

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-159



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. After receiving the completed application on July 17, 2015, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 10, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

THE APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a master chief [REDACTED] (E-9) in the Reserve, asked the Board to remove from his record an Enlisted Employee Report (EER) covering his service from December 1, 2011, to August 3, 2012, when he was transferred from his billet in the Selected Reserve.¹ He alleged that this disputed transfer EER was entered in his record about 18 months late and that it replaced his original annual EER dated November 30, 2012. He alleged that the transfer EER was prepared after he had transferred from the unit, [REDACTED], and without the approval of the Approving Official² who signed his annual, November 30, 2012, EER. This Approving Officer was the Office in Charge (OIC) of the Station. He alleged that the Sector Commander, who signed the transfer EER as the Approving Official, "did not have additional information that applied to the particular marking period" and that the transfer EER was not submitted in accordance with COMDTINST M1000.2, the Enlisted Accessions, Evaluations, and Advancements Manual (hereinafter, "Enlisted Manual"). The applicant alleged that when his annual, November 30, 2012, EER was issued, the rating officials who signed that EER "were well aware of all of the information applicable to the marking period in question." He alleged

¹ Enlisted reservists normally receive annual EERs but may receive "unscheduled" EERs on other occasions, including when transferred from one unit to another. Art. 5.E.3.a., COMDTINST M1000.2, the Enlisted Accessions, Evaluations, and Advancements Manual (hereinafter, "Enlisted Manual").

² Under Article 5.D.3. of the Enlisted Manual, each enlisted member is evaluated by a "rating chain" consisting of a Supervisor, who recommends the marks; a Marking Official, who assigns the marks; and an Approving Official, which approves the marks.

that the transfer EER, dated August 3, 2012, but prepared more than a year later, is erroneous, unjust, and prejudicial.

SUMMARY OF THE RECORD

On January 16, 1998, the applicant enlisted in the Coast Guard Reserve in pay grade E-4 and began drilling regularly in the Selected Reserve. He received very good EERs and, after advancing to chief [REDACTED] he was assigned to serve as the Senior Enlisted Reserve Advisor (SERA) at [REDACTED] beginning in July 2010. While assigned to [REDACTED], he received high marks of 5, 6, and 7 (on a scale of 1 to 7), on his annual EER dated November 30, 2011, and he advanced to senior chief [REDACTED]

On August 3, 2012, the applicant was transferred from [REDACTED] to another Reserve position at the Sector office. The reasons for this transfer were explained on a negative CG-3307 ("Page 7"), dated August 3, 2012, which the Sector Commander signed and entered in the applicant's record. The Page 7 states the following:

1. As a result of an Administrative Investigation, I have determined that your negative behavior while serving as the Senior Enlisted Reserve Advisor (SERA) created an unprofessional work environment at CG Station Despite efforts made by members of Sector ... and the leadership of [REDACTED] to set, monitor, and professionally convey performance expectations and resolve conflict, your behavior hindered the Station's ability to effectively lead and train its workforce.
2. Effective the date of this document, you are hereby removed as the [REDACTED] SERA. As a result of this administrative action, you will not receive any endorsement for a future SERA position. You are being offered a temporary position at [the Sector office] to allow you to drill while you are competing for a permanent position during Assignment Year 2013 (AY13). If you choose not to accept the position, you will be required to submit a Change in Reserve Component Category (RCC) form (CG-1001) to transfer [from the Selected Reserve] to the Individual Ready Reserve (IRR). You may still compete for a permanent assignment during AY13.
3. Additionally, you are reminded that you do not have the authority to obtain statements from members unless assigned by the command as an investigating officer. These actions alone undermined the authority of the command. Your wanting to initiate a CG-4910 [offense charge form] and investigation upon being presented with a CG-3307, regarding the need to safeguard personally identifiable information, furthered the rift between the active and reserve leadership at [the station].

Although the applicant had been transferred to the Sector, the [REDACTED] OIC approved an EER for him dated November 30, 2012, and entered it in his record. The OIC assigned him fourteen above-standard marks of 5, ten excellent marks of 6, one superior mark of 7, a satisfactory conduct mark [REDACTED] commendation for advancement.

On January 13, 2014, the applicant submitted an appeal of an EER with marks assigned by the Sector Response Department Head and approved by the Sector Commander to document his transfer from the Station on August 3, 2012. The applicant stated that the marks were “not a fair representation of my performance in light of the toxic command climate that existed at the unit. The OIC was made aware of my performance during the period and had four months to question or investigate any outliers.” He stated that the annual, November 30, 2012, EER with high marks that the OIC prepared was “a fair assessment of my performance.” The applicant argued that his mark in Loyalty and Communication should be raised and that he should receive a satisfactory conduct mark. He alleged that the Sector Com [REDACTED]

only has the limited [REDACTED] data available on which to base his response to my appeal, which is primarily a CG-3307. The reassignment CG-3307 in question is not a complete picture of all of the circumstances that led to [REDACTED] reassignment. Subsequent data has indicated that the improper investigation referred to in the reassignment 3307 was in fact a root cause analysis to determine if the process of transmitting documentation to the Sector and to the command was flawed or if the process was not followed and better management controls needed to be put in place. During the root cause analysis process, evidence of a potential violation of the UCMJ by the XPO was discovered, preserved, and forwarded to the OIC for action. The violation was of article 107 “Making a False Official Statement”. The XPO in his capacity as the XPO prompted the OIC [REDACTED] with a 3307 that he knew to be false. ... Subsequently, the XPO filed a frivolous hostile work environment complaint to insulate himself from action by the command on the violation of the UCMJ and for his poor performance that led to the toxic [REDACTED] command climate at [REDACTED]. The hostile work environment complaint was investigated and found without merit. Additionally, the substantiated deceptiveness by the XPO was a leading factor in the toxic command climate ... When I made my concerns on the record, as I did in the ... issue, he attacked me with a fraudulent accusation.

On February 10, 2014, the head of the Sector Response Department signed the transfer EER dated August 3, 2012, as the Marking Official. The applicant acknowledged receiving the EER by signature. In a memorandum to the applicant dated February 10, 2014, the Sector Commander, who signed the transfer EER as the Approving Official, advised him that “[d]ue to the inability for Direct Access [a Coast Guard personnel database] to produce an Employee Counseling Receipt for the period ending 03 August 2012, this memo serves as your Employee Counseling Receipt.” The memorandum shows that the disputed EER includes substandard marks of 3 in three categories: Working with Others, Loyalty, and Communicating; standard marks of 4 in ten categories; above-standard marks of 5 in ten categories; one excellent mark of 6; one superior mark of 7; an unsatisfactory conduct mark; and a mark of not recommended for advancement. The memorandum also includes the following comments supporting the unsatisfactory conduct mark and the recommendation against advancement: [REDACTED]

- “As documented in a negative CG-3307, [the applicant’s] conduct and behavior while the SERA for [REDACTED] hindered the Officer-in-Charge’s ability to effectively lead and train

the [REDACTED] workforce. His conduct and actions undermined the command and ultimately resulted in his removal as the SERA by the Sector Commander.”

- “As documented in a negative CG-3307, [the applicant’s] conduct and behavior while the SERA for [REDACTED] hindered the Officer-in-Charge’s ability to effectively lead and train the Station’s workforce. His conduct and actions undermined the command and ultimately resulted in his removal as the SERA by the Sector Commander. [He] is not recommended for future SERA positions. In order to earn a recommendation for advancement to Master Chief, he must improve his leadership skills in areas of working with others, loyalty and communication.”

Also on February 10, 2014, the Sector Commander forwarded the applicant’s appeal of the transfer EER to the District Commander and disagreed with the appeal. The Sector Commander explained that after the applicant asked to be frocked as a master chief in 2013, the command discovered that no transfer EER had been submitted and that, instead, the OIC had submitted regular marks for the applicant dated November 30, 2012, even though “the approving official for the [REDACTED] E7 and above is the Sector Commander.” Therefore, he stated, the EER prepared by the OIC had been corrected to reflect transfer marks dated August 3, 2012, including 11 substandard marks (below 4), which were shown to the applicant on December 17, 2013. The Sector Commander stated that in response to the applicant’s appeal and after two meetings with the applicant, he and the Marking Official had agreed to raise “all but two of the substandard marks (Working with Others and Communicating),” although they did not change the unsatisfactory conduct mark or the recommendation against advancement. Therefore, the Sector Commander recommended that the District Commander deny the appeal.

On March 3, 2014, the District Commander, a Rear Admiral, advised the applicant in a memorandum that he had carefully review the matter and consulted with the District Command Master Chief and would not grant the appeal. The District Commander stated that based on all the information available, the transfer EER “is an accurate depiction of your performance during this evaluation period.”

VIEWS OF THE COAST GUARD

On December 16, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG stated that the applicant was relieved of his duties as the [REDACTED] SERA on August 3, 2012, following an investigation that found that he “exhibited negative behavior and created an unprofessional work environment.” This investigation had been convened by the prior Sector Commander, and as a result, a negative Page 7 (CG-3307) was entered in the applicant’s record and he was transferred from [REDACTED] to a Sector office on August 3, 2012. The JAG stated that under Article 5.E.2.a.(2) of the Enlisted Manual, COMDTINST M1000.2, his transfer “constituted a Detachment for Permanent Change of Station (PCS) and therefore required an unscheduled Enlisted Employee Review (EER).”³ However, no EER documenting

³ Article 5.E.2. of the Enlisted Manual states that “[u]nscheduled enlisted employee reviews are conducted for any reason other than a regular enlisted employee review.” Article 5.E.2.a. states, “Complete an unscheduled employee

the transfer was timely completed. Instead of initiating the required transfer EER as the applicant's supervisor, the ██████ OIC approved regular, annual EER marks for the applicant in Direct Access dated November 30, 2012, after he had transferred.

The JAG stated that when the applicant, who was then an ISCS on the advancement list for ██████ asked to be frocked as a master chief in 2013, the Sector command reviewed his record and discovered that the ██████ OIC had failed to initiate a transfer EER on August 3, 2012, and had prepared and approved the regular EER dated November 30, 2012, instead. In addition, the Sector found that the regular EER has been prepared by the wrong rating officials. The JAG alleged that for all members in pay grade E-7 and above assigned to the ██████ including the applicant, the Sector's Response Department Head was designated as the Marking Official and the Sector Commander was the Approving Official. Instead, the applicant's November 2012 EER was signed by Station personnel, with the ██████ OIC serving as the Approving Official. In support of his claim that the November 2012 EER was not prepared by the correct rating chain, the JAG submitted a copy of the Sector's published rating chain, which shows that the Response Department Head serves as the Marking Official for ██████ OICs; that the Sector Commander serves as the Approving Official for all Sector stations' OICs, Executive Petty Officers (XPOs), and Engineering Petty Officers; and that for "crewmembers," the ██████ XPO serves as the Marking Official and the OIC serves as the Approving Official. (The published rating chain submitted by the JAG does not expressly show the rating chain of a SERA, who is the highest ranking Selected Reserve member at a unit.)

The JAG stated that after the investigation, the Sector's Response Department Head noted that the applicant's removal from his duty as SERA warranted a transfer EER and the Sector Commander agreed. Initially, these rating officials prepared a transfer EER with eleven substandard marks, as well as an unsatisfactory conduct mark and a recommendation against advancement. After meeting twice with the applicant, however, they agreed to raise most but not all of the substandard marks to standard marks of 4 or higher. The applicant was counseled about these marks on December 17, 2013, and appealed them on January 13, 2014, alleging that they were unfair "in light of the toxic command climate that existed at the unit."

The JAG concluded that the EER dated November 30, 2012, was properly corrected by the Sector Command because it was invalid and had not been prepared in accordance with policy. A transfer EER dated August 3, 2012, was required by policy and the rating chain should have included the Response Department Head as Marking Official and the Sector Commander as the Approving Official. The JAG stated that pursuant to Article 5.J.2.(5) of the Enlisted Manual,⁴ the Sector Commander should have sent a letter to the Personnel Service Center requesting

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, or 19 drill periods for reservists before one of the events listed below. ...

(2) Detachment for Permanent Change of Station. Commands shall ensure members sign the counseling sheet for transfer employee review NO LATER THAN 15 days before departing the unit to allow adequate time for counseling and appeal processing if required."

⁴ Article 5.J.2. states that "Approving Officials are authorized to change any mark they assigned to members still attached to the unit if the Approving Official receives additional information that applies to the particular employee review period." Article 5.J.2.b. states, "If the Approving Official already submitted the employee review to Commanding Officer (CG PPC), the Approving Official writes, signs, and sends a letter to Commanding Officer (CG PPC (adv)) to request changing the marks." Article 5.J.2.b.(5) states, "Any Approving Official who has reason

to correct the EER. However, the JAG argued, because the EER dated November 30, 2012, was invalid, the Sector Commander's failure to send the letter "was harmless error." The JAG concluded that the applicant has failed to prove by a preponderance of the evidence that the disputed EER is erroneous or unjust.

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

On December 29, 2015, the applicant responded to the JAG's advisory opinion. He alleged that the November 30, 2012, EER was "considered complete and finalized at the time by the supervisors and command in the rating chain. If the marks were incorrect, they should have been rejected by the Marking Official and the AO at the time they were finalized." The applicant explained that the published rating chain submitted by the JAG "was not in effect or applied consistently to reservists at the time the original marks were finalized" in 2012. The applicant alleged that "in my previous marks at the E7 and E8 level, the Marking Official and the AO for station personnel in my position were the OINC and the RDH [Response Department Head] respectively. There was discussion at the time for the AO for the station SERAs to be the Reserve RDH to provide a Reserve perspective to the marks, but this did not come to fruition. If the current AO wished to re-mark me, the instructions and guidelines valid at the time period the evaluation originally occurred should be followed."

The applicant argued that the November 30, 2012, EER was "within Coast Guard policy" because he was assigned to the Sector office only temporarily and so the rating chain at his permanent unit properly completed an annual EER for him. The applicant stated that because the Page 7 stated, "You are being offered a temporary position," he thought he was on temporary duty (TDY) at the time, not that he had received a permanent change of station (PCS). The applicant alleged that "the PCS action was taken after the fact."

The applicant argued that the JAG's claim that the Sector Commander's failure to request permission from PSC to correct his EER was harmless is incorrect. The applicant stated that the decision to change the OIC's November 30, 2012, EER should have been made by PSC, not the Sector Commander, so that the request would have received an "independent review." As a result of the Sector Commander's actions, the applicant stated, his name was removed from the [REDACTED] advancement list, which delayed his advancement and so had a significant monetary impact on him.

The applicant noted that ultimately, his EER was changed only because he requested frocking to [REDACTED]. He stated that he believes that "the action taken was not so much to correct an error, but to retroactively punish me beyond the options afforded under CG policy."

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 submissions, and applicable law:

to believe marks assigned by another commanding officer are erroneous shall write to Commander (CG PSC-EPM-1) describing the circumstances. This letter shall include any supporting documentation and a recommended course of action."

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.

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.⁵

3. The applicant alleged that his transfer EER dated August 3, 2012, is erroneous and unjust because it was entered in his record about 18 months later and by an incorrect rating chain and because it resulted in his removal from an advancement list and a delay in his advancement to [REDACTED]. 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/her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties "correctly, lawfully, and in good faith."⁷

4. The records show that pursuant to an investigation, which found that the applicant had contributed to a toxic command climate at his [REDACTED], he was permanently removed from his Selected Reserve billet as the SERA of the [REDACTED] on August 3, 2012. As noted in the Page 7, upon losing his Selected Reserve billet, he was not transferred to the Individual Ready Reserve, but allowed to fill another Selected Reserve billet in a Sector office on a temporary basis until he could compete for another billet. Although the applicant alleged that he thought he was serving at the Sector office on temporary duty orders (TDY), he has not proven by a preponderance of the evidence that his removal from the Station was not a permanent change—a permanent removal from his primary duties. Therefore, the Board finds that, pursuant to Article 5.E.2.a.(2) of the Enlisted Manual, a transfer EER should have been completed to document his permanent transfer from the [REDACTED].

5. The record shows that the [REDACTED] OIC approved an EER for the applicant dated November 30, 2012, although the applicant was no longer assigned to the [REDACTED] at the time. This fact alone rendered the November 30, 2012, EER invalid. In addition, the OIC acted as the Approving Official for this EER although, even if the applicant had still been assigned to the Station, the OIC was not his designated Approving Official. Although the published rating chain submitted by the JAG does not expressly show the rating chain of a SERA—the highest-ranking Reserve member of the [REDACTED] who was supervised by the OIC—it does support the claims of the JAG and the Sector Commander that, because the applicant was the [REDACTED] SERA and an E-8, the Response Department Head and the Sector Commander were, respectively, the applicant's designated Marking Official and Approving Official. The applicant's rebuttal to this information

⁵ *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).

⁶ 33 C.F.R. § 52.24(b).

⁷ 33 C.F.R. § 52.24(b).

was to claim that this rating chain had not been enforced consistently because on his 2011 EER, the Response Department Head had served as his Approving Official. The Board finds that the applicant has not proven by a preponderance of the evidence that the November 30, 2012, EER was prepared by his designated rating chain at the time or even by his designated rating chain when he was the SERA of the [REDACTED] prior to August 3, 2012. The preponderance of the evidence shows that the November 30, 2012, EER was invalid.

6. The record shows that in 2013, the Sector Commander discovered that the [REDACTED] OIC—a subordinate—had entered the invalid EER dated November 30, 2012, into the applicant's record and that no transfer EER had been created, as required by Article 5.E.2.a.(2) of the Enlisted Manual. The Sector Commander had the invalid EER removed and a transfer EER created and entered in the applicant's record. With regard to correcting EERs, Article 5.J.2. of the Enlisted Manual states that "Approving Officials are authorized to change any mark they assigned to members still attached to the unit if the Approving Official receives additional information that applies to the particular employee review period." Article 5.J.2.b. states, "If the Approving Official already submitted the employee review to Commanding Officer (CG PPC), the Approving Official writes, signs, and sends a letter to Commanding Officer (CG PPC (adv)) to request changing the marks." Article 5.J.2.b.(5) states, "Any Approving Official who has reason to believe marks assigned by another commanding officer are erroneous shall write to Commander (CG PSC-EPM-1) describing the circumstances. This letter shall include any supporting documentation and a recommended course of action." The circumstances of this case—in which the designated Approving Official (the Sector Commander) discovered that a subordinate OIC had erroneously acted as an Approving Official and entered an invalid EER in a SERA's record—are not exactly addressed by these regulations. Under Article 5.J.2.b.(5), the letter to PSC is only required if "another commanding officer" approved the EER, and the [REDACTED] OIC was not only not a CO, but a subordinate of the Sector Commander. However, the Sector Commander who removed the invalid EER was not the same person as the Sector Commander in August 2012. Therefore, although not strictly required by Article 5.J.2.b.(5), the Board finds that it would at least have been advisable for the Sector Commander (AO2) to consult PSC before removing the invalid EER. Because the November 30, 2012, EER was invalid, however—because it was approved by an OIC who had no authority to do so—the Board finds that the applicant has not proven by a preponderance of the evidence that the November 30, 2012, EER should be returned to his record.

7. The preponderance of the evidence shows that the transfer EER dated August 3, 2012, was prepared by the correct rating chain for the [REDACTED] SERA, albeit about 18 months late. A new Sector Commander served as the Approving Official, but the Marking Official responsible for assigning the marks—the Response Department Head—was the same person who would have assigned the marks had the transfer EER been timely initiated in August 2012. This Board has long held that the late preparation of an otherwise valid performance evaluation does not warrant removal of the evaluation.⁸ The applicant argued that the late preparation of the transfer OER prejudiced him because it resulted in his removal from an advancement list and the delay of his advancement. However, there is no evidence that the rating chain's actual error—the delay in preparation of the transfer EER—caused the applicant's removal from the advancement list.

⁸ See, e.g., CGBCMR Docket Nos. 2012-073, 2010-141, 2005-053, 2003-110; 2002-015; 43-98; 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority); and 475-86.

He was removed from the advancement list because he was not recommended for advancement on the transfer EER, and he has not submitted any evidence to show that, had the transfer EER been timely prepared by the correct rating chain in August 2012—including the OIC as Supervisor, the Response Department Head as Marking Official, and the Sector Commander as Approving Official—as required by Article 5.E.2.a.(2) of the Enlisted Manual, he would have been recommended for advancement and so not removed from the list.

8. The applicant has not proven by a preponderance of the evidence that either the removal of the November 30, 2012, EER from his record or the entry of the August 3, 2012, transfer EER into his record was erroneous or unjust. Accordingly, relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ORDER

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

June 10, 2016

