

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-194

██████████
██████████

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 July 28, 2012, and assigned it to staff member ██████████ to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 9, 2013, 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 xxxxxxxxxxxxxxxxxxxxxxxxxxxx, asked the Board to remove from his record his Enlisted Employee Evaluation (EER) dated January 10, 2012. The applicant stated that during a reorganization in January 2012, his position was moved to a new unit, and he researched the matter and advised his command that no EER was required. However, his command believed his information was incorrect and prepared the disputed EER. The command believed that an "unscheduled" EER was required because the identity of the applicant's EER Approving Official would be changing. The applicant alleged that no EER was required and pointed out that the rules for such EERs in ALCOAST 175/09 support his claim.

The applicant alleged that no EER was required because his position change pursuant to the reorganization was not an "intra-command reassignment" and his Approving Official, who was the commanding officer (CO) of his old unit, was not his direct supervisor and did not depart the applicant's unit. Moreover, if his command was correct, then EERs should have been prepared for all of the personnel whose positions were changing due to the reorganization, but they were not.

The applicant explained that he did not think that the disputed EER was correct or fair because the timing gave him only six months to improve his performance since his prior EER, when under the rules, he should have had twelve months. (He had not been recommended for

promotion on his EER dated June 30, 2011, and he was not recommended for promotion on the disputed EER.)

In support of his allegations, the applicant submitted a copy of ALCOAST 175/09 and an email conversation in which his prior CO directed him to submit input for the disputed EER. The CO noted in the email that ALCOAST 175/09 no longer applied because it had expired a year after it was issued in 2009 “as all ALCOASTs do.”¹

ALCOAST 175/09, issued on March 25, 2009, and canceled on March 24, 2010, states that because of widespread reorganization many members’ Approving Officials were changing even though their Supervisors and Marking Officials were not changing. Therefore, under the rules in the Personnel Manual, the reorganization would normally require “an excessive number of unscheduled EERs.” Therefore, the rules would be amended temporarily so that no EER would be required if one had been prepared within the past 184 days or if at least two of the old rating chain members were on the member’s new rating chain.

SUMMARY OF THE RECORD

The applicant’s record in the Direct Access database shows that on January 11, 2012, his position changed, although his position number stayed the same. Pursuant to the reorganization, his position moved from one command, a Base Support Unit, to another, the Base itself. The database shows that the change did not constitute a promotion or a permanent change of station. On the same date, the applicant’s prior unit CO, who had been his Approving Official, became the Executive Officer (XO) of the Base. The identity of the applicant’s Approving Official at the Base is not in the record.

The applicant’s EER dated June 30, 2011, contains several low marks and a non-recommendation for advancement. The disputed EER, dated January 12, 2011, is similar.

APPLICABLE REGULATIONS

Chapter 5.E.1. of COMDTINST M1000.2 provides that E-9s normally receive one annual EER at the end of June each year.

Chapter 5.E.2.a. states that a rating chain should “[c]omplete an unscheduled employee review if the rating chain completed a regular or unscheduled review for a period ending more than ... 184 days for E-7 and above employee reviews, ... before one of the events listed below.

- (1) Advancement or Change in Rating to Pay Grade E-7 or Above.
- (2) Detachment for Permanent Change of Station. ...
- (3) Change in Approving Official. Complete an unscheduled employee review as of the day prior to the change of the Approving Official when the following occur.

¹ COMDTINST M5215.6F states that ALCOASTs are “self-canceling after one year.”

- (a) Detachment for intra-command reassignments if the Approving Official will change, or
- (b) Detachment of an Approving Official who directly supervises an evaluatee.

Figure 5.C.1. in COMDTINST M1000.2 shows that the Approving Official for enlisted members assigned to Area or District units is the Commanding Officer, and the Base Commander serves as the Approving Official for enlisted members assigned to a Base. However, note 7 to Figure 5.C.1. states that “Commanders of sectors and bases ... have authority to assign division chiefs as Approving Official and branch chiefs as Marking Official for those members assigned to duty within their rating chain.”

VIEWS OF THE COAST GUARD

On February 8, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case.

The JAG stated that ALCOAST 175/09 was canceled a year after its issuance, but Chapter 5.E.1.a. of COMDTINST M1000.2, the Enlisted Accessions, Evaluations, and Advancements Manual provides the submission schedule for EERs and states that E-9s receive one annual EER each June unless one of the conditions for an “unscheduled EER” in Chapter 5.E.2.a. applies.

Regarding the criteria for an unscheduled EER, the JAG noted that 194 days had passed since the applicant’s prior EER, but alleged that none of the additional criteria listed under Chapter 5.E.2.a. applied. In this regard, the JAG stated that the applicant was not being promoted, he was not being detached on permanent change of station orders, and his Approving Official had not changed since his prior EER in June 2011. Therefore, the JAG concluded, “the applicant’s command did not have cause to do an unscheduled EER on 10 January 2012, and the default rule of an annual ‘regular’ EER should have been applied.”

The JAG urged the Board to correct the applicant’s record before the Career Retention Screening Panel (CRSP) meets on June 17, 2013.

The JAG also attached to his advisory opinion a memorandum on the case prepared by the Personnel Service Center (PSC). PSC recommended that the Board deny relief. PSC stated that the rules require preparation of an “unscheduled OER” “if there is a change in Approving Official for intra-command reassignments.” PSC did not actually state or submit evidence showing whether the applicant’s Approving Official changed in January 2012. However, PSC argued that “[r]egardless of whether ... the Applicant’s rating chain members changed, he completed an intra-command reassignment when BSU ... stood up,^[2] which was over 184 days since his last evaluation. Therefore, the January 2012 EER is valid.”

² PSC apparently misunderstood the nature of the reorganization. The applicant and his Approving Official, the CO, were assigned to the BSU before that unit was dissolved and their positions were integrated into the Base command on January 11, 2012.

RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 20, 2013, the applicant responded to the views of the Coast Guard. He stated that he had no objection to the JAG's recommendation that relief be granted. He asked the Board to correct his record in time for it to be correct before the CRSP convenes in June 2013.

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 filed within three years of the date of the disputed EER.

2. The applicant alleged that his rating chain erroneously and unjustly entered a negative, unscheduled EER dated January 10, 2012, in his record when he should have had a year to improve his performance before his next regular EER on June 30, 2012. In considering allegations of error and injustice, 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.³ Absent evidence to the contrary, the Board presumes that military officials, such as the applicant's CO, and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁴

3. As a xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, the applicant normally received regular, annual OERs at the end of June each year.⁵ On June 30, 2011, he received a poor EER while assigned to a BSU. His Approving Official was the CO of the BSU. The record shows that more than 184 days later, his command structure was reorganized in that the BSU was disestablished and absorbed into the Base. The CO of the BSU became the XO of the Base on January 11, 2012. The CO initiated the disputed EER apparently believing that the reorganization involved changes that met the criteria for an "unscheduled" EER under Chapter 5.E.2.a. of COMDTINST M1000.2.

4. Most of the events that can trigger preparation of an unscheduled EER under Chapter 5.E.2.a. of COMDTINST M1000.2 clearly did not apply in January 2012: The applicant was not promoted; he did not receive PCS transfer orders; and the CO of the BSU, his Approving Official, was not also his direct supervisor. Therefore, under Chapter 5.E.2.a., the reorganization required preparation of an unscheduled EER dated January 10, 2012, only if it resulted in (a) an "intra-command reassignment" for the applicant and (b) a change in the identity of his Approving Official. The CO of the BSU initiated the disputed EER presumably because he thought that the applicant's position change pursuant to the reorganization constituted an "intra-command reassignment" with a change of Approving Official.

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ COMDTINST M1000.2, Chap. 5.E.1.

5. PSC alleged that the reorganization resulted in an “intra-command reassignment” for the applicant from the Base to the BSU (which is the opposite of what happened) and that this fact alone required preparation of an unscheduled EER, whether or not the applicant’s rating chain changed. PSC’s interpretation of Chapter 5.E.2.a. is clearly erroneous because an intra-command reassignment *per se* does not require an unscheduled EER unless the member’s Approving Official—the third member of the rating chain—changes. PSC did not reveal whether the identity of the applicant’s Approving Official changed on January 11, 2012. Moreover, whether the applicant’s change in position constituted an “intra-command reassignment” is debatable since his command—the BSU—was in essence being dissolved and absorbed into another command—the Base.

6. The JAG’s memorandum fails to provide the critical information as it incorrectly focuses on whether the Approving Official who signed the disputed EER was the same person who served as the applicant’s Approving Official on his prior EER dated June 30, 2011. It says nothing about whether the reorganization’s effect on the applicant’s position constituted an intra-command reassignment or whether the reorganization caused the identity of his Approving Official to change as of January 11, 2012.

7. The Coast Guard did not submit any information showing the composition of the applicant’s rating chain following the reorganization. Figure 5.C.1. of COMDTINST M1000.2 suggests that the applicant’s Approving Official may have changed because of the reorganization since his prior Approving Official became the XO of the Base, rather than the Base Commander, who normally serves as the Approving Official for enlisted members assigned to the Base. However, note 7 to Figure 5.C.1. states that a Base Commander may delegate his Approving Official duties. Whether the applicant’s Base Commander did so is unknown.

8. The applicant has raised a substantial question regarding the correctness of the unscheduled OER, and the Coast Guard has presented erroneous arguments and failed to cast light on the two critical criteria under Chapter 5.E.2.a.(3)(a): whether the reorganization on January 11, 2012, resulted in an “intra-command reassignment” for the applicant and changed the identity of his Approving Official. PSC argued that the unscheduled EER was required under Chapter 5.E.2.a. of COMDTINST M1000.2, but the JAG argued that the applicant’s “command did not have cause to do an unscheduled EER.” The JAG also urged the Board to grant relief before the CRSP convenes in June 2013 because the continued presence of the negative EER in the applicant’s record could affect the results of the CRSP. The Board notes that if the CRSP does not select the applicant for retention—i.e., if he is selected for involuntary retirement—he might lose career opportunities because of his pending retirement even if the Board were later to determine that the criteria for an unscheduled EER under Chapter 5.E.2.a.(3)(a) were not met, order removal of the EER, and reverse the results of the CRSP.

9. In light of the unusual circumstances of this case, the Board finds that the applicant has proved by a preponderance of the evidence that the continued presence of the disputed EER in his record constitutes an injustice, and it should be removed promptly.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [REDACTED] USCG, for correction of his military record is granted. The Coast Guard shall remove from his record and the Direct Access database his enlisted marks (EER) dated January 10, 2012.

