 4, six “above-average” marks of 5, four “excellent” marks of 6, two “superior” marks of 7, a satisfactory conduct mark, and a recommendation for advancement. The

marks of 7 are supported by comments commending the applicant for his willingness to work 60-hour work weeks without complaining.

On March 31, 2001, while maintaining filing systems and processing FOIA requests at another unit, the applicant received an EER with ten marks of 4, eight marks of 5, four marks of 6, a satisfactory conduct mark, and a recommendation for advancement.

The applicant served on active duty from January 2, 2002, through February 14, 2003. On his EER dated August 29, 2002, the applicant received sixteen marks of 4, five marks of 5, one mark of 6, a satisfactory conduct mark, and a recommendation for advancement. He received an Achievement Medal for “superior performance of duty” on a survey team in the [REDACTED]. The certificate notes that he helped collect information from 11,000 people in a 30-day period; developed a database with 11,000 rows and 12 columns to track survey responses; developed a mailing list of 1,100 people who wanted paper copies of the survey; and personally mailed the survey to each one. In the fall of 2002, he injured his shoulder and, while undergoing physical therapy, received a letter of appreciation for his assistance to the Coast Guard [REDACTED] in organizing their files and entering [REDACTED] and contact information into a database.

On May 9, 2003, the applicant signed a two-year EAD contract to begin on June 1, 2003. The contract does not specify what billet the applicant was supposed to fill. Print-outs from the applicant’s “Career Summary” in the Coast Guard’s database indicate that he was assigned to the REC as a license evaluator for the period June 16, 2003, to February 15, 2005. None of the print-outs reflect the applicant’s reassignment to the [REDACTED]. On his EER dated November 30, 2003, the applicant received twenty-one “average” marks of 4, one “above-average” mark of 5 for “Quality of Work,” and a satisfactory conduct mark, but he was not recommended for advancement.

On April 28, 2004, ENS G entered a Page 7 in the applicant’s record with this text:

[The applicant] was counseled in regards to his unsatisfactory job performance. He has displayed an apathetic attitude towards job assignments and an inability to put forth the necessary effort required to complete tasking in a timely and efficient manner. [He] does not update his Supervisor unless directly asked and then provides vague, generalized answers. When a task is completed, he does not seek additional tasking, nor is he capable of completing multiple assignments within a set period of time. [He] requires constant guidance when tasked with new projects and does not effectively research or utilize available resources to work through problems on his own. His performance does not reflect the standards expected of a First Class Petty Officer.

For the period December 1, 2003, to May 31, 2004, the applicant’s rating chain gave him the following marks and comments on his EER:

PERFORMANCE CATEGORY	MARK	COMMENTS SUPPORTING “POOR” MARKS OF 2
Professional, Specialty Knowledge	2	“[He has] marginal knowledge of [REDACTED] despite having been in the division for 11 months ... demonstrated a total lack of interest ... and has on several occasions stated that he is not supposed to be here, that he was originally assigned to another division. He has demonstrated no proficiency in matters related to [REDACTED] nor any desire to gain proficiency aside from what is immediately required by his tasking.”

Quality of Work	3	
Monitoring Work	2	"[He] has difficulty prioritizing his tasks despite minimal tasking. He has only demonstrated an ability to work on one project at a time and is unable to set priorities without direct instruction. He does not update his supervisor on project status without being asked directly to do so and then provides ... vague responses."
Using Resources	2	"[He is] unable to properly and effectively use even the most basic of tools and publications, such as a chart, without detailed and explicit instruction. When tasked with finding the [REDACTED] he was referred to [REDACTED]. He then required his supervisor to locate and point out the specific examples on the chart. He then required his supervisor to explain how to determine the bottom type from the data observed on the chart. When asked to find the [REDACTED] He then stated that he needed training and was unwilling to make an attempt at working it out on his own. When his supervisor opened the book it became apparent that the required information was located within the first few pages and that [the applicant] had made no attempt to figure it out on his own."
Safety	4	
Stamina	2	"[He] does not react well to stressful situations. He becomes very defensive when tasked with anything new. He does not contribute any extra time to ensure project completion in a timely manner and frequently desires immediate compensation time for any activity after 1600. An opportunity arose at the command for 1400 liberty for all donors during a blood drive. ... he was told that his project would need to be completed before any liberty was granted. He later stated that he would not donate if he was not going to get liberty. [He] often seeks any excuse to arrive late or depart early. When computers were shut down for maintenance at 1545, he departed 15 minutes early without consulting his supervisor. On a separate occasion, he reported 20 minutes late from lunch without consulting his supervisor because of scheduled maintenance being performed on his computer."
Communicating	3	
Directing Others	2	"[He] does not instill confidence in coworkers or superiors. He is unable to be placed in a leadership capacity because of his lack of proficiency in any issue related to [REDACTED]. He has not been able to maintain the standards in quantity or quality of work that is expected of a [PO1]. He is unable to manage difficult situations because he becomes stressed at any unfamiliar situation. Because of his poor performance and apathetic attitude, his superiors believe that he would make a poor role model for a junior member and is, therefore, not placed in any supervisory positions."
Working with Others	3	
Developing Subordinates	3	
Responsibility	2	"[He] provides little or no support for policies and decisions. When tasked with e-mailing updates to his supervisors twice a day, he demonstrated resistance. When counseled regarding his failure to meet the standards he refused to take responsibility and demonstrated no motivation to improve."
Evaluations	3	
Work-Life Sensitivity, Expertise	3	
Setting an Example	2	"[He] projects an apathetic attitude towards assigned work. On several occasions, he has stated that he didn't want to come to the [REDACTED] and that he is supposed to be somewhere else. He shows no interest in assigned tasks and often needs to be reassured of the value of the work. He has repeatedly demonstrated an inability to make decisions and frequently requires explicit instruction before undertaking any responsibility."

Military Bearing	4	
Customs & Courtesies	3	
Health & Well-Being	4	
Integrity	3	
Loyalty	3	
Respecting Others	3	
Human Relations	4	
Adaptability	2	"[He] has a great deal of difficulty adapting to anything new. He is clearly unwilling to adapt to his position within the [REDACTED] as evidenced by his poor performance, apathetic attitude, and stated desire to be elsewhere. When tasked with a new project, he requires explicit instruction from his supervisor and is unwilling to perform adequate research on his own prior to seeking guidance. He often becomes stressed by changes in routine or any new obstacles or issues."
Conduct (S or U)	S	
Recommendation for Advancement (R or N)	N	"[He] has not demonstrated the leadership qualities nor satisfactorily performed the duties expected of a [PO1]. His sub-par performance is evidence that he is not currently capable of the duties and responsibilities that are required of the next higher pay grade. He lacks self-confidence necessary to provide leadership to others."

(Dated signatures on the EER show that the applicant was not counseled about it or advised of his right to appeal the marks until November 22, 2004. He did not appeal the marks.)

On July 2, 2004, LCDR M counseled the applicant about his "unsatisfactory performance" and presented him with the following memorandum:

1. This is to inform you that for the previous 12 months, your performance has been unsatisfactory compared to your 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 six months, or you will be considered for discharge.
2. The reasons for being placed on performance probation are: an apathetic attitude towards job assignments and an inability to put forth the necessary effort required to complete tasking in a timely and efficient manner. You do not update your Supervisor unless directly asked and then only provide vague, generalized answers. When a task is completed, you do not seek additional tasking, nor are you capable of completing multiple assignments within a set period of time. You require constant guidance when tasked with new projects and do not effectively research or utilize available resources to work through problems on your own. Your performance does not reflect the standards expected of a First Class Petty Officer as was addressed in counseling sessions and documented in a CG-3307, as well as your most recent set of marks.

On his EER dated November 30, 2004, the applicant received one mark of 2 for "Directing Others," thirteen marks of 3, eight marks of 4, a satisfactory conduct mark, and no recommendation for advancement. The record contains no counseling page to show that he was counseled about the mark of 2 in this EER. He did not appeal these marks.

On February 15, 2005, the applicant was released four months early from his EAD contract. His DD 214 shows that he was honorably "deactivated" with an RE-1 reenlistment code

(eligible to reenlist) for “completion of required active service.” He had completed 15 years, 3 months, and 26 days of total active service and 17 years and 5 days of total inactive service.

### **APPLICANT’S ALLEGATIONS ABOUT THE MAY 2004 EER COMMENTS**

Regarding the mark of 2 and comment for “Professional, Specialty Knowledge” in his May 2004 EER, the applicant stated that his Supervisor failed to take into account his work on an underkeel depth survey project, for which he prepared a spreadsheet, which he kept up to date, and organized and maintained underkeel charts. He alleged that it was the only assignment he received that used his actual skill set and that both CDR F and LCDR M praised his spreadsheet work. The applicant also noted that he “did considerable work in the [REDACTED] database” and ensured that the unit vehicles were properly maintained. The applicant alleged that he was not provided any on-the-job training to acquire knowledge of [REDACTED] and although he “would have welcomed the chance to become more fully involved [with [REDACTED]], ... was given to understand that I lacked the requisite background,” which was not his fault.

Regarding the mark of 2 and comment for “Monitoring Work,” the applicant complained that the Supervisor failed to cite examples of his poor prioritization and inability to work on more than one thing at a time. He stated that if she had asked him to keep her updated about the status of his projects, he would have done so.

Regarding the mark of 2 and comment for “Using Resources,” the applicant stated that the tools that the Supervisor called “basic” were entirely new to him. He had never used a [REDACTED] before and had no idea what the numbers and symbols indicated. However, she provided no on-the-job instruction to help him learn about the [REDACTED]. Regarding the [REDACTED], he stated that it was only easy to find the answer to her question if you knew the subject matter and terminology, which he did not. He did try to figure out the answer on his own before he asked for help. Moreover, ENS G completely ignored his resourcefulness in preparing the [REDACTED] spreadsheet and creating parent units in the [REDACTED] database. In one instance, the applicant stated, ENS G asked him to find a database of [REDACTED]. He searched for one but was told that no such database existed. She insisted that there must be one and that he continue to look for it. When he asked for suggestions as to where else he should look because he did not want to waste time looking for something that did not exist, she became agitated because she thought he was being insubordinate.

Regarding the mark of 2 and comment for “Stamina” in the EER, the applicant again complained about a lack of specific allegations to which he could respond. The applicant stated that he “never requested compensation time except for work performed on weekends, e.g., taking vehicles in for repair” and that he never refused to work late to complete important projects. The applicant argued that there was no correlation between his stamina and his decision not to give blood or not to be present when the computers were not functioning. He alleged that he did not often arrive late or leave early and pointed out that ENS G cited only two instances in a six-month period. He argued that most supervisors would not make a “big deal” over a member leaving 15 minutes early when the computers were down, and the time he returned late from lunch because his computer was undergoing maintenance, he had “left word that [he] would be late getting back, which apparently wasn’t passed on to her.”

Regarding the mark of 2 for “Directing Others,” the applicant stated that he must have inspired confidence in his work on the [REDACTED] and maintaining vehicles because he was not removed from those duties. He argued that he could inspire confidence in those projects that made use of his skill set, such as the [REDACTED] and the [REDACTED] he prepared for LCDR M. In addition, he alleged that he always strove for quality no matter how mundane the assigned task. As an example, he noted that he had been asked to trim the edges of the [REDACTED] to fit in the drawers, and an “examination of the chart drawers will reveal rows of neatly trimmed documents with not a ragged edge to be found.” Another time, he stated, ENS G greatly underestimated the amount of time a project would take and got angry when the arbitrary deadline she set was not met. She had asked him to create a database of certain entries in file folders. Many of the entries were barely legible and many others were written in cryptic script that took time to decipher. When the project took more time than ENS G had provided, she became “exceedingly wrath.” The applicant complained about the lack of examples to support his supervisor’s allegations that he could not manage difficult situations and became unduly stressed in unfamiliar situations. Finally, he noted that since he was the lowest ranking member in his department, he had no opportunity to direct others.

Regarding the mark of 2 for “Responsibility,” the applicant complained that when ENS G accuses him of offering “‘no support for policies and decisions’, she clearly means **her** policies and decisions. While I considered some of [ENS G’s] ‘policies and decisions’ to be a tad on the ‘persnickety’ side, e.g., her insistence that all leave chits be placed in a folder with an attached routing slip, I never hesitated to comply with them.” Moreover, the applicant alleged, he did not resist updating her on the status of his work but merely pointed out that updating her at the end of each afternoon and the beginning of each morning would result in identical reports since no progress would be made overnight and so would serve no useful purpose. The applicant stated that in his experience, tasking normally flows from the top down—i.e., the member need not continually request work. He argued that “if a member informs his supervisor that he has completed an assigned task, and the supervisor is well aware that the member [has not] been given anything else to work on, then it shouldn’t be ‘rocket science’ for the supervisor to conclude that the member needs further tasking and to provide it; otherwise, the presumption is that the supervisor has nothing for the member to work on.”

Regarding the mark of 2 for “Setting an Example,” the applicant complained that ENS G again failed to provide an example of a time when he could not reach a decision. He stated that her criticism of his request for “explicit instruction” unfairly rebukes him for “wanting to clearly understand the nature of a given assignment in order to properly execute it.” He argued that supervisors who resent giving explicit instructions are usually fearful that they will be held accountable if something goes wrong when their instructions are followed. Therefore, they make their instructions as vague as possible. Regarding ENS G’s allegation that he required reassurance of the value of assigned tasks, he argued that a competent supervisor would “take pains to encourage their members when assigning tasks that appear to be of a ‘keep-busy’ nature.”

Regarding the mark of 2 for “Adaptability,” the applicant stated that ENS G’s allegation that he acted stressed and apathetic (in this comment and others throughout the EER) was her interpretation of the fact that he felt bored, frustrated, and underutilized because he was assigned to the [REDACTED] for nearly eighteen months but was never provided with a “clearly defined job description as to what [his] responsibilities [were].” After the [REDACTED] projects were completed, he was given only short-term “odd jobs,” many of which were “keep-



busy” work, such as trimming chart edges, and did not fill his time. He alleged that he was not given enough work because he did not have the required background for a [REDACTED] assignment, but LCDR M knew that when the applicant first arrived at the division and promised to “work things out.” He alleged that LCDR M only accepted him at [REDACTED] to help get LCDR G at the REC “out of a jam” with Headquarters, and that he bore the brunt of their deal. The applicant stated that he informed ENS G of the fact that he had signed the EAD contract to work at the REC, not in [REDACTED], and that she took this news as “gratuitous grousing” rather than “an effort to explain why [his] attitude might come across as being ‘stressed and apathetic.’” However, instead of understanding and empathizing with what had happened, “her response was, in effect, ‘You’re here, so shut up and suck it up!’” This lack of understanding “only served to make a difficult situation that much worse.” The applicant also complained about the lack of examples of instances in which his response was “stressed” and alleged that the lack of examples contradicts her claim that he was often stressed because, if so, she would have cited examples.

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

On April 15, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request.

Regarding the applicant’s allegation that he was not counseled about the May 31, 2004, EER until November 22, 2004, the JAG admitted that under Article 10.B.4.a.4. of the Personnel Manual, EER counseling should have occurred within twenty-one days of the end of the evaluation period. However, he argued, the Board has held in another case, BCMR Docket No. 2004-041, that “lateness, *per se*, is insufficient to justify removal of an otherwise valid EER, especially when that lateness has caused no harm to the member.” The JAG stated that although the Service “expects full compliance with its administrative guidelines, failure to meet those guidelines does not create an entitlement on the part of Applicant to have otherwise valid EERs expunged. To do so would be to exalt form over substance.” Furthermore, the JAG alleged, although the applicant was not counseled about his May 2004 EER marks until November 22, 2004, he was clearly aware of his shortcomings prior to that date since he was counseled about them on April 28, 2004, as shown on the Page 7 signed by the applicant on that date, and on July 2, 2004, when he was placed on performance probation. The JAG also alleged that there is no evidence that the delay in counseling prejudiced the applicant’s marks in his November 2004 EER. The JAG concluded that the applicant has not proved that he was harmed by his command’s violation of the deadline in Article 10.B.4.a.4.

Regarding the applicant’s allegation that he withdrew his EER appeal to avoid potential charges under the UCMJ, the JAG argued that the applicant has admitted that “he made a personal choice not to pursue the appeals process and has not produced evidence that the Coast Guard committed error or caused injustice.”

The JAG also adopted the findings and analysis of the case provided in a memorandum prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that although the applicant’s command failed to counsel him about his EER marks within twenty-one days of May 31, 2004, the applicant was “not deprived of his right to appeal” the marks in that EER, as he was afforded an opportunity to appeal them in November 2004. Moreover, despite the lack of EER counseling, the applicant “should have been keenly aware of his shortcomings prior to receiving the EER counseling on November 22, 2004,” because of the Page 7 entered in his record on April

28, 2004, and because he was placed on performance probation on July 2, 2004. CGPC argued that the applicant has not proved that the May 2004 EER is unjust or that he was unaware that his performance was substandard. CGPC further argued that because the July 2, 2004, memorandum mentioned the applicant's most recent marks and placed him on performance probation, the applicant "was presumptively aware of the EER contents or should have requested proper counseling at that time. ... Furthermore, the applicant's statements in his BCMR application do not reflect that [he] expressed concern about his EERs until after he was subsequently released from EAD and sought out additional ADSW opportunities."

CGPC also argued that the applicant has not proved any error or injustice in his November 2004 EER. CGPC stated that the marks in this EER show a marked improvement in his performance, although it was still "significantly below standard." CGPC stated that although the applicant claims that his two 2004 EERs contrast with the outstanding performance reflected in other EERs, the applicant was not recommended for advancement in five of his last twelve EERs and has received numerous below average marks of 3 in other EERs. CGPC submitted a chart showing the applicant's marks on his last twelve EERs as follows:

Date	Leadership							Professional Qualities					Performance						Military		C <sup>1</sup>	A <sup>2</sup>		
11/30/04	2	3	3	3	3	4	3	4	4	4	4	4	3	3	3	3	3	4	3	3	4	3	S	N
5/31/04	2	3	3	2	3	3	2	4	3	3	3	4	2	2	3	2	2	4	2	3	4	3	S	N
11/30/03	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	5	4	4	4	4	4	4	S	N
8/29/02	4	4	4	5	4	4	4	4	5	6	4	4	4	5	5	5	4	4	4	4	4	4	S	R
3/31/01	4	4	4	5	4	5	4	4	4	6	4	4	5	6	5	6	5	4	6	5	5	5	S	R
9/30/00	4	5	4	4	4	4	6	5	5	6	4	4	6	4	5	7	5	4	7	4	5	6	S	R
9/30/99	4	4	4	5	4	4	4	4	5	4	4	4	4	4	3	3	4	4	3	4	4	5	S	R
9/30/98	3	3	3	3	3	3	3	4	4	4	4	4	4	4	4	3	4	4	4	4	3	3	S	N
5/8/98	4	4	4	4	4	4	4	4	5	5	5	4	4	4	4	5	5	4	4	4	5	4	S	N
1/24/97	4	4	4	4	4	4	4	4	4	4	4	4	3	6	6	5	5	4	4	4	4	4	S	R
5/31/96	4	4	4	4	4	4	4	4	4	4	4	4	5	6	6	5	5	4	4	4	4	4	S	R
7/23/95	4	4	4	5	4	4	5	4	5	5	5	5	5	4	6	6	4	4	6	5	5	5	S	R

<sup>1</sup> C represents the conduct mark, which is either satisfactory (S) or unsatisfactory (U).

<sup>2</sup> A represents the advancement recommendation, which is either recommended (R) or not recommended (N).

Finally, CGPC stated that although the applicant's failure to appeal his EER marks through his chain of command "does not in itself preclude appeal through the BCMR, a decision in favor of the applicant would indicate a clear divesture from the appeal policy as prescribed" in the Personnel Manual.

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

On April 17, 2008, the Chair sent the applicant a copy of the advisory opinion and invited him to respond within thirty days. The applicant was granted an extension and submitted his response on June 5, 2008.

The applicant stated that he disagreed with the Coast Guard. He argued that both EERs he received in 2004 should be expunged because “they transpired in a billet other than the one stipulated by my EAD ... contract.” He alleged that the contract stipulated that he would be assigned to the REC. However, because LCDR G had filled the billet at the REC with another reservist without consulting Headquarters, the applicant was “shunted off” to another first class billet in the [REDACTED] for which he had no skills or background knowledge. In support of this allegation, the applicant submitted from a civilian employee of CGPC, Mr. H, who stated that that when the applicant’s request for EAD was approved in 2003, CGPC expected him to be assigned to the REC. However, shortly after the applicant began EAD, he contacted Mr. H and told him that someone else had filled the billet at REC. “Consequently,” Mr. H stated, the applicant “was assigned to another division which he was not qualified to fill.” The reassignment was done without the knowledge or consent of CGPC.

The applicant alleged that when he realized that he was out of his depth during the first week in the division, LCDR M convinced him to stay and promised to “work things out” for him, but did not do so. The applicant argued that it was manifestly unfair for LCDR M to convince him to stay in a billet for which he had no skill, promise to “work things out” for him, and then fail to do so by giving him very low marks in his EERs. He compared the Coast Guard’s actions to assigning a first class yeoman (administrative specialist) to a first class machinery technician’s billet and then giving the yeoman low marks because he did not know how to maintain internal combustion engines.

Regarding the lateness of his EER counseling, the applicant argued that his case is not comparable to that in BCMR Docket No. 2004-041 because the delay in his case was six months, whereas in 2004-041, the preparation of the EER was delayed only six weeks. The applicant argued that the six-month delay in his case “unequivocally crossed the line from form to substance.” He also asked the Board to question certain Coast Guard personnel on his behalf and to enjoin the Coast Guard to answer many questions concerning his case and his superiors.<sup>2</sup>

The applicant further argued that no provision of the Personnel Manual states that the Page 7 he received on April 28, 2004, is an acceptable substitute for the EER counseling required under Article 10.B.4.a.4. of the Personnel Manual. He stated that the “only thing [he] learned ... from the CG-3307 was that [he] had very serious personality conflicts” with ENS G. He also argued that the Page 7 is “long on generalities and short on particulars” as it included no specific examples of his alleged shortcomings. He argued that if these alleged shortcomings were so egregious, they should have been obvious to his previous and subsequent supervisors.

The applicant alleged that he did raise the issue of counseling when he received the memorandum from LCDR M on July 2, 2004, but LCDR M “passed the buck” to CDR F. CDR F’s “‘counseling’ consisted of telling me that my problems stemmed from being temperamentally unsuited to work in a ‘fast-paced environment’ like USCG [REDACTED]; reiterating his refusal to countenance any criticism of [ENS G]; and stating that I should never have been placed in the [REDACTED] (no disagreement there!). At no time did [CDR F] make any mention of my May 04 marks.”

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<sup>2</sup> The BCMR staff notified the applicant that he bears the burden of submitting evidence to prove his allegations and that the Board does not have authority to conduct investigations or to order the Coast Guard to conduct investigations.

Regarding the Coast Guard's argument that the July 2, 2004, memorandum also put him on notice of his alleged deficiencies, the applicant stated that the memorandum contains a patent falsehood as it indicates that his performance had been unsatisfactory for twelve months, which is refuted by his EER dated November 30, 2003. Because of this patent falsehood, the applicant argued, the July 2, 2004, memorandum "should be disregarded." He also argued that it should not be presumed that he knew his marks were low because of the July 2, 2004, memorandum. Instead, because he was not counseled about his EER marks within twenty-one days of May 31, 2004, he could presume that his marks were acceptable, even if his placement on probation informed him that his performance was "deficient in some respects." The applicant also pointed out that nothing in the Personnel Manual states that the counseling he received on July 2, 2004, is an acceptable substitute for EER counseling. He alleged that because he was not counseled about his May 2004 marks until November 22, 2004, just eight days before the end of the next evaluation period on November 30, 2004, he was at a distinct disadvantage. In addition, he alleged that when he received the November 2004 marks, he had no real chance to appeal them because he had just received his May 2004 marks and his efforts were of necessity focused on appealing the worse set of marks. He alleged that it is "well-nigh impossible to simultaneously process and appeal two different sets of marks."

In response to the Coast Guard's claim that his decision not to appeal his marks was a "personal choice," rather than a reaction to unfair pressure, the applicant stated that he was "understandably outraged" when LCDR M waited until November 2004 to counsel him about his May 2004 marks because "any fair-minded person would agree that the proper course of action for [LCDR M] would have been to discuss them with me and get my 'take' before reaching any conclusion as to their validity. Instead, he simply 'rubber stamped' everything that [ENS G] alleged and sent the marks off to HRSIC without seeking any input whatsoever from me." The applicant stated that he "'lost it' and gave [LCDR M] 'a piece of my mind' as to what I thought of his so-called 'leadership.' In doing so, I clearly contravened the strictures of the UCMJ as regards displaying proper behavior towards a superior officer; and I subsequently felt very chagrined over my outburst. Under the circumstances, however, I think that an impartial observer, while not condoning my actions, would still understand what engendered them." He alleged that he was "singled out for ill treatment" because no one else in his unit had to wait six months to be told about their EER marks. He also alleged that the six-month delay in counseling proves that LCDR M and CDR F doubted the accuracy of the marks assigned by ENS G; were afraid that the marks would not "stand up to an impartial scrutiny"; and were afraid that his appeal of the marks would "reveal actions which they would have preferred to keep 'under the rug.'"

The applicant stated that CDR F did not discuss his behavior toward LCDR M until after the applicant had prepared his appeal of the marks and arranged to meet with the Command Master Chief. The day before their meeting, CDR F called him in, told him about the charges against him, and offered to drop the charges if the applicant dropped his EER appeal and agreed to early termination of his EAD contract. The applicant alleged that CDR F offered him this deal because CDR F did not want the Captain to know that LCDR M had accepted a PS1 with no appropriate skills or experience to fill a billet in the [REDACTED]; that LCDR M had given the applicant a memorandum with a false statement about his performance; and that LCDR M had failed to counsel him about his marks for six months. The applicant alleged that these revelations would have embarrassed CDR F in front of the Captain since they occurred on CDR F's "watch." Therefore, CDR F made the applicant "an offer [he] couldn't refuse" because

LCDR M's infractions under CDR F's watch could have "put the kibosh" on CDR F's own chance of promotion. The applicant pointed out that neither the JAG nor CGPC denied the fact that CDR F had threatened him with UCMJ charges to get him to drop his EER appeal and terminate his EAD contract early. He stated that his decision to drop the appeal and end the contract was not a "personal choice" but a matter of "'knuckling under' to intimidation," which the JAG and CGPC ignored and the applicant regrets.

Regarding the marks in his November 30, 2004, EER, the applicant alleged that after he was placed on performance probation on July 2, 2004, he was assigned primarily menial tasks and little work. In retrospect, he believes that his chain of command was trying to get him to "pack it in" before the end of the new evaluation period. Since he had not been counseled about his May 2004 marks, he asked how he could fairly "have been expected to deal with the issues relative to my performance if [he] was never explicitly or specifically—as distinct from cryptically and ambiguously—apprised of them in a timely manner, i.e., without the prescribed 21-day period." Moreover, he alleged that he was harmed by the delay of his counseling because, if there had been no delay, he would not have lost his temper with LCDR M and so could not have been threatened with charges under the UCMJ. Absent this threat, he would have been able to appeal his EER marks. The applicant further alleged that after he "lost it" with LCDR M, CDR F realized that he was "getting close to the 'breaking point'" and so applied more pressure until the applicant finally agreed to leave under duress. He could not appeal the marks in the November 2004 EER because he needed to concentrate on appealing the worse marks in his May EER, which he had received almost simultaneously. Moreover, the applicant alleged, he was never counseled about his low marks in the November 2004 EER.

Regarding his past performance record, the applicant noted that he received three of the five EERs on which he was not recommended for advancement while he was assigned to the [REDACTED] in a billet he did not seek and for which everyone knew he was not qualified. The applicant alleged that, having been arbitrarily placed in the wrong billet, he could not possibly have received a recommendation for advancement in any of his EERs.

### **APPLICABLE REGULATIONS**

Article 10.B.1.b. of the Personnel Manual in effect in 2004 states that "[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely employee reviews. To this end, the Service has made enlisted performance criteria as objective as possible, within the scope of jobs and tasks enlisted personnel perform."

Article 10.B.5.a.1. states that members in pay grade E-6 (first class petty officers) on active duty receive regular, semiannual EERs at the end of each May and November. Article 10.B.5.a.3. states that "[r]egular employee reviews may not be delayed. The unit rating chain is responsible for ensuring complete reviews are acknowledged by the evaluatee and completed within CGHRMS not later than 30 days after the employee review period ending date."

Article 10.B.2.b.8. states the following regarding performance feedback during an evaluation period:

No specific form or forum is prescribed for performance feedback. Performance feedback - formal or informal - actually occurs whenever an evaluatee receives any advice or observation from a rating official on their performance or any other matter on which they may be evaluated. Performance feedback can occur during a counseling session, particularly during a mid-period session, through on-the-spot comments about performance, or at the end of the employee review period. Each evaluatee must be continuously alert for the “signals” received in one of these ways from the rating chain. If the signals are not clear, the evaluatee must ask the rating chain for clarification.

Article 10.B.4.b. states that an enlisted member is “ultimately responsible for” the following:

1. Learning the EERS intent and procedures as set forth in these prescribed guidelines.
2. Finding out what is expected on the job.
3. Obtaining sufficient feedback or counseling and using that information in adjusting, as necessary, to meet or exceed the standards.
4. If desired, providing a list of significant accomplishments.
5. Signing in the member's signature block of the counseling sheet and retaining this form as a receipt to indicate acknowledgment of:
  - a. The counseling and review of their employee review;
  - b. The impact of their employee review on their Good Conduct eligibility;
  - c. The appeal time frame;
  - d. His or her advancement potential and recommendation.
6. Verifying through CGHRMS self service that their individual employee review has been properly recorded.

Note: Members that have an approved employee review will be notified on their Leave and Earnings Statement (LES). It is their responsibility to verify their employee review and report any discrepancy thru their chain of command.

Article 10.B.4.c.3. states that the Supervisor in a rating chain must “clearly communicate goals and acceptable standards of performance to the evaluatee before and throughout the marking period”; provide a means by which the evaluatee may provide input on his performance; complete the EER with recommended marks and any required supporting comments; forward the completed EER and supporting comments to the Marking Official no later than nine days before the end of the evaluation period; and counsel the member about the EER after the Approving Official has approved the EER. Article 10.B.4.c.3.f. notes that

[t]he importance of how effective [EER counseling] can be in setting the evaluatee up for future success cannot be over emphasized. How well the supervisor clearly communicates the member's past performance and methods in which to improve are primary to ensuring future success. The Supervisor is required to ensure the evaluatee is provided with a printed counseling sheet and acknowledges receipt by obtaining their signature Article 10.B.4.a.4.

Article 10.B.4.c.4 states that the Marking Official in a rating chain reviews the marks recommended by the Supervisor; “[d]iscusses with the Supervisor any recommendations considered inaccurate or inconsistent with the member's actual performance, paying special attention to recommended 1s, 2s, 7s, unsatisfactory conduct marks, or low competency marks”; assigns the marks; and forwards the EER to the Approving Official no later than five days after the end of the evaluation period.

Article 10.B.4.c.5.c. states that the Approving Official in a rating chain is responsible for ensuring that the assigned marks are consistent with the evaluatee's performance; that the evaluatee is counseled and advised of the appeal procedure; and that the required supporting comments are completed. The Approving Official also reviews the EER and “discusses with [the Marking

Official] any recommendations considered inaccurate or inconsistent with the evaluatee's actual performance, paying special attention to recommended marks of 1, 2, or 7; unsatisfactory conduct marks; low competency marks, or a 'Not Recommended' mark in the Recommendation for Advancement competency." Article 10.B.4.c.5.f. states that the Approving Official "[f]orwards the completed employee review to the Supervisor to counsel and inform the evaluatee." The Approving official also ensures that the EER is processed in time for the member to be able to review it in the CGHRMS database no later than thirty days after the end of the evaluation period. (Article 10.B.4.c.5.g.)

Article 10.B.4.c.3.f. states that the Supervisor must "counsel[] the evaluatee on the employee review after the Approving Official's action. ... The Supervisor is required to ensure the evaluatee is provided with a printed counseling sheet and acknowledges receipt by obtaining their [sic] signature." Commands are not required to retain a copy of the counseling sheet. Article 10.B.4.a.4. states that the unit must ensure that EERs "are completed, including the signed counseling sheet, not later than 21 days after the end of the employee review period ending date. If an evaluatee refuses to sign the counseling sheet, a unit representative should so state in the evaluatee's signature block and sign the statement prior to transmitting the completed EER to HRSIC. The unit provides the evaluatee the original counseling sheet."

Article 10.B.2.a.1. provides that "[s]upporting remarks are required to be submitted along with the employee review, up 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, unsatisfactory conduct mark, or loss of recommendation for advancement." Article 10.B.6.b.1. states the following regarding supporting remarks on an EER:

The employee review is designed to inform members how they are performing compared to the written standards. The form requires few or no supporting remarks and should cover explicitly all performance factors for each evaluatee. The rater may use the employee review as a tool in counseling the evaluatee.

a. Raters must provide supporting remarks for certain marks Article 10.B.2. These remarks serve as supplemental information on the evaluatee in determining decisions such as OIC certification, removal for cause, regular duty assignments, or special duty assignments as a recruiter, instructor, investigator, or CMC.

b. 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.

Article 10.B.7.2. states that a member should be marked as recommended for advancement on an EER when "[t]he member is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade. The rating chain should choose this entry regardless of the member's qualification or eligibility for advancement." Article 10.B.7.2.b. provides that a member should be marked as not recommended for advancement when he "is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade."

Article 10.B.7.4. states that a mark of not recommended for advancement cannot be appealed. However, Article 10.B.9. provides procedures for appealing the numerical performance marks on an EER. Article 10.B.9.a.2. states that the "appeals process is designed to review marks the evaluatee believes were based on: a. incorrect information; b. prejudice; c. discrimination; or d. disproportionately low marks for the particular circumstances." Article 10.B.9.b.1. states that before submitting a written appeal, a member should request an audience with the rat-

ing chain, including the Approving Official, to see if the objection to the EER may be resolved. A written appeal must be submitted within fifteen days of the date the member signs the completed EER.

Article 12.B.9. authorizes commands to process for discharge members whose performance has been unsatisfactory for at least six months, though a period of twelve months is preferred. Article 12.B.9.c. states that unsatisfactory performers may be identified through their performance evaluations. Article 12.B.9.d. states that before initiating such a discharge, the member may be placed on performance probation for so that he has a chance to improve his performance. The member must be notified of the probationary period by memorandum as follows:

1. This is to inform you that for the previous (number) months, your performance has been unsatisfactory compared to your 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 six months, or you will be considered for discharge.
2. The reasons for being placed on performance probation are: (state specific facts, incidents, unheeded corrective performance guidance, and any other documentation which supports the unsatisfactory performance evaluation(s)).

Under 12.B.9.e., if the member's performance does not improve substantially during the probation, the command may initiate an involuntary administrative discharge, in which case member receives a DD 214 showing "unsatisfactory performance" as the reason for separation and a reenlistment code of RE-4 (ineligible) or RE-3Y (waiver required to reenlist due to unsatisfactory performance).

## 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 received less than three years after the applicant's release from active duty and so was timely filed.<sup>3</sup>

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant has asked the Board to expunge two EERs from his record. Under Article 10.B.1.b. of the Personnel Manual, "[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely employee reviews." Under its rules, the Board begins its analysis of every case by presuming that a disputed EER is correct as it appears in the record, and the applicant bears the burden of submitting sufficient evidence to prove by a preponderance of the evidence that the EER is erroneous or unjust.<sup>4</sup> Absent evidence to the contrary, the Board presumes that the applicant's rating

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<sup>3</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 "tolls the BCMR's limitations period during a servicemember's period of active duty").

<sup>4</sup> 33 C.F.R. § 52.24(b).



chain prepared the EERs “correctly, lawfully, and in good faith.”<sup>5</sup> To establish error in an EER, an applicant must prove that the EER was adversely affected by a significant factual error, a prejudicial violation of a statute or regulation, or some factor that “had no business being in the rating process.”<sup>6</sup>

4. The Coast Guard argued that the Board should deny relief because the applicant failed to appeal his EER marks. CGPC argued that a grant of relief “would indicate a clear divesture from the appeal policy” prescribed in the Personnel Manual. Under Article 10.B.9. of the Personnel Manual, a member may appeal his EER marks within fifteen days of signing of his EER. Because the fifteen-day period for appealing an EER has long passed, the applicant’s opportunity to appeal the disputed marks is no longer available. The Board’s policy is that exhaustion of administrative remedies has occurred in situations where a remedy existed but is no longer available or practical. This policy is consistent with its rule at 33 C.F.R. § 52.13(b) and with congressional intent.<sup>7</sup> The only limitation Congress placed on filing an application with the BCMR is the three-year statute of limitations under 10 U.S.C. § 1552(b), and it even allowed that to be waived in the interest of justice. A blanket denial of applications in the absence of an appeal within fifteen days under Article 10.B.9., as suggested by CGPC, would be a violation of the Board’s responsibility under 10 U.S.C. § 1552.

5. The Board sometimes considers an applicant’s failure to appeal a performance evaluation as evidence of his opinion of the fairness of the evaluation when he received it. In this case, however, the disputed marks are so poor and the applicant’s anger about them is so palpable that the Board does not believe that his failure to appeal them constitutes evidence that he believed they were fair when he received them.

6. The applicant alleged that he originally sought a billet at the REC, in which he knew he could do well because of his administrative background. He alleged that he signed the EAD contract believing that he would be assigned to that billet but instead was unfairly assigned to a billet in the [REDACTED] for which he was not qualified and in which he could not possibly perform well because of the expertise required. Although he alleged that the REC billet was specified in his EAD contract, the contract itself does not actually state what billet he was supposed to fill. However, entries in the Coast Guard’s database and Mr. H’s statement strongly support the applicant’s allegation that he was supposed to work at the REC as a license evaluator. His EER comments show that he was placed in the [REDACTED] instead. However, the applicant’s reassignment to a different billet than the one he sought was presumably based on the needs of the Service<sup>8</sup>—specifically, [REDACTED]—and would not constitute an injustice against him unless (a) the billet was one in which he could not possibly succeed; or (b) his rating

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<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).

<sup>6</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992) (holding that a performance evaluation should only be removed if adversely affected by (a) a “misstatement of significant hard fact,” (b) a “clear and prejudicial violation of a statute or regulation,” or (c) factors that “had no business being in the rating process”); *see also Hary v. United States*, 618 F.2d 704, 708 Cl. 1980); CGBCMR Dkt. No. 86-96.

<sup>7</sup> *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (holding that “[o]f ‘paramount importance’ to any exhaustion inquiry is congressional intent”) (citing *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)).

<sup>8</sup> The Board notes that the applicant alleged that his reassignment was the result of an improper deal between LCDR G at the REC and LCDR M in the Waterways Division. He did not submit any evidence to prove this allegation, but even if he did prove this allegation, the reason for the applicant’s reassignment would not, in and of itself, affect the validity of his EERs.

chain unreasonably failed to modify his assigned duties or its expectations of his performance if the billet actually required expertise that he did not have and could not acquire on the job.

7. The applicant alleged that the billet to which he was assigned in the [REDACTED] required expertise that he did not have and could not learn on the job. He likened his situation to a yeoman being required to repair an engine. Mr. H of CGPC stated that the applicant was not qualified for the billet in the [REDACTED]. The record does not contain, however, the designation of this billet. Whether the billet in the [REDACTED] was originally designated a PS1 billet, a BM1 billet, a generic “general petty officer” billet, or something else is not apparent in the record. Although Mr. H stated that he remembers that the applicant was not qualified for the billet, the Board cannot conclude that it was impossible for him to succeed given the work he was assigned. The EER comments show that his rating chain expected him to gain some knowledge of [REDACTED] work during his assignment and to become somewhat proficient at the work, but that he showed no interest in doing so. Absent evidence to the contrary, his rating chain’s expectations that he would learn “on the job” and their assessment of his attitude and efforts to do so are presumptively correct.<sup>9</sup>

8. The applicant alleged that when he began to work in the [REDACTED] in June 2003, LCDR M acknowledged that the applicant did not have the proper expertise for the billet but promised to “work things out” for him—presumably by assigning him only work that comported with his skills or by lowering their expectations of his performance in the billet. The applicant has not proved this allegation, but assuming *arguendo* that the billet was not a PS1 billet or a general petty officer billet and that it required specialized training unavailable to the applicant, some such accommodation would have been necessary and fair.

9. The applicant alleged that his EERs prove that his supervisor during the first evaluation period, LT P, fairly accommodated or accounted for his lack of appropriate expertise, as shown by the many “average” marks of 4 on his November 2003 EER, but that ENS G, who supervised his work in 2004, refused to take his lack of appropriate skills into account and unfairly assigned him poor marks for being unable to perform work he did not have the expertise to do. However, the applicant submitted no evidence to support his allegation that ENS G’s tasking and expectations were unreasonable given his prior background and several months of work in the [REDACTED]. For example, he alleged that she unreasonably expected him to be able to read a [REDACTED] but he did not prove that her expectation was unreasonable since he had been assigned to the division for several months. As stated above, the Board’s rules accord ENS G a presumption of regularity—a presumption that she acted correctly, lawfully, and in good faith in supervising and evaluating the applicant—and the applicant has submitted no evidence, such as corroborative statements from colleagues in the division who were aware of his work; from LT P, his first supervisor; or from his predecessor or successor in the billet, to support his contention that her expectations, tasking, and evaluation were unreasonable and unfair given his PS1 skills and prior months working in the [REDACTED].

10. The Board notes that many of the criticisms in the EER marks concern an alleged “apathetic attitude” toward gaining proficiency in [REDACTED] work on the part of the applicant. He denied having this attitude when working for ENS G but failed to submit statements corroborating his allegation. Indeed, all of the applicant’s allegations of error with respect to the

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<sup>9</sup> 33 C.F.R. § 52.24(b).

numerical marks in the May 2004 EER and supporting remarks suffer from a lack of corroborative evidence. Moreover, the record indicates that the applicant was formally counseled about unsatisfactory performance on April 28, 2004, and he admits that he knew his supervisor was quite dissatisfied with his work. He further admitted that he was not too concerned about her opinion of his performance because he would not be eligible for advancement regardless of how she marked him and he did not realize that poor marks might affect his eligibility for future ADSW and EAD. In light of his admissions and the Page 7 dated April 28, 2004, there is no basis in the record for finding that the EER marks were an unfair surprise.

11. The applicant argued that his 2004 EERs should be expunged because he was not presented the May 2004 EER counseling sheet for signature until November 22, 2004, contrary to the requirements of Article 10.B.5.a.3. the Personnel Manual. The Board has held in another case, BCMR Docket No. 2004-041, that “lateness, *per se*, is insufficient to justify removal of an otherwise valid EER, especially when that lateness has caused no harm to the member.” Under Article 10.B.4.c.5.f. of the Personnel Manual, by the time a member is counseled on his EER marks, the evaluation period has ended and the marks have already been approved by the Approving Official. Once an evaluation period has ended, the only way a member can affect his EER marks is by appealing them under Article 10.B.9. Therefore, the extremely late date of the applicant’s May 2004 EER counseling could not possibly have affected the marks in the May 2004 EER itself. The applicant did not exercise his right to appeal the marks in November 2004.

12. Although the applicant alleged that the lateness of his EER counseling proves that LCDR M knew that the marks were erroneous and unfair, the Board is not persuaded that the lack of timely EER counseling was not simply a matter of administrative oversight since LCDR M did counsel the applicant about his placement on performance probation based in part on the poor EER marks on July 2, 2004. In addition, the Board notes that under Article 10.B.4.c.3. of the Personnel Manual, it was ENS G’s responsibility to show the applicant his EER marks and comments and to have him sign them in June 2004. Apparently, she prepared the EER and the memorandum to place him on performance probation but did not have him sign the EER. The Board is not persuaded that her failure in this regard proves that she knew the marks to be erroneous or unfair.

13. The applicant signed the May 2004 EER supporting comments page to acknowledge counseling on November 22, 2004, just eight days before the end of the evaluation period on November 30, 2004. Article 10.B.4.c.3.f. of the Personnel Manual states that “[t]he importance of how effective [EER counseling] can be in setting the evaluatee up for future success cannot be over emphasized. How well the supervisor clearly communicates the member’s past performance and methods in which to improve are primary to ensuring future success.” Therefore, the lack of a timely signed counseling page for the May 2004 EER is significant evidence that the applicant might not have been given the information he needed to improve his performance in time to earn a good EER on November 30, 2004—specifically, knowledge of his deficiencies (as perceived by the rating chain) and of what he should do to improve. As the Coast Guard pointed out, however, the applicant was formally counseled about his deficiencies verbally and in writing on April 28, 2004, and July 2, 2004. The July 2, 2004, memorandum cited verbal counseling sessions as well as the April 28<sup>th</sup> Page 7 and the May 2004 EER marks. Although the applicant argued that he had no way of knowing that an EER had been prepared, as a PS1 with more than thirty years of experience and more than twenty years as an E-6, he was presumably expecting to receive regular EER marks for the period ending May 30, 2004. Moreover, if he did not expect

them, the July 2, 2004, memorandum put him on notice that they had been prepared. As administrative oversights sometimes occur, Article 10.B.4.b.6. of the Personnel Manual advises members to verify through CGHRMS that EERs have been entered in their records. In light of the above, the Board finds that the applicant has not proved by a preponderance of the evidence that the extreme lateness of his official marks counseling for his May 2004 EER denied him timely knowledge of his performance deficiencies (as perceived by his rating chain) or of what he needed to do to improve his performance so that his November 2004 marks could be better. Therefore, he has not proved that his November 2004 EER marks were adversely affected by this rating chain's violation of the 21-day rule under Article 10.B.4.a.4. of the Personnel Manual with regard to his May 2004 marks.

14. The applicant alleged that the 2004 marks should be expunged because he was coerced into not appealing them. He alleged that he was threatened with charges under the UCMJ and advised that no charges would be laid if he dropped his EER appeals and requested early termination of his EAD contract. There is no evidence in the record to support these allegations except for the fact that the applicant's contract was in fact terminated early. However, even assuming *arguendo* that such a bargain was struck between CDR F and the applicant, the forgone opportunity to appeal the EER marks would not justify their expungement unless the applicant also proved that his appeals would likely have succeeded. The applicant alleged that his EER appeals would have succeeded because they would have exposed alleged wrongdoing by members of his rating chain or their friends, but the Board is not persuaded the appeal authority would have found the EERs to be erroneous or unjust simply because the applicant was assigned to the [REDACTED], for which he had little experience or skills, instead of the REC.

15. The applicant has made numerous allegations of improper actions, attitudes, and motivations on the part of various officers involved in his assignment to the [REDACTED] EER preparation, and contract termination. Those allegations not specifically addressed above are considered to be not dispositive of the case.

16. The applicant has submitted insufficient evidence to support his allegations that his 2004 EER marks are erroneous or unjust. He has not overcome the presumption of regularity or proved by a preponderance of the evidence that the EERs were adversely affected by a significant factual error, a prejudicial violation of a statute or regulation, or some improper factor, such as illegal discrimination. In light of the absence of significant corroborative evidence, such as statements from other members who might have witnessed his attitude, efforts, and performance in the [REDACTED], it appears that the applicant failed to understand that he must support his claims with corroborative evidence. It is possible, for example, that the applicant could produce evidence that the [REDACTED] billet required so much expertise that he could not be expected to learn the work and succeed there and that ENS G nevertheless regularly assigned him tasks that required him to demonstrate expertise that he could not have been expected to have or to learn during his first several months on the job.

17. Accordingly, the Board finds that the applicant's request should be denied but that if within 180 days of the date of this decision he submits evidence or information that, in the Chair's estimation, could result in a different outcome of this case, the Chair will docket the case for further consideration.

## ORDER

The application of PS1 [REDACTED], USCGR, for correction of his military record is denied. However, if within 180 days of the date of this decision he submits evidence or information that, in the Chair's estimation, could result in a different outcome of this case, the Chair shall docket the case for further consideration.

