DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-082

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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 after receiving the applicant's completed application on February 4, 2009, 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 September 24, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, who was a [redacted] when he filed his application,[1] asked the Board to correct his record by correcting or removing his semi-annual enlisted employee review (EER) for the period ending September 30, 2007, which was completed on December 5, 2007, and a negative Page 7 (administrative counseling form CG-3307)[2] dated October 1, 2007. The disputed Page 7, which is signed by the applicant and by two lieutenants—LT O and LT R—from his Coast Guard and Navy chains of command, respectively, states the following:

> 01 OCT 07 You are being counseled concerning your responsibility to keep both chains of command informed of your foreign travel and cautioned against attempting to undermine the authority of the two commands of which you are a part.
>
> In December 2006 you were permitted to go TAD [temporary additional duty] to [redacted] for [redacted] training despite not meeting the previous verbal pre-requisite given by xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx of being qualified in your main

[1] The Coast Guard's Direct Access database indicates that the applicant recently left the [redacted] rating to attend "A" School to transfer to the [redacted]

[2] A Page 7 (form CG-3307, "Administrative Remarks") may be used to document counseling provided to a service-member or any other positive or negative noteworthy event that may occur during a member's military career. HRSICINST M1000.2A, Encl. (6).

> duty station at the (XXX or Navy command). You led your CG command to believe that the XXX was in favor of your TAD and vice versa. Following your training, you were told that going back to for training or similar professional development that was clearly more personal in nature would not be considered as it was not particularly beneficial for the Navy command [to which] you are assigned nor the Coast Guard.
>
> You were verbally counseled that before you would be authorized TAD orders you were to meet two pre-requisites. First, check with the XXX to see if there was any additional training that you could complete to help with your imagery analysis skills. Second, ensure the TAD would further your professional development as a No administrative action nor adverse marks were entered amongst this confusion in an attempt to give you the benefit of the doubt.
>
> Despite this, you submitted a foreign travel request form stating your intentions to go TAD to for training in June 2007. Furthermore, you submitted this request to CG-221 without routing it through your command at xxxxxxx [XXXX], disregarding every prerequisite required of you by this office and that of your tenant command at the XXX.
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> You are reminded that when seeking to visit a foreign country on leave you must seek advance permission from your Coast Guard chain of command in accordance with Personnel Manual, COMDTINST M1000.6A, Article 7.A. When you asked the XXX about your foreign travel you were told to go through the CG because the CG held your security clearance. You submitted a foreign travel intent form to CG-221 in June but failed to inform your command at HQ that you would be departing on leave to a foreign country until 4 days prior to your scheduled departure. Such late notice is not in keeping with seeking advance permission as required by COMDTINST M1000.6A, Article 16.J.1.a. or appropriately using your chain of command.
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> Your actions undermined the authority of both commands and showed a lack of responsible decision making. You failed to act in the manner of an experienced third class petty officer. This is the first formal step being taken by this command to document, and more importantly, correct any further indiscretion on your part.

The disputed EER contains numerical marks on a scale of 1 (worst) to 7 (best) in twenty-five performance categories, including one “excellent” mark of 6, nine “above average” marks of 5, fourteen “average” marks of 4, and one “below standard” mark of 3 for the performance category “Integrity.” The EER also contains a conduct mark of “satisfactory” and an advancement mark of “not recommended for advancement.” The only name that appears on the EER is that of the Approving Official, who was the Commanding Officer of the XXXX. The mark of 3 for “Integrity” is supported by the following written comment:

> During the marking period, [the applicant] took advantage of his unique position as the sole CG representative to a Navy command by attempting to undermine the authority of both commands. [He] attempted to undermine the authority of both commands by requesting permissive TAD orders to from his Navy command and another CG Headquarters office despite specifically being told by his parent CG Headquarters command that he was not to go TAD to foreign country or station unless he could demonstrate a need for such training by the Navy or CG. Not only did [he] fail to meet prerequisites for approval of general TAD training, but he still attempted to gain authority to go TAD to a foreign country to do training when he completed a Notification of Foreign Travel form in July of 2007. [The applicant] did this without informing his parent CG Headquarters command of such a request. [He] abused the previous benefit of the doubt he had been given when he had been allowed to go TAD to for similar training, which was more of a personal benefit, in January 07 and caused both commands to question his integrity.

The mark of "not recommended for advancement" on the EER was supported by the following written comment:

> [The applicant] is not recommended for advancement as a result of his failure to display the integrity and honesty that is expected of a second class petty officer. [Comments for mark of 3 for "Integrity" included here.] Additionally, [the applicant] must do a better job at representing the CG as part of a willing partnership at this unique joint Navy, NOAA, and CG command. [He] has given the impression that he does not want to be part of the command at the XXX and this has reflected poorly upon the CG. [He] must display the integrity that is expected of a third class petty officer by not misinforming various commands for personal gain and become a willing participant at the XXX command to earn a recommendation for advancement.

APPLICANT'S ALLEGATIONS

The applicant alleged that during the evaluation period, he was officially assigned to the XXXX within Inspections and Compliance Directorate at Coast Guard Headquarters. However, his Commanding Officer was a Rear Admiral within the Headquarters Support Command, and the policies and procedures of the Support Command differed from those of the Directorate. Moreover, he was not assigned to work in the XXXX offices but at the xxxxxx, under the command of a Navy captain. Therefore, he alleged, the Navy prepared his EERs but never did so properly.

The applicant alleged that his work required him to have access to secret and top secret computer systems, and access to those systems is administered by the Coast Guard's Intelligence Coordination Center (ICC), which is located across the street from the XXX. His primary duty at the XXX was to provide reconnaissance support to the Coast Guard's xxxxxxxxxxxxxxxxxxxx xxxxxxxx). However, the XXX's systems could not support the top secret imagery required.

The applicant alleged that he was not informed that he worked for the Navy until almost 18 months after he began working at the XXX. The applicant's Coast Guard successor had told him that he worked for the XXX and was accountable to them and could disregard many of the Navy's directives since they were in conflict with those of the XXX. However, he received numerous directives from the XXXX stating that the Navy was his primary chain of command. Yet the Navy's "authority varied arbitrarily depending on where tasking was coming from at different times throughout the year."

Regarding the disputed Page 7, the applicant stated his job at the XXX had certain prerequisite qualifications and that he had completed all except that he "lacked the essential experience." The prerequisites were set by the XXX, not by the Coast Guard, and were ultimately waived since he lacked only experience. He alleged that "this requirement was not looked upon seriously as I was of the impression that all XXX tasking superseded any deadlines placed on me by the Navy."

The applicant alleged that whereas the Page 7 states that the XXX command was told that the Coast Guard would not support the training unless the Navy supported it, in fact it was the Navy who told the Coast Guard that the Navy would not support the training unless the Coast Guard was in support of it. Moreover, the applicant alleged,

> [b]oth chains of command were thoroughly informed of my intentions to further my ███ training as this is the main reason I joined the Coast Guard. The assignment to the position at the XXX was advertised as a ███ assignment and requires ███ training for a period of nine (9) months with the Air Force. However, none of the skills attained are used at the XXX. The Coast guard advertised a ███ career field and continued to advertise the position as a ███ job. However, neither was found to be true. Both chains of command were informed of my intentions to make every effort to maintain ███ skills as it was my primary career goal and the reason for staying on active duty. The training completed with the Air Force is far superior than that conducted by the Navy.
>
> At no time was I informed that further requests would not be considered but was told that it was not likely to get approved. I was told by the Coast Guard chain of command that the Navy chain of command would have to support the training in order to be considered. I continued to press for the training as my skills in ███ were rapidly deteriorating.

Regarding paragraph 3 of the Page 7, the applicant alleged that although he was told that additional training should be for his career development as an ███, it would have been "counter productive for an ███ working in ███ to attempt working in ███ qualifications, as the career goals of the member were purely ███ related as the rating name misleads one to believe. To expect a person to complete 9 months of extensive training only to not be able to develop the skills acquired is preposterous."

Regarding paragraph 4 of the Page 7, the applicant admitted that "no request for official foreign travel was submitted to either chain of command. A Notification of Foreign Travel was submitted to the Special Security Office (CG-221) stating official business which was later corrected and withdrawn after discussion with the XXX OPS boss, LT [R], ruled out any opportunity for this training." The applicant stated that the Notification of Foreign Travel form is not a request for travel authorization and is supposed to be submitted directly to CG-221. Only leave requests and requests for temporary active duty (TAD) must go through the Headquarters administrative staff, and a memorandum documenting the foreign destination must go to the CO for approval. The applicant alleged that neither the Navy nor the Coast Guard provided any prerequisites and the system is confusing. He stated that on the four previous occasions when he has traveled abroad, different procedures were used each time due to inconsistent directives from the various chains of command and turnover on the administrative staff.

Regarding paragraph 5 of the Page 7, the applicant alleged that his Coast Guard XXXX supervisor, LT O, informed him that the Coast Guard needed notification of his leave only to ensure that it was accounted for in his leave balance. He stated that the regulations cited in the Page 7 "were not clearly applied as uniqueness of the position required many different procedures to be followed. These remained inconsistent, ambiguous, arbitrary." The applicant alleged that he worked through the ICC because they had all the proper forms, were familiar with the procedures, and needed to be informed of his travel because they held his system access.

Regarding paragraph 6 of the Page 7, the applicant alleged that he "showed extensive thoroughness and responsibility by making sure that all things were taken care of with regard to foreign travel to the best of my ability. The lack of responsibility comes on the administration of the position that the member is in and the numerous shortfalls and endless counts of neglect of all commands involved. As a lone third class petty officer on independent duty with a high level of responsibility and little guidance or support accompanied by minimal access to adequate

resources and no senior enlisted guidance from the Coast Guard, I was able to successfully execute the responsibilities."

Regarding the disputed EER, the applicant alleged that he was not notified of the EER until two and one-half months after the end of the evaluation period. During that period, he futilely took a servicewide examination for advancement. The applicant alleged that the EER should be corrected or expunged because it is based on the erroneous and unjust comments in the Page 7.

In support of his allegations, the applicant submitted a statement from a civilian contractor at the ███, who wrote that the applicant "informed me of his foreign travel approximately mid July of 2007 as is required for ample processing time and completion of necessary security briefs associated with the countries visited. [He] then cancelled the official business portion of his foreign travel [but] allowed the leave portion of the travel to remain. The cancelled leave request was received in my office approximately 29 August 2007."

The applicant also submitted a statement from a first class petty officer at the XXX, who wrote that the applicant "had executed orders that were approved in error when he was first authorized to complete training on temporary duty in ███████. As his supervisor, I did not participate in the evaluation process that was conducted during the marking period being questioned. Nor was I consulted with regard to the [Page 7] he is appealing. I understand this to be counter to Coast Guard Commandant Instruction, however could not be prevented due to the uniqueness of his position."

VIEWS OF THE COAST GUARD

On July 1, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC recommended that the applicant's request be denied. The PSC noted that the applicant did not attempt to appeal the disputed EER, in accordance with Article 10.B.9. of the Personnel Manual, or seek administrative redress for the Page 7. The PSC stated that following an incident in December 2006, the applicant was verbally counseled about his chain of command and, in particular, the appropriate chain of command and requirements for requesting TAD orders. The disputed Page 7 was prepared in response to a subsequent similar incident in June 2007.

The PSC stated that the Page 7 shows that the applicant failed to keep his Coast Guard chain of command informed and to "vet his travel through both his prescribed chains of command." The PSC noted that the Page 7 was signed by both his Coast Guard and Navy supervisors, and that the applicant has not submitted any document that rebuts the information therein. The PSC stated that the Navy first class petty officer who submitted a statement for the applicant was "his former USN supervisor."

The PSC noted that the applicant's own statement acknowledged his need to vet his travel through his chain of command and also made "it clear that he was determined to obtain [redacted] training" and that he was dissatisfied with the nature of his duties at the XXX.

Regarding the EER, the PSC stated that it does not deviate significantly from his prior and subsequent EERs. The PSC submitted a print-out of all his EER marks since May 2002 showing that, except for the mark of 3 for "Integrity" and the recommendation against advancement, the marks in the disputed EER are similar to those the applicant has received in other EERs. The PSC alleged that the mark of 3 was substantiated by the supporting comments and that the EER "was properly executed by the applicant's Coast Guard chain of command."

Regarding the timing of the EER, the PSC stated that although the chain of command did not meet the deadlines prescribed under the Personnel Manual for preparing an EER, the applicant has "failed to demonstrate an injustice or compounded error resulting from this delay in counseling." The PSC concluded that the applicant "has not established any error or injustice with regards to the [Page 7] or the EER."

RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 13, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. No response was received.

APPLICABLE REGULATIONS

Article 10.B.1.b. of the Personnel Manual in effect in 2007 states that "[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely enlisted employee reviews."

Figure 10.B.3.1. shows that for enlisted members assigned to Headquarters units, the rating chain shall consist of a Supervisor designated by the Division Chief, who initially assigns all of the marks on the EER; the Division Chief as the Marking Official, who reviews all of the marks; and an Approving Official, who is the Commanding Officer and who approves the EER before it is entered in the Coast Guard's database. In addition, enlisted members may appeal their EER marks (except for the advancement recommendation) up to the Assistant Commandant over their division.

Article 10.B.4.c.3. states that a Supervisor "[g]athers all written and oral reports on the evaluee's performance [and] [a]scertains the status of the evaluee's performance qualifications for next higher pay grade" before completing an EER with supporting comments and forwarding it to the Marking Official no later than nine days before the end of the evaluation period.

Article 10.B.4.c.4. states that a Marking Official "[g]athers all written and oral reports on the evaluee's performance"; reviews the EER; and "has the authority to return the employee review to the Supervisor for further justification or support for any marks." The Marking Official 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.g. states that an Approving Official "[g]athers all written and oral reports on the evaluee's performance"; ensures that the marks are consistent with performance; "has the authority to return the employee review to the Supervisor for further justification or support for any marks"; and forwards a completed EER to the Supervisor to counsel the member so that the process is completed and the EER is entered in the database within thirty days of the end of the evaluation period.

Under Articles 10.B.2.a.1. and 10.B.6.b.1., any numerical mark of 1, 2, or 7, an unsatisfactory conduct mark, or a recommendation against advancement must be supported by a written comment. Article 10.B.7.1. states that when making an advancement recommendation, the evaluators should consider not only past performance but also "the member's potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, and adherence to the Service's core values."

Article 10.B.9.b states that before appealing an EER, a member "should request an audience with the rating chain to verbally express any concerns that could lead to a written appeal." If the member is unsatisfied with the rating chain's response, the member may submit a written appeal of the EER through his CO to the Appeal Authority within 15 days of receiving counseling on the EER or with an explanation of why the 15-day deadline was not met. However, Article 10.B.9.a.3. states that "[t]he recommendation for advancement portion on the employee review may not be appealed."

Article 14.B.2.a. states that a member may seek correction of an entry in his military record through his chain of command. As an example, the article states that for "a member who receives an Administrative Remarks, CG-3307 from his or her division chief documenting purported substandard watchstanding, an appeal through the division chief and the executive officer to the commanding officer should suffice. (This appeal may be in the form of a so-called 'Request Mast' pursuant to Article 9-2-3, Coast Guard Regulations, COMDTINST M5000.3 (series).)" Article 14.B.3. provides the regulations of the Personnel Records Review Board (PRRB), which has authority to correct members' records during the year after their entry.

Article 4.G. contains regulations concerning TAD travel orders. Article 7.A.2.h. states that Article 16.J. applies to members' requests to travel to foreign countries while on personal leave. Article 16.J.1.a.1. states that "[e]xcept as provided below, personnel desiring to visit foreign countries must obtain advance permission."

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

2. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued. Although the applicant apparently did not appeal the EER marks; pursue a request mast about the Page 7; or challenge either document through the PRRB, the applicant's failure to exhaust these potential administrative remedies in 2007 does not negate the Board's mandate under 10 U.S.C. § 1552 to remove errors and injustices found upon the application of a member within three years of their discovery. However, an applicant's failure to pursue administrative remedies is evidence that the Board may consider in deciding whether disputed records are erroneous.

3. 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]

4. The applicant alleged that his EER for the evaluation period ending September 30, 2007, and the Page 7 dated October 1, 2007, are erroneous and unjust. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is fair and accurate, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[4] Absent evidence to the contrary, the Board presumes that military officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[5]

5. The applicant has not overcome the presumption of regularity with respect to any part of the Page 7 dated October 1, 2007. The Page 7 is signed by superior officers from both his Coast Guard and Navy chains of command at the XXXX and the XXX, respectively. The fact that a civilian contractor at the ICC received notification of the applicant's intent to travel overseas in ample time to process the notification and provide the required security briefing to the applicant does not refute any of the comments in the Page 7. The applicant also submitted a statement from a Navy first class petty officer who stated that he had supervised the applicant at the XXX and was present at least during the first, December 2006 incident mentioned in the Page 7, for which the applicant was given the benefit of the doubt. This petty officer claimed that he was not consulted with regard to the Page 7. However, he did not deny the accuracy of any comment in the Page 7, and the Board knows of no rule requiring the chains of command to consult him when preparing the Page 7.

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[3] *See Steen v. United States,* No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

[4] 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

[5] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

6. The applicant argued that having two chains of command with separate procedures was so confusing that he should not be faulted for failing to follow procedures regarding requests for training and travel. However, the Page 7 states that in December 2006 the applicant led the Coast Guard chain of command to believe that his Navy chain of command wanted him to get additional [redacted] training in [redacted] and led the Navy chain of command to believe that the Coast Guard chain of command wanted him to get the training, when in fact the training was not necessary for his assigned duties and was simply training he desired. Therefore, the applicant clearly knew that to receive TAD training orders, both his Navy and Coast Guard chains of command should be consulted. In addition, the Page 7 states that he had been warned that permission to attend any future training would have to be based on the needs of the Services—i.e., his progress as an [redacted] and his work at the XXX—not on his career aspiration to become a [redacted]. Yet within a few months, the Page 7 indicates, he attempted to bypass his Coast Guard chain of command by submitting a foreign travel form required to attend more [redacted] training in [redacted] directly to CG-221 without submitting a request for authorization to attend the training to his Coast Guard chain of command. The applicant has not proved that having a chain of command within XXXX while working at the XXX was so confusing that a petty officer who had recently been counseled on the matter and who had more than five years of experience would be unaware of the fact that he needed to seek permission from his Coast Guard chain of command if he wanted to attend training overseas. The Board concludes that the applicant has not proved by a preponderance of the evidence that the Page 7 dated October 1, 2007, is erroneous or unfair.

7. The applicant alleged that his EER dated September 30, 2007, is erroneous and unjust because (a) it is based on the erroneous Page 7; (b) he had two chains of command with conflicting authorities and priorities and was confused about to whom he was accountable; and (c) the EER was prepared late. The Board will address these arguments in order:

(a) As stated in findings 5 and 6, above, the applicant has not proved by a preponderance of the evidence that the disputed Page 7 was erroneous or unjust. Therefore, the applicant has not proved that the low mark of 3 for "Integrity" and recommendation against advancement in the EER are based on erroneous information.

(b) As stated in finding 6, above, the Board is not persuaded that the applicant was so confused by having both a Navy and Coast Guard chain of command that he was unaware that he needed authorization from his Coast Guard chain of command, which administered his billet, pay, and leave and provided his rating chain, to attend training overseas. The applicant did not name the members or titles of his rating chain or submit anything to show that his rating chain was other than that published in Figure 10.B.3.1. of the Personnel Manual, and the correct Approving Official cited in that figure—the CO of the XXXX—is named on the disputed EER. Moreover, under Article 10.B.4.c. of the Personnel Manual, the rating chain members could rely on reports from the XXX and the XXX in preparing the marks and comments in the EER. The fact that the Navy first class petty officer was not personally asked for EER input in the fall of 2007 does not prove that the rating chain did not receive reliable and accurate information about the applicant's performance from the XXX chain of command. In addition, the Board notes that the petty officer did not dispute the accuracy of the comments in the Page 7 or the EER. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that he was evaluated by an invalid rating chain or that having a rating chain distinct from his

XXX chain of command was so confusing that he was prejudiced in the performance of his duties.

(c) The applicant argued that the EER is erroneous and unjust because he was not counseled about it until more than two months after the end of the evaluation period. Under Article 10.B.4.c.5.g. of the Personnel Manual, an EER must be completed and the member counseled about it within thirty days of the end of the evaluation period. Since the evaluation period ended on September 30, 2007, the applicant should have been counseled about the EER by the end of October, but the disputed EER he submitted is dated December 5, 2007, and he stated that he was not counseled until December. Therefore, the preponderance of the evidence shows that the applicant's rating chain failed to comply with the deadlines provided in the Personnel Manual for preparing and submitting EERs. However, the Board has long held that delay *per se* is insufficient to justify removal of an otherwise valid and accurate evaluation from a member's record.[6] The applicant has not shown how he was harmed by the rating chain's approximately six-week delay in completing and counseling him about the EER. While he apparently took the service-wide examination for advancement during that period, the Board is not persuaded that he was harmed merely by taking the test. Because the applicant has not submitted any evidence to show how the delay of his EER counseling harmed him, the Board finds that the rating chain's failure to comply with the deadlines under Article 10.B.4.c.5.g. constituted a harmless administrative error.[7]

8. The applicant has failed to prove by a preponderance of the evidence that his Page 7 dated October 1, 2007, and his EER for the evaluation period ending September 30, 2007, are either erroneous or unjust.[8]

9. Accordingly, the applicant's requests should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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[6] *See, e.g.*, BCMR Docket Nos. 2008-076, 2005-053, 2004-041, 2003-110, 2002-015, 57-96.

[7] *See* FED. R. CIV. P. 61 ("Harmless Error: … At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief"); *Quinton v. United States,* 64 Fed. Cl. 118, 125 (2005) (finding that harmlessness requires that there be "no substantial nexus or connection" between the proven error and the prejudicial record that the applicant wants the Board to remove or correct); *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (finding that an error in an officer's military record is harmless unless the error is "causally linked with" the record the officer wants corrected); *Hary v. United States*, 618 F.2d 704, 707-09 (Ct. Cl. 1980) (finding that the plaintiff had to show that the proven error "substantially affected the decision to separate him" because "harmless error … will not warrant judicial relief.").

[8] For the purposes of the BCMRs, "'[i]njustice', when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

ORDER

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