

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-113

FINAL DECISION

This proceeding was conducted according to 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 completed application on May 4, 2013, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 31, 2014, 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 asked the Board to correct a mark on his November 2007 Enlisted Employee Review (EER) from not recommended for advancement from E-6 to E-7 to recommended.¹ He explained that after he advanced from E-5 to E-6 on September 1, 2007, his command refused to recommend him for advancement to E-7 on his November 2007 EER even though the conduct that caused him not to be recommended had occurred while he was still an E-5 on August 27, 2007.

The applicant stated that in 2007 he was told that he was not being recommended for advancement because he had not met the eligibility requirements for the next advancement, but he recently learned that this was not a legitimate reason for the mark and that it could keep him from being advanced or selected for warrant officer or special programs. In support of these allegations, the applicant submitted the following documents:

- An Administrative Remarks (Page 7) entry that the applicant signed on September 2, 2007, documents formal counsel about his dereliction of duty on August 27, 2007, when

¹ Enlisted members are evaluated by a rating chain, which consists of a supervisor, who recommends evaluation marks; a marking official, who assigns the marks; and an approving official, who approves the EPEF. All three members of the rating chain also indicate on the EPEF whether they recommend the member for advancement to the next pay grade. A member cannot be advanced if his rating chain does not recommend it. Personnel Manual, Article 10.B.4.d.

he failed to report for duty when piped, and about a pattern of similar behavior on prior occasions. The applicant's qualification as an Inport Junior Officer of the Deck was revoked and he was directed to prove that he could be relied on to stand an effective watch and to requalify as JOOD by November 15, 2007.

- The narrative description for the mark of recommended for advancement on an EER states "The individual is fully capable of satisfactorily performing the duties and responsibilities of the next higher paygrade. Recommended may be chosen irrespective of the individual's qualification of eligibility for advancement. If all eligibility requirements have been met, the selection constitutes an official recommendation for advancement."
- Comments on the applicant's November 2007 EER state that he needed to "improve his leadership and JOOD skill set to prepare for positions of greater leadership and responsibility. [His] JOOD qualification was rescinded this marking period due to failing to show up at an Inport damage control drill due to his failure of executing the daily plan of the day and enforcing the Executive Officer's Morning Orders. [He] will have the opportunity during this next marking period as the sole division ET1 to hone his leadership skills and stand out as a premier JOOD. [He] is not recommended for CPO [advancement to E-7] this marking period.

VIEWS OF THE COAST GUARD

On August 2, 2013, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the applicant had lost his JOOD qualification during the reporting period, had been counseled about a pattern of poor leadership and responsibility, and was counseled in writing on his November 2007 EER that he needed to improve his leadership to prepare for positions of greater leadership and responsibility. PSC stated that it was correct for the applicant's command to consider both his past performance and potential to perform the duties and responsibilities of the next paygrade when deciding whether to recommend the applicant for advancement and so the Board should deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 9, 2013, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 10.B. of the Personnel Manual in effect in 2007 governed the evaluation of enlisted members. Article 10.B.7.1. provides that a rating chain's recommendation for advancement must consider both past performance and "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. Each rating chain member must address this independent section every time they complete an employee review." Article 10.B.7.3. states that if the Approving Official of an EPEF does not recommend the member for advancement, he or she "must ensure that the member is properly counseled on the steps necessary to earn a recommendation and prepare supporting remarks." Article 10.B.7.4. provides that the "Approving Official's decision on the advancement recommendation is final and may not be appealed."

Article 5.C.4.e.4. of the Personnel Manual provides the following:

The commanding officer's recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. A recommendation for advancement shall be based on the individual's qualities of leadership, personal integrity, adherence to core values, and his or her potential to perform in the next higher pay grade. Although minimum performance factors have been prescribed to maintain overall consistency for participation in the SWE, the commanding officer shall be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation.

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. Although the application was not filed within three years of the applicant's discovery of the non-recommendation for advancement in his November 2007 EER, it is considered timely because he has continued to serve on active duty since that time.²

2. The applicant asked the Board to correct his November 2007 EER to show that he was recommended for advancement and alleged that the non-recommendation is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, 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 Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁴

3. The record shows that the applicant was counseled in writing about a pattern of irresponsibility and lack of leadership during the reporting period for the November 2007 EER.

² *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

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).

Likewise, he was properly counseled in writing on the EER about why he was not being recommended for advancement. Therefore, the Board finds that his command's decision not to recommend him for advancement to E-7, even though he had been allowed to advance to E-6, was correct and fully justified in accordance with the guidelines for such decisions in Articles 5.C.4.e.4. and 10.B.7. of the Personnel Manual in effect at that time. The applicant has not proved by a preponderance of the evidence that the mark of not recommended for advancement on his November 2007 EER is erroneous or unjust.⁵

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

[ORDER AND SIGNATURES ON NEXT PAGE]

⁵ See *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is treatment by military authorities that "shocks the sense of justice").

ORDER

The application of [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

January 31, 2014

