

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-001



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on October 3, 2019 and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 17, 2021, 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 E-7 EMC, asked the Board to correct his record by removing a negative CG-3307 (“Page 7”) placed in his employee file.

The applicant has alleged that the negative “Page 7” placed in his file was not dated and does not provide the applicant’s rank. The applicant claimed the missing date and rank places an undue prejudice on him for future promotions. The alleged negative CG-3307 occurred while the applicant was at the Naval Diving and Salvage Training Center attending dive school, but because of the lack of date on the negative “Page 7” it could be construed that this evaluation took place more recently in his career.

The applicant claimed the contested “Page 7” took place over fourteen years ago and only refers to the applicant as “Petty Officer.”¹ The applicant also claimed the “Page 7” was excessive and the comments were copied and pasted from one of the applicant’s previous employee reviews.

The applicant argued the negative “Page 7” is unwarranted because he was already punished with low evaluation marks and was not recommended for advancement. However, upon counseling and guidance, the applicant succeeded. At this point in his career, the applicant is

¹ The term “Petty Officer” is used to refer to enlisted members with a rank of E-4 through E-6.

concerned this negative “Page 7” has and will continue to hinder his progression for advancement toward Warrant Officer, or Command Chief positions.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 2, 2001 and continues to serve as of the date of this decision.

In approximately September of 2004, the applicant received a negative “Page 7”, for “Poor Quality of Work”, “Communication”, and “Setting an Example.” Both the applicant and his commander signed this negative CG-3307.

VIEWS OF THE COAST GUARD

On March 3, 2020 a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board grant alternate relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The Coast Guard argued, after reviewing numerous instructions and Coast Guard manuals, that the removal of a “Page 7” is not required for administrative errors that can easily be remedied. The Coast Guard provided a list of these manuals and argued that none of the many instructions and manuals studied state that a “Page 7” is invalid and must be removed if left undated, or without providing a service member’s rank. However, the Coast Guard conceded that the absence of these items from the service members “Page 7” is erroneous.

The Coast Guard argued that although the applicant claimed that the “Page 7” at issue is excessive, unjust and that he was already “punished” with low marks and a non-recommendation for advancement, none of the instructions and manuals consider “page 7s” to be a form of punishment but are used more for documenting punishments in other contexts such as Non-Judicial Punishments (NJP) which are not applicable here.

The Coast Guard argued that the applicant bears the burden of proof and that the EER summary provided by the applicant does not include the comments section, but no policy prohibits the use of a negative “Page 7” in addition to comments in the EER. In practice, a “Page 7” and formal counseling may come closer in time to the infraction or poor performance than EERs, and very often serve as justification for a commander who issues lower marks later or other adverse actions against a service member. The Coast Guard argued that CG-3307s put service members on notice of potential future actions that may be taken by commanders.

The Coast Guard also argued that even if the “Page 7” was issued contemporaneously with the applicant’s EER or afterward, documentation of his poor performance in this matter was not unjust, as the command has many reasons why documentation in this form may be necessary or desire at a later date such as performance probation, administrative separation, NJP, reassignment, fitness for specific duties, safety aboard the unit, good order, and discipline, etc.

Finally, the Coast Guard argued that the applicant failed to meet his burden of establishing by a preponderance of the evidence that the Coast Guard committed an injustice. However, the lack of a date and the applicant's rank on the subject of the "Page 7" is erroneous and the Board should deny the requested relief and grant alternate relief by directing the Coast Guard to amend the negative "Page 7" at issue here.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 5, 2020 the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received

APPLICABLE LAW AND POLICY

Chapter 10.B of the Coast Guard Personnel Manual provides the necessary guidance on the Coast Guard Enlisted Employee Review System (EERS). In relevant part:

10.B.1.a. Purpose

The Enlisted Employee Review System (EERS) has been designed to serve several specific purposes:

1. To set standards by which to evaluate the performance and behavior of all enlisted members;
2. To inform enlisted members of the performance standards they will be measured against;
3. To provide a means by which enlisted members can receive feedback on how well they are measuring up to the standards;
4. To capture a valid, reliable reference of enlisted members' performance, so the Coast Guard may advance and assign members with a high degree of confidence;
5. To provide critical information that may affect discharges, re-enlistments, good conduct, advancement eligibility, and reductions in rate.

10.B.2.a. Policy

Each commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely employee reviews. To this end, the Service has made enlisted performance criteria as objective as possible, within the scope of jobs and tasks enlisted personnel perform. In using the EERS, strict and conscientious adherence to the specific wording of the standards is essential to realizing the purpose of the employee review process.

Chapter 10.B.2 of the Coast Guard Personnel Manual discusses required supporting remarks, or CG-3307s, in relevant part:

10.B.2.a. Discussion

Supporting remarks are required to be submitted along with the employee review, up through the marking chain to address the future leadership potential of all enlisted personnel, E-6 and above, and for any recommended marks of 1 (Unacceptable), 2 (Poor), or 7 (Superior), unsatisfactory conduct mark, or loss of recommendation for advancement. See Articles 10.B.6.a. and 10.B.9.a of the Coast Guard Personnel Manual.

a. Employee reviews that result in assignment of unsatisfactory conduct mark or low competency marks as defined in Article 10.B.8.a. of this manual, must be support by adverse remarks entry for:

...
7. Not Complying with Civilian and Military Rules, Regulations, and Standards.
...

d. To clearly distinguish this type of remarks entry from all others, start the entry in the conduct competency field with the following:

“This is an adverse supporting remarks entry for...”
...

Chapter 10.B.6. of the Coast Guard Personnel Manual discusses the employee review process. In relevant part:

10.B.6.a. General

1. 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. The rating chain shall base employee reviews on how the member performed in each competency consistently throughout the period, except for conduct, to which the member must adhere every day of the period. 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.

2. The rating chain uses employee reviews to evaluate enlisted members performance of duties in any position or pay grade, whether in specialty or not.

...
4. Members are divided into three pay grade groups: master, senior, and chief petty officers (E-9, E-8, and E-7); petty officers (E-6, E-5, and E-4); and non-rated personnel (E-3, E-2, and E-1). Use the non-rated employee review for non-rated personnel with designators.

5. Each competency is defined in terms of three performance standards: low, middle, and high. These standards are not the same for each pay grade group. The higher the pay grade group, the higher the standards become, as should be expected considering their increased training and experience. All raters shall mark each evaluatee against the written standards, not against others in the same rate or rating.

6. For a mark of 2, 4, or 6, the member must meet these standards and no others in the next higher performance standard. A mark of 4 represents the expected performance level of all enlisted personnel. 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.

10.B.6.b. Documentation

1. The employee review is designed to inform members how they are performing compared to the written standards. The form requires few or no supporting remarks and should cover explicitly all performance factors for each evaluatee. The rater may use the employee review as a tool in counseling the evaluatee.

a. Raters must provide supporting remarks for certain marks Article 10.B.2. These remarks serve as supplemental information on the evaluatee in determining decisions such as OIC certification, removal for cause, regular duty assignments, or special duty assignments as a recruiter, instructor, investigator, or CMC.

The Coast Guard Personnel and Pay Procedure Manual (2002), Enclosure 6, outlines the procedures required to be followed when filling out Administrative Remarks, or Page 7s. In relevant part:

1. Administrative Remark entries are broken down into the following "types":

...

d. Performance and Discipline (P&D-#) Note: Includes indebtedness, non-support of dependents, general (positive/negative), evaluations, good conduct eligibility, and weight

2. Each of the sample entries consist of the following information:

a. Entry type and number.

b. The reference providing the requirement to complete the CG-3307 entry.

c. The responsible level for completing the entry, i.e., PERSRU or Unit.

d. The entry itself. The entry should be modified to fit the circumstances as necessary

e. When and where applicable, a member's acknowledge entry

It has been determined that items a. thru c. are valuable for tracking authorized entries and therefore MUST be included as part of the Administrative Remark entry when actually preparing a CG-3307. (Emphasis Added).

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.

2. Although the application was not filed within three years of the applicant's discovery of the alleged error or injustice, it is considered timely because he has remained on active duty in the interim.²

2. The applicant alleged the negative "Page 7" in his official military record is unjust because it does not provide a date, nor does it provide the applicant's rank at the time the "Page 7" was executed. The applicant argued that because there is no date and only refers to the applicant as "Petty Officer"—a title that includes all enlisted members with ranks E-4 through E-6—the

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).

negative “Page 7” can be misconstrued as having taken place later in his career, thereby hindering his future promotion opportunities. 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 the military 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

4. Under 10 U.S.C. § 1552(a), the Board may “remove an injustice” from a member’s record, as well as correct an error in the record. The Board has authority to determine whether an injustice has been committed on a case-by-case basis.⁵ Therefore, the Board must consider whether the applicant’s negative Page 7 constitutes an injustice. The policies and procedures that govern Administrative Remarks can be found in the Coast Personnel Manual and Personnel Pay and Procedure Manual. Article 10.B.2.a.1(a) of the Personnel Manual states that employee reviews that result in assignment of an unsatisfactory conduct mark or low competency marks as defined in Article 10.B.8.a. must be supported by an adverse remarks entry for “...(7) not complying with civilian and military rules, regulations, and standards.” Article 10B.2.a.1(c) states,

In noncompliance with civilian and military rules, regulations, and standards; a one-time, minor infraction (e.g., late to work) is insufficient to be classified as an adverse remarks entry, which, in turn, necessitates conducting a special employee review and terminating Good Conduct Award eligibility. Adverse entries dealing with minor infractions should focus on patterns of unacceptable behavior instead of a one-time minor infraction.”

Under the policies and procedures of the Coast Guard, including a negative “Page 7” with a low employee review is required in order to add context and elaboration on service members who receive low or unsatisfactory marks on the reviews. Again, in Article 10.B.6.b.1(a) policy dictates that,

Raters must provide supporting remarks for certain marks as provided in Article 10.B.2. These remarks serve as supplemental information on the evaluatee in determining decisions such as OIC certification, removal for cause, regular duty assignments, or special duty assignments as a recruiter, instructor, investigator, CMC.

The applicant claimed this negative “Page 7” is unnecessary and redundant because the comments included in the negative “Page 7” were already included in his employee review, but the Board was unable to verify this information because the applicant failed to include with his application the comments section from the employee review at issue here. The applicant also claimed that the negative “Page 7” is excessive because he already received low evaluation marks and was not recommended for advancement. However, Coast Guard policy and procedure require this type of Administrative Remarks entry, or “Page 7”, be submitted in conjunction with an employee review

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).

⁵ Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. According to *Sawyer v. United States*, 18 Ct. Cl. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577, and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), purposes of the BCMRs under 10 U.S.C. § 1552, “injustice” is “treatment by military authorities that shocks the sense of justice.”

that includes low evaluation marks, especially when an applicant is not recommended for advancement, which is the case here. Article 10.B.2.a. states in relevant part,

Supporting remarks are required to be submitted along with the employee review, up through the marking chain to address the future leadership potential of all enlisted personnel...and for any recommended marks of...unsatisfactory conduct mark, or loss of recommendation for advancement. See Articles 10.B.6.a. and 10.B.9.a of the Coast Guard Personnel Manual.

Although the applicant's commander at the time followed certain Coast Guard policies and procedures when completing the negative "Page 7", he neglected to follow all Coast Guard policies and procedures regarding this type of entry. Specifically, the Coast Guard Personnel Pay and Procedure Manual (2002) requires that each Page 7 include at a minimum: a.) Entry type and number; b.) The reference providing the requirement to complete the CG-3307 entry; and c.) The responsible level for completing the entry, i.e., PERSRU or Unit. This same article states the following:

It has been determined that items a. thru c. are valuable for tracking authorized entries and therefore MUST be included as part of the Administrative Remark entry when actually preparing a CG-3307.

The negative "Page 7" contested by the applicant does not include "the reference providing the requirement to complete the CG-3307 entry." However, the Board believes this oversight can be easily remedied without removing the "Page 7" from the applicant's official records.

The applicant argued the negative "Page 7" is excessive and unwarranted and to allow it to remain in his permanent record would hinder his goal of advancement. However, the Board believes allowing the "Page 7" to remain in the applicant's permanent record not only complies with Coast Guard policies and procedures, but it also shows future commanders and promotion boards that the applicant has the ability to take counsel, learn from it and grow as both a person and service member; characteristics and attributes the applicant should be proud of and commended for. The applicant himself conceded in his application that this negative "Page 7" led him to seek counseling and guidance, and as a result the applicant has succeeded as a Coast Guard member.

The applicant also argued that the lack of date on the negative "Page 7" leaves too much room for interpretation and could be misconstrued as having taken place more recently in his career. However, given the ample Coast Guard Instruction Manuals consulted by the Board regarding this kind of negative entry, it is reasonable to assume that most commanders or supervisors—individuals more acquainted with the policies and procedures governing "Page 7" entries related to employee reviews—viewing the applicant's PDR will discern that the negative "Page 7" at issue here would be connected to the applicant's poor employee review given that Coast Guard policies and procedures require such an entry.

Accordingly, it is ordered that the applicant's request be denied, but alternate relief be granted. The Coast Guard should correct the negative "Page 7" contested by the applicant in the following ways:

- 1.) Update the Reference type to reflect the following:

“COMDTINST 1000.6 (series), Article 10.B.2.”

- 2.) Update the date of the Page 7 to reflect the same date the employee review was effective. Specifically,

“September 30, 2004.”

- 3.) Update the applicant’s rank on the Page 7 to reflect the applicant’s rank at the time the Page 7 was executed. Specifically,

“Rank E-4.”

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of [REDACTED] [REDACTED] [REDACTED] [REDACTED] for correction of his military record is denied, but alternate relief is granted. The Coast Guard will update his negative "Page 7" with the following corrections:

- Update the Reference type to reflect the following:
"COMDTINST 1000.6 (series), Article 10.B.2."
- Update the date of the Page 7 to reflect the same date the employee review was effective. Specifically, "September 30, 2004."
- Update the applicant's rank on the Page 7 to reflect his rank at the time the Page 7 was executed. Specifically, "Rank E-4."

December 17, 2021

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]