

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-090

██████████
██████████ MST1/E-6

FINAL DECISION

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 after receiving the completed application on February 13, 2018, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 21, 2018, 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, an active duty Marine Science Technician First Class (MST1/E-6), asked the Board to correct her record by changing her May 31, 2016, semiannual Enlisted Employee Review (EER) to reflect that she was “Recommended” for advancement instead of “Not Recommended” and to reinstate her on the eligibility list for advancement to Chief Marine Science Technician (MSTC/E-7) resulting from the May 2017 Servicewide Examination (SWE).¹

The applicant claimed that she was subjected to “discrimination, hostile work environment, and poor leadership.” She stated that the EER in question is inconsistent with the EERs before it and afterwards. She explained that in the disputed marking period she had a new direct supervisor whom she “confronted on two separate occasions regarding concerns that [she] was treated differently from the other First Class Petty Officers.” She stated that during the “initial appeal

¹ Article 3.A.6.a.2.a. of the Enlisted Accessions, Evaluations, and Advancements manual, COMDTINST M1000.2A, states that to be eligible for advancement to Chief, Senior Chief, or Master Chief Petty Officer, the member must have maintained his or her Commanding Officer’s recommendation for advancement for the entire 24-month period leading up to the “terminal eligibility date” for the advancement eligibility list. Article 3.A.3.d. states that the “terminal eligibility date” for an SWE conducted in May is January 1 of the following year. Therefore, to have been eligible for advancement off the May 2017 SWE advancement list, the applicant would have had to have maintained her CO’s recommendation for advancement from January 1, 2016, through December 31, 2017, and the “Not Recommended” mark that she received in May 2016 meant that she was still ineligible for advancement to Chief by the terminal eligibility date for the May 2017 SWE advancement list, January 1, 2018.

process” she requested to see write-ups explaining why she was not recommended for advancement, but her command did not provide them. The applicant asserted that she was “made aware of some of the write-ups when [she] received [her] appeal packet from District.” She claimed that incidents were included that she was never counseled about and that were inaccurate. She also stated that her direct supervisor failed to provide her with mid-marking period counseling which would have included informing her that she was “on the road” to receiving a “Not Recommended” for advancement.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard June 19, 2008. She has no negative entries in her record. She has received high marks and a “Recommended” for advancement mark on all of her EERs except for the one in question. She has received many awards and commendations.

The disputed EER covers the marking period of December 1, 2015, to May 31, 2016. In the twenty-five performance categories evaluated on a scale from 1 (worst) to 7 (best), she received five 4s, nine 5s, seven 6s, and four 7s. She received a “Satisfactory” conduct mark but she was not recommended for advancement by her commanding officer (CO). She received positive supporting comments for each of the four categories in which she received a 7. The comment explaining the mark of “Not Recommended” for advancement states:

[The applicant] is not capable of satisfactorily performing the duties and responsibilities of an E-7. [The applicant] does not have the maturity level or leadership skills necessary to be a competent supervisor of junior enlisted members. During this marking period she has exhibited poor judgment in several areas including gun decking [falsifying] an oral board for a co-worker and not properly following the chain of command. [The applicant] also disobeyed a direct order from her direct supervisor who advised all the first class petty officers to ensure that no inspections or exams were to be rescheduled so that inspectors could get back in time for gym classes. [The applicant] attempted to reschedule a facility inspection so that she could attend a class at the gym. Given time, mentorship and additional experience as a lead petty officer or supervisor, [the applicant] could potentially gain the required leadership experience necessary to be advanced to the next higher pay grade.

On her next EER, dated November 30, 2016, the applicant’s rating chain assigned her high marks of twelve 6s, eleven 7s, and a mark of Recommended for advancement.

The applicant was named her Sector’s Staff Sailor of the Quarter for the last quarter of 2016, and she received a letter of commendation praising her performance.

Because she had not been recommended for advancement by her CO on her May 31, 2016, EER the applicant was not eligible for advancement to MSTC by the terminal eligibility date for the May 2017 SWE advancement list, which was January 1, 2018. Therefore, although she apparently took the May 2017 SWE, she was ineligible to advance, and her name was removed from the advancement list of members resulting from the May 2017 SWE.

VIEWS OF THE COAST GUARD

On July 20, 2018, 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 doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application is timely and therefore should be considered on the merits. PSC stated that the disputed EER included supporting comments for the mark of “Not Recommended” explaining why the applicant had received that mark. PSC noted that the applicant had received a letter of commendation, but stated that it was for the period of October 2016 to December 2016, whereas the disputed EER covered the period of December 1, 2015, to May 31, 2016. Therefore the letter of commendation concerned her performance for a period after the marking period. PSC argued that the applicant did not submit any evidence of error or injustice. PSC stated that the applicant was notified of the reasons for the disputed mark in the comments section of the EER. When she received this mark, she became ineligible for the following SWE because she had not maintained her CO’s recommendation for advancement. PSC also asserted that the applicant failed to provide any evidence of discrimination, a hostile work environment, or poor leadership. PSC therefore recommended that the Board deny the requested relief.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 7, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited her to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

The Enlisted Accessions, Evaluations and Advancements manual, COMDTINST M1000.2, Article 3.A.4.b.(3), states that COs are responsible for execution of the advancement program. The CO’s “recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. Although minimum performance factors have been prescribed to maintain overall consistency for participation in SWE, the CO ... will be personally satisfied that the member’s overall performance in each factor has been sufficiently strong to earn the recommendation.”

Article 3.A.13. states that a member’s name is removed from an advancement list if the CO does not recommend the member for advancement.

Article 3.A.6.a.2.a. includes the following special eligibility requirements for competing for advancement to Chief (E-7), Senior Chief (E-8), or Master Chief (E-9):

For 24 months prior to the terminal eligibility date and for the entire period from recommendation to advancement, have no unsatisfactory conduct mark, court martial (CM) or civil convictions, non-judicial punishments (NJP), and maintain the commanding officer’s advancement recommendation. See Article 3.A.13. of this Manual for additional guidance for members who lose their eligibility after participating in the servicewide exam.

Article 4.D.3.e. states that the approving official's decision regarding the advancement is final and may not be appealed.

Article 4.A.2.i. states the following regarding performance feedback:

No specific form or forum is prescribed for performance feedback. Performance feedback, formal or informal, actually occurs whenever an evaluatee receives any advice or observation from a rating official on their performance or any other matter on which they may be evaluated. Performance feedback can occur during a counseling session, particularly during a mid-period session, through on-the-spot comments about performance, or at the end of the enlisted employee review period. Each evaluatee must be continuously alert for the "signals" received in one of these ways from the rating chain. If the signals are not clear, the evaluatee must ask the rating chain for clarification.

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 alleged that her mark of "Not Recommended" for advancement on her May 31, 2016, EER and consequent removal from the May 2017 SWE list were 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.² 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."³

3. The applicant alleged that she was subjected to "discrimination, hostile work environment, and poor leadership" during the reporting period for the disputed EER. However, she did not provide any evidence or explanation with these assertions, and the record contains no evidence to support these claims. The Board will not grant relief on these grounds.

4. The applicant asserted that she was not informed of the reasons why she received the mark of "Not Recommended" on the disputed EER. However, the comments section on the EER includes an explanation specifically supporting this mark. The applicant claimed that she was not properly counseled about her performance during the reporting period, but she provided no evidence to support this assertion, there is no requirement for documented mid-term counseling,⁴ and her rating chain is presumed to have acted correctly.⁵ Nor would a proven lack of counseling justify changing a mark of "Not Recommended" to "Recommended" because "Recommended" is not a default mark that a member is entitled to receive if not adequately

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁴ Enlisted Accessions, Evaluations and Advancements manual, COMDTINST M1000.2, Article 4.A.2.i.

⁵ *Arens* at 1037.

counseled about poor performance. To recommend a member for advancement, a CO must be personally satisfied that the member is able to perform the duties of the next higher grade.⁶ Accordingly, the Board will not change the mark to “Recommended” on the disputed EER.

5. The applicant also asked the Board to reinstate her onto the May 2017 SWE eligibility list for advancement. However, she has not shown that her CO erred by marking her as “Not Recommended” for advancement on her May 31, 2016, EER. In accordance with Article 3.A.4.b.(3) of the Enlisted Accessions, Evaluations and Advancements manual, the CO’s advancement recommendation is the single most important eligibility requirement in the advancement system. And Article 3.A.6.a.2.a. states that to be eligible to advance to Chief, a member must have maintained her CO’s recommendation for advancement for the entire 24-month period leading up to the “terminal eligibility date” for the SWE advancement list. Therefore, when the applicant took the May 2017 SWE, she knew or should have known that she would not be eligible to advance to Chief as a result of that test because of the mark of “Not Recommended” on her May 31, 2016, EER. Because the applicant has not shown that the mark of “Not Recommended” was erroneous or unjust, she has not proven by a preponderance of the evidence that her name was erroneously or unjustly removed from the advancement eligibility list resulting from the May 2017 SWE.

6. The applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that the mark of “Not Recommended” on her EER or her removal from the advancement list was erroneous or unjust. Accordingly, relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁶ Enlisted Accessions, Evaluations and Advancements manual, COMDTINST M1000.2, Article 3.A.4.b.(3).

ORDER

The application of MST1 [REDACTED], USCG, for correction of her military record is denied.

December 21, 2018

