

**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. 2016-150**



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**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 June 11, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 5, 2017, 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 [REDACTED] on active duty, asked the Board to correct his record by removing an administrative form CG-3307 ("Page 7"), dated October 1, 2015; changing low marks he received on his November 30, 2015, Enlisted Employee Review (EER); and changing his mark of Not Recommended for advancement on his November 30, 2015, EER. The applicant stated that the marks on his EER are unjust and they are based on the negative Page 7 which he stated was based on an incident that was investigated and "ended in a their word against [the applicant's] and seems their word won." The applicant claimed that he found out about the EER marks when information was released for the May 2016 Servicewide Exam. He stated that he was not counseled on the bad marks until he brought up the fact that he was not recommended for advancement "which was well after the marking period." The applicant stated that counseling is recommended to be done within 21 days of the end of the marking period as per COMDTINST M1000.2A, Article 4.B.1.d.

The applicant argued that his military record speaks for itself to show his character during his military service. He stated that he has never missed a Good Conduct award in his combined 17.5 years of service, and he has received two Coast Guard Achievement medals. He therefore asked the Board to remove the negative Page 7, and change the negative marks and Not Recommended on his November 30, 2015, EER.

### **SUMMARY OF THE RECORD**

On October 1, 2015, the applicant received the negative Page 7 disputed here. It is signed by the applicant as having acknowledged reading the entry. It states in full:

During a room inspection on, or about 10 JUL15, you asked the sexual orientation of an Honor Guard trainee, in the presence of a second trainee. The question had no bearing on the room inspection, did not protect the privacy of the member, and was delivered in an unprofessional manner. On a separate occasion, you treated these same two trainees differently when you greeted others in the immediate area, but not them. In both these instances, you failed to meet the Coast Guard core value of respect, and did not follow Commandant's Anti-Harassment and Discrimination Policy. As Honor Guard leadership, you are expected to set the example, and to treat all members respectfully without regard to sexual orientation, or any other attribute protected by law or Coast Guard policy. This behavior is directly linked to your performance in the areas of 'Respecting Others' and 'Human Relations' and 'Responsibility' of the Enlisted Employee Review. Further behavior of this nature will not be tolerated; additional disciplinary and administrative action will be taken if you fail to maintain and promote an environment that treats others with respect and is free from harassment or discrimination. Additional behavior of this nature may also result in your removal from special assignment to the CG Honor Guard.

On November 30, 2015, the applicant received an EER for the period of June 1, 2015, to November 30, 2015. Of the 25 categories in which enlisted members are evaluated on a scale of 1 to 7 with 7 being the best, the applicant received two 7s; five 6s; six 5s; seven 4s; and five 3s. The low marks of 3 were for Responsibility, Setting an Example, Respecting Others, Human Relations, and Judgment. He received a "Satisfactory" mark for conduct and "Not Recommended" for advancement. In the comments section, the two 7s were justified with laudatory comments, and the Not Recommended contained the comment that the applicant "is currently not fully capable of satisfactorily performing the duties and responsibilities of the next higher paygrade, or to assume greater leadership roles and responsibilities." This was the first time the applicant has received a Not Recommended since his first EER in 2002.

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

On January 6, 2017, 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 on the case prepared by PSC. PSC recommended that the Board deny relief in this case. PSC argued that the applicant failed to prove the existence of an error or injustice in his military record by a preponderance of the evidence. PSC stated that his commanding officer had the authority and discretion to determine if a member is capable of performing the duties and responsibilities of the next higher paygrade and to assign a recommendation for advancement. PSC argued that the applicant did not show that his command acted outside of its authority or Coast Guard policy. Therefore, PSC recommended that the Board deny relief in this case.

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

On January 10, 2017, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited a response within 30 days. No response was received.

### APPLICABLE REGULATIONS

The Enlisted Accessions, Evaluations and Advancements manual, COMDTINST M1000.2A, Article 4.B.1.d. states that every unit is responsible for ensuring that “employee reviews are completed, including the signed counseling sheet, not later than 21 days after the end of the employee review period ending date.” Article 4.D.1.b.(2) states that normally “a single, isolated event, either positive or negative, should not drastically affect the marks assigned during the employee review period. However, the rating chain must consider the overall positive or negative impact of the event.”

According to Article 3.A.4.b.(3), the command officer’s recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. Article 4.D.3.e. states that the approving official’s decision regarding the advancement is final and may not be appealed.

### 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.

2. The applicant asked the Board to correct his record by removing a Page 7 dated October 1, 2015; changing low marks he received on his November 30, 2015, EER; and by changing his mark of Not Recommended for advancement on his November 30, 2015, EER. He alleged that the Page 7 and marks on the EER are erroneous and unjust because he was not timely counseled on the marks. 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.<sup>1</sup> 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.”<sup>2</sup>

3. The applicant claimed that he was not timely counseled on his November 30, 2015, EER. The applicant received the negative Page 7 disputed here on October 1, 2015, and he signed the Page 7 acknowledging receipt. The applicant was put on warning that his actions that led to the Page 7 were directly linked to several areas evaluated in the EER. The EER has an effective date of November 30, 2015, and the applicant has not proven by a preponderance of the evidence that the EER and the required counseling sheet were not completed within 21 days of that date. Coast Guard officials are presumed to have acted correctly and lawfully, and the Board will not assume that they did not follow COMDTINST M1000.2A, Article 4.B.1.d. in completing the applicant’s EER. Moreover, even if the EER preparation and counseling were

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<sup>1</sup> 33 C.F.R. § 52.24(b).

<sup>2</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).

delayed beyond the 21-day recommended period, the applicant has not shown that he was harmed by the delay. The record shows that he had already been notified of how his performance was not meeting his rating chain's expectations when he was counseled on the disputed Page 7 during the reporting period for the EER.

4. The applicant likewise has not proven by a preponderance of the evidence that there was an error or injustice in his EER marks, non-recommendation for advancement, or the disputed Page 7. As noted in finding 2, absent evidence to the contrary, the applicant's records are presumptively correct, and the fact that the applicant has received medals and better EERs before and after 2015 is not evidence that the disputed documents are erroneous or unjust. Therefore, the Board finds no error or injustice requiring correction in the applicant's record.

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

**(ORDER AND SIGNATURES ON NEXT PAGE)**

**ORDER**

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

May 5, 2017

