

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-006

████████████████████
██████████ MKCS

FINAL DECISION ON RECONSIDERATION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case for reconsideration because the advisory opinion of the Coast Guard in the original proceeding was mailed to the applicant’s attorney’s prior address, the attorney had informed the BCMR staff of a new, slightly different address, and the attorney stated that he had never received it and so the applicant had been deprived of the opportunity to respond in writing to the advisory opinion. The Chair docketed this case on August 10, 2017, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 26, 2018, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S ORIGINAL REQUEST AND ALLEGATIONS

The applicant, a senior chief machinist’s mate (MKCS/E-8) in the Reserve, asked the Board to correct his record by removing his Enlisted Employee Review (EER) dated July 26, 2012, and by voiding the result of a Career Retention Screening Panel (CRSP), which did not select him for retention and so resulted in his involuntary retirement on October 1, 2016.

The applicant stated that the disputed EER, which documents his performance of active duty as a trainer for the Deployable Operations Group (DOG) for ten months ending in July 2012, is adversely affected by procedural errors, comments concerning his performance during a prior evaluation period, and below average marks¹ that are belied by comments showing superior performance. The applicant alleged that he discovered these errors in April 2016, when he was not selected for retention by the CRSP.

The applicant stated that under COMDTINST M1000.2 (hereinafter “the Enlisted Manual”), he is entitled to an accurate, fair, objective, and timely EER, but his 2012 EER violated

¹ On an EER, members are evaluated on a variety of performance dimensions on a scale of 1 (worst) to 7 (best). A mark of 4 is considered “standard,” or average.

these requirements. He argued that a comparison of this EER with his prior and subsequent EERs and the awards and accolades he has received shows that the EER is an outlier and should be considered presumptively irregular. The applicant further argued that during his career he has regularly exceeded the Reserve requirement of performing one drill weekend per month and two weeks of annual active duty training.

The applicant noted that the 2012 EER references his incorrect receipt of the Family Separation Allowance as justification for the low marks. The applicant argued that the low marks were unwarranted because he had been inadvertently overpaid a total of \$1,643.10 in 2011 and 2012 and he returned the overpayment as soon as he was notified about it.

The applicant noted that another EER comment alleges that he inappropriately reviewed the EER of a chief petty officer, MKC. The applicant alleged that he had been “directed by [his Supervisor, a chief warrant officer, CWO H], not to use his Command Approval status to view [the MKC’s] overdue evaluation.” The applicant alleged that he followed this directive, but it “was changed prior to the submission of the next evaluation.”

The applicant argued that the EER is inconsistent. He stated that when he appealed his EER marks, CWO H wrote a rebuttal that is inconsistent with some of CWO H’s comments in the EER that support a high mark for the applicant’s professionalism. The applicant stated that responses from his commanding officer (CO), executive officer (XO), and the logistics officer (LO) also directly contradict the EER comments with high praise for his performance.

The applicant argued that the EER also violates the Enlisted Manual because the below-average comments concern performance that occurred from August to November 2011, “well before the start of this evaluation period.” In this regard, he argued that the EER should cover only the period from December 1, 2011, through July 7, 2012, and the allegation that he had improperly reviewed the MKC’s evaluation arose in November 2011.

The applicant also alleged that the EER was prepared late and that he was never counseled about not being recommended for advancement as required by Article 4.D.3.c. of the Enlisted Manual. Regarding the delay, he stated that his Marking Official, a different CWO, was required to ensure that he was counseled and to have the EER marks entered in the Direct Access database no later than five days after the applicant’s last day on active duty orders. But the Approving Authority, his CO, was late in approving the EER by more than sixty days. The applicant stated that because of this delay, his regular, permanent command was “locked out” and unable to timely enter his regular, annual EER marks with a recommendation for advancement. He stated that as a result of this lock out and delay, he was not eligible to take the Servicewide Examination (SWE) for advancement to master chief (MKCM) in 2012. The applicant alleged that if the July 7, 2012, EER had been timely prepared, he would have received another EER, on which he would have been recommended for advancement, before the deadline for SWE eligibility in 2012, and if he had advanced to MKCM as a result of the SWE, his record would not have been reviewed by the CRSP and he would not have been subject to mandatory retirement. The applicant stated that at the time of application, he ranked #1 on the then-current MKCM eligibility list.

In support of his allegations, the applicant submitted copies of his military records, the most relevant of which are included in the Summary of the Record below, and the following:

- The CO of a Port Security Unit (PSU) 311 stated in an email on October 25, 2012, that he had heard nothing but praise for the applicant's technical expertise and that he appreciated the applicant's "straight forward approach and recommendations." This email responded to a request for feedback from the applicant, who wrote that he had discovered the disputed EER by accident on October 3, 2012, and had been counseled about the low marks by the CWO who was his Marking Official, who had claimed that "nearly every PSU had complained about my instructional ability and demeanor." The applicant noted that he could appeal the EER because the thirty-day appeal period since the EER's finalization had not passed.
- LT T at PSU 301 wrote a statement in response to an email from the applicant dated October 24, 2012, in which the applicant stated that he had "received counseling on my marks and was informed that almost every PSU that I visited had complaints about my instructional ability and my lack of respect for the students and/or the PSU staff." The applicant asked for feedback and indicated that he would appeal the EER to the DOG. In reply, the lieutenant wrote that he was shocked because the low marks "are entirely opposite of my experience with you" when they worked together at PSU 308.
- An email from LT T, dated August 16, 2012, states that a significant engineering problem was being addressed thanks to folks like CWO H and the applicant.
- In response to an email from the applicant dated October 5, 2012, MKCM H of PSU 307 denied that he had ever called the DOG to complain about the applicant's treatment of other members or that he had ever said that the training team was welcome back as long as the applicant was not on the team. MKCM H stated that the applicant and the rest of the team had been very professional and very well informed.
- A commander at PSU 305 stated that the applicant had been an invaluable member of her unit in 2016.
- A lieutenant commander stated that the applicant had been an invaluable member of PSU 305 since September 2015.

APPLICANT'S REQUEST FOR RECONSIDERATION

After the Chair sent the applicant a copy of the Board's decision deny relief in his original case on June 19, 2017, he submitted his request for reconsideration on August 9, 2017, denying that either he or his attorney had received the advisory opinion of the Coast Guard and noting that he had asked that it be sent to him as well as his attorney.

The applicant stated the disputed EER was delivered to him in a cowardly manner. He stated that CWO H called and asked him on March 29, 2012, to accept an extension of his active duty orders through August 2012, which would not have happened if CWO H had had any problems with his performance. He stated that not a single member of his rating chain offered him counseling and that he had "had to force them to do my evaluation counseling" so that he could appeal the EER. He again alleged that if his command had timely prepared the EER, his perma-

ment unit “would have had ample time (20 drills) to issue a regular evaluation” with a mark of recommended for advancement. He noted that he still remained #1 on the advancement list.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Reserve in 1992. He drilled regularly as a member of the Selected Reserve and earned the MK rating. He advanced to chief (MKC) in 2004 and to senior chief (MKCS) in 2011. During his Reserve career, the applicant generally received good annual EERs from his Reserve commands, but on his annual EERs for 2006 and 2007, he was not recommended for advancement to MKCS. From March 2006 until his retirement, the applicant was living in North Carolina and assigned to drill at a nearby unit.

From August 23, 2011, to July 6, 2012, the applicant served on temporary active duty (TDY) orders and was assigned to a traveling training team based at the DOG, in Arlington, Virginia. The DOG command entered a CG-3307 form (“Page 7”), signed by the applicant and the Executive Officer, to document the following counseling in his record:

You are hereby counseled on your entitlement to FSA. On 10 APR 12 it was determined that from 23 AUG 11 through 28 MAR 12 you were erroneously paid FSA-T in the amount of approximately \$1750. This is an overpayment which PPC will initiate the repayment process to recoup the funds from your pay. In accordance with CG Pay Manual, COMDTINST M7220.29 (series), Ch. 3.H.3.a(3), to qualify for FSA-T you must have no social visits between you and your dependents for an initial 30-day qualifying period, which never occurred in your case. Additionally, as noted on Form CG-2035 signed by you on 03 OCT 11, you had the responsibility of notifying your command if your dependent(s) visit you for more than 30 days.

COMDTINST M7220.29 (series), Ch. 3.H.5.c. allows a member to continue to be entitled to FSA-T while your dependent(s) visit at or near the TDY [temporary duty] station for less than 30 days; however, information gathered in your case indicates that your dependent(s) accompanied you continuously from 23 AUG 11 through 28 MAR 12.

To become eligible for FSA-T in the future:

1. You must remain separated from all of your dependent(s) for 30 continuous days with “NO” social visits to initially qualify for FSA-T.
2. After the initial 3-day qualifying period has been met, you may have social visits which are temporary in nature. Your FSA-T may be terminated if your spouse again travels with you on a consistent basis.
3. Your new initial period of eligibility for FSA-T will begin on 29 MAR 12 or whenever your spouse departed, whichever is later.

In a letter dated June 5, 2012, the applicant was advised that he had completed at least twenty years of satisfactory federal service for retirement purposes and would be eligible for retired pay at age 60.

On the disputed EER, dated July 26, 2012, the applicant received one low mark of 2 for “Integrity,” three below-standard marks of 3 for “Setting an Example,” “Working with Others,” and “Customs and Courtesies,” and a mark of “N” denoting that he was not recommended for advancement by his rating chain. He also received eight average marks of 4, five above standard

marks of 5, six excellent marks of 6, and two superior (best possible) marks of 7. The applicant's rating chain included the following required comments to support the mark of 2:

[The applicant] requested FSA-T and received separation funds the entire time while on orders. During the time period of 23 August 2011 through 28 March 2012 the member was accompanied by his spouse on every training mission. An investigation was conducted and member received a Negative CG-3307 [Page 7] for erroneous receipt of FSA-T funds during this time.

[The applicant] used his permissions with Direct Access to view another member's Enlisted Evaluation Report from previous marking periods. [He] then questioned and contradicted marks from previous years that member received despite not have a supervisory relationship for those periods and no justification for viewing those marks.

The rating chain included this comment to support the command's mark of not recommended for advancement:

[The applicant] demonstrates outstanding knowledge and expertise in the engineering field. He is technically sound, proficient and would be considered an asset to any Coast Guard engineering department. However [he] is lacking the integrity, judgment and leadership required of a Master Chief Petty Officer and therefore not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.

Following his return from active duty to his regular Reserve unit, the applicant did not receive another EER until November 30, 2013. His EERs in 2013, 2014, and 2015, contain high marks and recommendations for advancement.

On April 30, 2015, the Personnel Service Center (PSC) issued ALCGPSC 051/15 concerning the upcoming CRSP dated September 21, 2015, which would determine who would be retained in an active Reserve status. ALCGPSC 051/15 stated that the reservists whose records would be reviewed by the CRSP would consist of "all E-6 and below who, as of 1 June 2015, have performed at least 20 years of satisfactory qualifying federal service ... [for retirement purposes], and all E-7 and above who, as of 1 June 2015, have performed at least 20 years of satisfactory qualifying federal service ... and have three or more years' time in grade (TIG)." It also directed these reservists to "engage their servicing SPO [Servicing Personnel Office] to update their EI-PDR [electronic personnel records] to ensure their record is accurate and complete" and advised them how to ask PSC to add missing documents to their records. PSC noted that members could apply to the BCMR for correction of errors or injustices in their records but that an application would not exempt them from consideration by the CRSP. PSC also informed member that they could submit a memorandum for consideration by the CRSP, endorsed by their COs, to relate mitigating information regarding documentation of substandard performance or misconduct.

On September 21, 2015, the CRSP convened and did not select the applicant for retention in the active Reserve. The written selection standards the CRSP was given stated that performance and conduct-based considerations should guide the panel's recommendations, such as Unsatisfactory Conduct marks and marks of not recommended for advancement on an EER, overall low marks, evidence of moral or professional dereliction, alcohol abuse, sexual assault or harassment, felony convictions, non-judicial punishment, financial irresponsibility, and other adverse information.

On November 12, 2015, the applicant received his third Achievement Medal for his service at his Reserve unit from March 2006 to September 2015.

On December 9, 2015, the applicant asked PSC for “a list of the subjects or infractions that resulted in this decision” of the CRSP. In response, the applicant was advised that the panel’s deliberations are secret but that he could review his EI-PDR and appeal the decision.

On December 17, 2015, the applicant submitted an appeal of the CRSP’s recommendation that he be retired to PSC. In the appeal, he alleged that the disputed EER was erroneous and that his record contained “excess” Page 7s “that are correct, yet may have been misinterpreted by the CRSP.” He stated that the Page 7 concerning his family separation pay appears twice in his record and alleged that the duplicate could have been misinterpreted by the CRSP as a second event. He stated that his wife had unexpectedly relocated after she was laid off and their home in North Carolina was damaged by Hurricane Irene.²

Regarding the EER, the applicant alleged in his appeal that the XO of his permanent unit discovered the EER in the applicant’s Direct Access file almost 90 days after the end of his active duty orders. He alleged, “The late entry date, 17 days after my last day on orders, precluded my Command from entering a regular set of marks [dated November 30, 2012] with a recommend[ation] for advancement.” He alleged that the EER had been marked final, without counseling, more than sixty days after it was entered in the database. He argued that the MKC whose EER he was criticized for viewing was his direct subordinate at the DOG; that he was told to process all of the engineering division’s EERs; that he held Command Approval to process all of these evaluations in Direct Access; and that under the Enlisted Manual, he was required to review and submit timely EERs for all members under his supervision. Therefore, he argued, he should not have received a low mark for “Integrity” as a result of reviewing the MKC’s EER. The applicant also noted that LT T, with whom he worked for two of his ten months on active duty with the DOG, was shocked by the applicant’s marks and that the CO of PSU 311 had stated that he had no issues with the applicant’s performance.

On March 14, 2016, PSC denied the applicant’s appeal of the CRSP result. PSC stated that his appeal had been thoroughly reviewed by a three-member panel, which denied the appeal. PSC stated that the applicant would be transferred to the Inactive Status List as of October 1, 2016, unless he submitted a request for retirement. The applicant submitted a retirement request and was retired on October 1, 2016.

ORIGINAL VIEWS OF THE COAST GUARD

On March 9, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum on the case prepared by PSC.

² The governor of North Carolina issued evacuation orders for counties along the coast on August 23 and 25, 2011, because of Hurricane Irene, which caused flooding and tornadoes before making landfall on August 27, 2011.

PSC noted that with respect to the disputed EER, the applicant's request is not timely because he received it in 2012 and did not contest its accuracy until more than three years later in 2016. PSC noted that the applicant did not appeal his marks or contest the EER through the Personnel Records Review Board (PRRB). PSC claimed that the applicant's delay in contesting the EER has prejudiced its ability to submit evidence because members of the applicant's rating chain who prepared the EER retired in 2013.

PSC noted that the applicant had applied for and received the family separation allowance while on TDY even though his dependent had accompanied him. While the applicant alleged that this was an "inadvertent error," PSC called his conduct "unethical."

PSC stated that the applicant argued that the EER was not prepared within the proper time period but argued that the "lateness of an EER does not invalidate an otherwise valid performance evaluation or justify its removal." PSC also argued that the applicant did not show that he was not counseled on his EER marks.

PSC concluded that the applicant has not proven by a preponderance of the evidence that the disputed 2012 EER is erroneous or unjust. PSC argued that the low marks and non-recommendation for advancement were justified based on the applicant's unethical behavior in flagrantly violating policy with regard to the FSA. Therefore, PSC recommended that the Board deny relief.

VIEWS OF THE COAST GUARD IN RESPONSE TO RECONSIDERATION REQUEST

On April 11, 2018, the Board received the Coast Guard's response to the applicant's request for reconsideration. The Coast Guard recommended denying relief. PSC noted that the applicant did not submit any new evidence and has not submitted sufficient evidence to show that an error or injustice occurred. The JAG likewise stated that there is "no error or injustice on the part of the Coast Guard justifying any relief."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 13, 2018, the Chair mailed to both the applicant and his attorney copies of the views of the Coast Guard and invited a response within thirty days. No response was received.

APPLICABLE REGULATIONS

The Enlisted Manual in effect in 2012, COMDTINST M1000.2, contains the following provisions regarding EERs:

Article 5.A.2. states that each CO must ensure all enlisted members receive accurate, fair, objective, and timely EERs. Article 5.D.1. states that the unit is responsible for ensuring that EERs are completed and the members are counseled "not later than 21 days after the end of the employee review period ending date." Articles 5.D.2. and 5.D.3. provide that EERs are prepared by a "rating chain": The evaluatee may submit input for the EER at least 14 days before the end of the rating period and is responsible for verifying through Direct Access that their EER has been

properly recorded. The Supervisor recommends the marks and forwards the EER with the supporting comments no later than 9 days before the end of the rating period. The Marking Official reviews the recommended marks, discusses inaccuracies or inconsistencies with the Supervisor, may return the EER to the Supervisor for correction, and forwards the EER no more than 5 days after the end of the rating period. The Approving Official ensures that the EER is consistent, discusses any inaccuracies or inconsistencies with the Marking Official, and may return it to the Marking Official for correction. The Approving Official also ensures that the member is counseled and advised of appeal procedures and that the EER is processed in time so that the member may view it in Direct Access within 30 days of the end of the rating period.

Article 5.E.1.a. provides that senior chiefs normally receive regular, annual EERs each November 30. Article 5.E.1.b.(3) lists circumstances under which a command is not required to prepare a regular, annual EER. The circumstances include when a “regular or unscheduled [EER] has been completed within ... 184 days for E-7 and above ... or 19 drill periods for reservists.”

Article 5.B.2.o. notes that reservists may receive “unscheduled” EERs to document periods of active duty and transfers. Article 5.E.2.b. states that for reservists who have performed TDY at a unit other than their permanent unit, the TDY command shall complete a special EER upon the reservist’s completion of active duty if more than 92 days have passed since the reservist’s last regular EER. It also states that long-term active duty orders of more than 140 days are considered a permanent change of station, and so Article 5.E.2.a. applies. Article 5.E.2.a.(2) states that the TDY command shall complete an unscheduled EER for members E-7 and above when they are detached for a permanent change of station and more than 184 days or more than 19 drill periods have passed since the member’s last EER.

Article 5.F.1.a.(2) states, “The rating chain will evaluate each enlisted member on the required period ending date to assess his or her actual performance since the last recorded employee review.” Article 5.F.1.b.(1) states that “raters shall mark each evaluatee against the written standards” on the EER form. Article 5.B.1. states that marks of 1, 2, or 7 on an EER or a mark of not recommended for advancement must be supported by written comments. Article 3.A.4.e.(4) states the following about an advancement recommendation:

The CO/OICs 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 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.

Article 5.I.1. states that a reservist may submit an appeal of his EER marks within 30 days of signing the counseling sheet or explain the circumstances that prevented him from submitting the appeal within 30 days. An EER appeal is forwarded up the chain of command, and

the rating chain members may add comments responding to the appeal. However, a recommendation against advancement on an EER 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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
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.³
3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.⁴ The applicant has asked the Board to remove from his record an allegedly erroneous EER that he received in 2012. Although the applicant claimed to have discovered the error in 2016, the preponderance of the evidence shows that he knew the contents of the EER no later than October 2012 and so should have submitted his application to the Board no later than October 2015. The Board notes that the applicant also alleged that he was unjustly subject to the CRSP in 2015 and retired in 2016 because of the 2012 EER, but his argument concerning the CRSP review and his retirement depends entirely on the disputed 2012 EER being erroneous and subject to removal. Therefore, the Board finds that he discovered the alleged error in this case no later than October 2012, and his application is untimely.
4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁵ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”⁶ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”⁷
5. The applicant did not explain why he failed to challenge his 2012 EER before the PRRB or apply to the BCMR within three years of receiving it.

³ *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 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁵ 10 U.S.C. § 1552(b).

⁶ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁷ *Id.* at 164, 165; see also *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

6. The applicant's 2012 EER is presumptively correct⁸ and was authorized in accordance with Article 5.E.2. of the Enlisted Manual because the applicant was transferred from long-term active duty at the DOG to his Reserve command in North Carolina in July 2012. The Board's cursory review of the merits shows that the applicant's claims cannot prevail for the reasons listed below:

a. Although the applicant received better EERs before and after July 2012, his performance during other rating periods is not evidence that the disputed EER is erroneous or unjust, as members' performance can vary over time and under different circumstances.⁹

b. The applicant alleged that the three below-standard marks of 3 for "Setting an Example," "Working with Others," and "Customs and Courtesies" on the disputed EER are based on false information about how he conducted the trainings and treated others. He submitted statements from two officers and a master chief praising his performance as a trainer. The EER comments show, however, that the low marks were based at least in part on his receipt of FSA and his decision and conduct in viewing the MKC's past EER contrary to orders. His evidence shows that he successfully conducted trainings, but it does not persuade the Board that the low marks are erroneous. In this regard, the Board notes that the applicant claims to have appealed the EER in 2012, but he did not submit his appeal along with the rating chain's responses to his appeal, and his rating officials retired in 2013 and are no longer available to provide details of why they assigned him marks of 3 in those categories.¹⁰

c. The applicant alleged that his receipt of FSA while his wife was living with him was an inadvertent error and should not have resulted in a mark of 2 for "Integrity" on the EER. However, the Page 7 states that the applicant signed his FSA application, CG-2035, on October 3, 2011, by which date his wife had been living with him for more than a month since she left their house in North Carolina in August 2011 because of Hurricane Irene.

d. The applicant alleged that at the time he reviewed the MKC's prior EER, for which he was criticized in the disputed EER, he had authority to do so because he was the MKC's supervisor. However, the EER comment states that he reviewed the MKC's

⁸ 33 C.F.R. § 52.24(b); see *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

⁹ *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) ("[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.").

¹⁰ *Lebrun v. England*, 212 F. Supp. 2d 5, 13 (D.D.C. 2002) (holding that the doctrine of laches bars a claim when one party's delay has prejudiced the other party's ability to produce evidence and/or witnesses); *Cornetta v. United States*, 851 F.2d 1372, 1379 (Fed. Cir. 1988) (holding that "while the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, tolls the running of the limitations period [for military member on active duty] it does not suspend time to be considered in the laches calculation. *Deering v. United States*, 620 F.2d 242, 245, 223 Ct. Cl. 342 (1980). Here, Cornetta's post-discharge service in the Coast Guard stopped the running of the six-year statute of limitations, but it did not affect the period to be considered in determining whether laches affects his claim.").

EERs for periods before the applicant supervised him, and the applicant admitted that he had been directed by his Supervisor, CWO H, not to do so. Although as the MKC's supervisor, the applicant was authorized to prepare the MKC's current EER, he has not shown that his rating chain erred in assessing his "Integrity" poorly as a result of this incident and his improper receipt of FSA.

e. The applicant alleged that the EER is inconsistent, but the EER marks of 2 and "not recommended for advancement" are properly supported by written comments as required by Article 5.B.1. of the Enlisted Manual, and so the EER is not inconsistent. Although the applicant alleged that his rating chain's responses to his EER appeal contradict parts of the EER, he did not submit those responses or anything from his rating officials that contradicts the assigned marks.

f. The applicant alleged that the low EER marks are improperly based on performance that occurred during the previous rating period, which ended on November 30, 2011. He noted that he is accused of having erroneously received SFA beginning in August 2011, and he claimed that the allegation that he had improperly reviewed the MKC's prior EERs arose in November 2011. However, the Enlisted Manual does not expressly prohibit mentioning conduct that occurred before the rating period, much less prior conduct that was discovered or proven by investigation during the rating period. The negative Page 7 shows that the applicant's erroneous receipt of FSA from August 2011 through March 2012 was not determined until an investigation concluded on April 10, 2012. There is no evidence supporting the applicant's claim that he was first accused of viewing the MKC's prior EERs in November 2011, but even assuming that is true, his CO might not have concluded that the accusation was proven before the rating period ended on November 30, 2011.

g. The applicant alleged that he was never counseled about the disputed EER although EER counseling is required by Article 5.D.3. of the Enlisted Manual. This claim, however, is refuted by his own statements. Specifically, the applicant told the CO of PSU 311 and LT T at PSU 301 in October 2012 that he had been counseled about the disputed EER by the Marking Official.

h. The applicant alleged that the disputed EER was approved by his CO more than sixty days after the time provided in the Enlisted Manual and that, as a result of that lateness, his Reserve command was prohibited from providing him with a regular, annual EER dated November 30, 2012, with a recommendation for advancement. The reporting period ended on July 26, 2012, and so under Article 5.D.3.d(3)(i) of the Enlisted Manual, the EER should have been completed by August 26, 2012. Although the exact date of the completion is not in the record, the applicant's October 5, 2012, email indicates that his EER had been completed recently and so was apparently more than a month late. The Board has long held, however, that lateness *per se* does not justify removing an otherwise valid performance evaluation.¹¹ Although the applicant alleged that he was harmed by the delay because it prevented his command from preparing a regular EER for him dated

¹¹ See, e.g., CGBCMR Docket Nos. 2015-159, 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.

November 30, 2012, the Board disagrees. Article 5.E.1.b.(3) of the manual states that a regular EER “is not required” for E-7s and above if the member has received a regular or unscheduled EER within the prior 184 days or 19 drill periods. “Is not required” does not mean prohibited; it indicates that the Reserve command had discretion in deciding whether to prepare a regular EER for the applicant—possibly with a recommendation for advancement so that he could compete for advancement—and chose not to. Moreover, even if the “do not” in Article 5.E.1.b.(3) was interpreted as a prohibition, it is the end date of the prior EER reporting period, July 26, 2012—not the date the EER was entered in the database—that determined whether an EER was required. The date the prior EER was entered in the database was irrelevant to whether another EER was due under Article 5.E.1. The 184 days or 19 drill periods in Article 5.E.1.b.(3) are counted from the end date of the prior reporting period (July 26, 2012), not the date the EER for the prior reporting period gets signed and entered in the database. Therefore, the delayed entry of the July 26, 2012, EER from late August 2012 to late September or early October 2012 had no effect on his rating chain’s authority to prepare a regular EER dated November 30, 2012. The delay of the disputed EER is therefore harmless error.¹²

7. Because there are no grounds for removing the disputed EER from the applicant’s record, there are no grounds for setting aside the result of the CRSP or for voiding his retirement. The record contains insufficient evidence to substantiate the applicant’s allegations of error and injustice in his military record, which is presumptively correct.¹³ Based on the record before it, the Board finds that the applicant’s claim cannot prevail on the merits.

8. Accordingly, the Board will not excuse the application’s untimeliness or waive the statute of limitations. The applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹² 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.”).

¹³ 33 C.F.R. § 52.24(b); see *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties “correctly, lawfully, and in good faith.”).

ORDER

The application of MKCS [REDACTED], USCGR (Retired), for correction of his military record is denied.

October 26, 2018

