

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-119


BM2

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 June 3, 2020, 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 April 1, 2022, 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 Boatswains Mate second class (BM2/E-5) who was honorably discharged from active duty on September 1, 2019, and entered the Individual Ready Reserve (IRR) shortly thereafter, asked the Board to correct his record by removing a Change of Commanding Officer's Recommendation (CORC) Enlisted Evaluation Report (EER) dated June 19, 2019, that shows that he was no longer recommended for advancement.

The applicant stated that during his four years on active duty, he consistently received exceptional EERs. Further, the applicant stated that his military record is excellent and does not include any disciplinary infractions. On multiple occasions, he stated, he publicly represented the Coast Guard and brought good credit to the Service. Then, in June 2019, the applicant's enlistment was set to expire. However, at the time, his station was lacking qualified small boat coxswains for the upcoming search and rescue season. Instead of being discharged, the applicant stated that he voluntarily extended his enlistment by three months to ensure that his unit's operational readiness would not be hindered. The applicant stated that it was during this three month extension that his clean record was tarnished.

The applicant argued that on June 19, 2019, his Officer in Charge (OIC) unjustly issued him a CORC EER that changed his advancement potential from "Ready for Advancement to "Not Recommended." According to his OIC, the CORC was a result of the applicant's good order and discipline issues. Specifically, the OIC stated that a subordinate had confided in the applicant that

he had used drugs while on leave and the applicant had not informed the command. The applicant argued that the CORC was unjust for three reasons. First, the applicant argued that he had not actually witnessed the subordinate use drugs because he was not in the state where the alleged marijuana use had occurred. Further, the applicant argued that a single incident does not warrant a CORC EER for good order and discipline issues. Finally, the applicant argued that he was unjustly blamed for the actions of other people.

The applicant also argued that the CORC EER is erroneous because his OIC did not provide clear guidelines as to how he could earn his recommendation for advancement.

The applicant argued that he is capable of serving in the next higher paygrade as evidenced by his strong performance. To support this assertion, the applicant cited a Commandant's Letter of Commendation award that he received in July 2019. The Letter of Commendation praised the applicant for his performance of duty while serving at his unit from July 2016 to May 2019. The applicant argued that to issue a Letter of Commendation while simultaneously revoking his advancement recommendation proves the illegitimacy of the CORC EER.

The applicant stated that following his discharge from active duty, he transitioned to the IRR and also enrolled in college. On his college campus, he is actively involved in a student organization for veterans. The applicant also stated that he is involved in his community, notably at a local funeral home and at his church. The applicant concluded by stating that he is considering reentering the Coast Guard. He stated that if the CORC were to remain in his record, his chances of success as a Chief Petty Officer, Warrant Officer, or Commissioned Officer would be profoundly diminished.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on June 2, 2015, for a term of four years. After recruit training, the applicant attended BM "A" school. In July 2016, the applicant was stationed on the east coast where he served for the remainder of his active duty career.

On the applicant's semiannual EER dated March 31, 2019, on a scale of 1 to 7, he received three above-standard marks of 5, five excellent marks of 6, and five superior marks of 7 in the various performance categories; a Satisfactory Conduct mark; and a mark of Ready for Advancement. The comment regarding the applicant's advancement potential states the following:

Member has the capability and capacity to carry out the duties and responsibilities of the next higher grade of E-5 and has satisfied all eligibility and qualification requirements for the next higher grade. Member is on the BM2 advancement list. Member is highly recommended for advancement to BM2.

On June 19, 2019, the applicant received a negative Administrative Remarks form ("Page 7") from his OIC. The Page 7 stated the following:

You are being counseled on your poor leadership, lack of integrity, and failure to adhere to the Coast Guard's Core Values. On June 14th, 2019, the unit had a random urinalysis screening. While waiting around the boathouse, a subordinate E-3 who was randomly selected to provide a urine specimen approached you a [sic] told you he had smoked an illegal substance. Your response was something to the effect of that you "wouldn't urinate for him." This is where you failed—you simply did

nothing. You did not report the knowledge you had that one of your subordinates had used illegal drugs to anyone in the chain of command. Even worse, you discussed this knowledge with a different E-3 member! Upon talking to Coast Guard Investigative Services, you stated that you were counting on the urinalysis screening to find the drug use. Your ignorance of our Core Values is troubling. As a member who recently made Second Class Petty Officer, you knew of your obligation to report this. As a person who has discussed with me your desire to attend Reserve—Officer Candidate School and hopefully join the Officer Corps, I am sincerely disappointed; You will not receive an endorsement from me for OCS.

You have failed as leader and as a Coast Guardsmen. Not living up to our Core Values is something that won't be tolerated. Effective immediately, I am Not Recommending you for Advancement to E-6. Your lack of action shows that you cannot even perform as a Petty Officer, let alone a First Class Petty Officer!

That same day, the applicant received a Member Counseling Receipt regarding his CORC EER. The applicant was counseled that he was not recommended for advancement to E-6 due to good order and discipline issues. The Reviewer's comments state that the applicant was told by a subordinate that he had used drugs while on leave. However, the applicant did not inform the command or any other senior person. Consequently, more people became involved in the situation which negatively impacted the good order and discipline of the unit. The applicant was advised that in order to earn a recommendation for advancement, he must "take responsibility for [his] actions, demonstrate better judgment, and do the right thing when presented with a challenging circumstance."

On September 1, 2019, the applicant was released from active duty and entered the IRR.

VIEWS OF THE COAST GUARD

On December 9, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that approving officials have the final say regarding a member's advancement recommendation. This decision is based on the approving official's judgment of whether a member is or is not ready to assume the responsibilities of the next higher paygrade. PSC stated that as a result of the incident that occurred on June 14, 2019, the approving official lost confidence in the applicant's ability to carry out the responsibilities of the next higher paygrade. PSC argued that the approving official acted within Coast Guard policy and had a good and sufficient reason to change his advancement recommendation.

The JAG argued that the applicant failed to show that the Coast Guard committed an error or injustice. First, the JAG argued that that the CORC does not contain a misstatement of fact. Next, the JAG argued that the applicant did not prove an injustice exists that shocks the sense of justice. The JAG stated that the Enlisted Evaluation System Procedures Manual gives a rating chain discretion and judgment to gauge a member's potential. In this case, the JAG argued that the OIC fairly expected the applicant, a senior Petty Officer, to fulfil his duty and obligation of reporting his subordinate's misconduct to the command.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 14, 2021, 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 4.D.3 of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, discusses the Advancement Recommendation as follows:

a. Basis for the Advancement Recommendation. While the rating chain must consider past performance, it must also consider and base the advancement recommendation on the member's potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, personal integrity, and adherence to the Service's core values. The approving official's recommendation for advancement (to include change in rating by participation in the SWE [Servicewide Examination]) is valid only for a specific competition and must be renewed for each succeeding competition. Thus the rating chain must address this independent Section every time they complete an evaluation report.

b. Guidelines for the Advancement Recommendation. When completing the advancement potential part of the evaluation report, the rating chain should focus on the guidelines in Article 3.A.4.b.(3) of this Manual on advancement recommendations and then select one of the following choices:

(1) Ready. Assign this mark if, in the view of the rating official, at the time of this evaluation the individual has the capability and capacity to carry out the duties and responsibilities of the next higher grade, and has satisfied all eligibility and qualification requirements for the next higher grade. Required time in grade/service must not be considered when determining overall eligibility for advancement. Note 1.

(2) Not Ready. Assign this mark if, in the view of the rating official, at the time of this evaluation the individual is satisfactorily performing their required duties but is not yet ready to carry out the duties and responsibilities of the next higher grade, or has not satisfied all eligibility and qualification requirements for the next higher grade. Required time in grade/service must not be considered when determining overall eligibility for advancement. Note 1.

(3) Not Recommended. Assign this mark if, in the view of the rating official, the individual should not be advanced to the next higher grade, regardless of qualification or eligibility, due to negative conduct or poor performance, including an unsatisfactory conduct mark, or good order and discipline issues.

Note 1: When determining if a member has satisfied eligibility requirements for advancement, the requirements to complete the Coast Guard Chief Petty Officer Academy (or other DoD Senior Enlisted Academy) or the Coast Guard Senior Enlisted Leadership Course must not be considered due to these courses being offered only after a member is above a cutoff for advancement to the next higher grade. No eligibility requirements for advancement must be considered on EERs for members in paygrades E-1 through E-3.

...

e. Required Comments and Counseling. If a member is not ready or not recommended for advancement, the approving official must counsel the member on why this mark was assigned and on the steps necessary to earn a ready for advancement and prepare required comments in

accordance with Articles 3.A.4.b.(2), 3.A.4.e., and 4.B.4. of this Manual. Comments for a not ready and not recommended must be detailed and specific to why the mark was assigned and should outline the steps necessary to earn a ready for advancement.

...

i. Change of Commanding Officer's Recommendation (CORC). At any time, the member's commanding officer may change a recommendation for advancement for any good and sufficient reason. A change of CORC may be submitted by the member's commanding officer (or approving official if delegated) by completing a CORC EER in Direct Access. When submitting a CORC to change a not ready or not recommended to ready, the approving official must ensure eligibility requirements are met. When submitting a CORC to change the recommendation to not ready or not recommended, comments are required in accordance with Article 4.D.3.e. of this Manual.

Article 7.a. of the Coast Guard Investigative Service Roles and Responsibilities Manual, COMDTINST 5520.5F, states the following regarding mandatory reporting to CGIS:

- a. Felony-Level UCMJ Violations. All actual, alleged, or suspected felony violations of the UCMJ must be reported to CGIS when the suspect/accused is:
 - (1) A coast Guard member on active duty, a reserve member serving on activity duty, or a former Coast Guard member who was on active duty when the offense was committed.

Article 5.D. of the Military Drug and Alcohol Policy Manual, COMDTINST M1000.10A, states the following regarding drug incident investigations:

1. Summary. The Coast Guard does not tolerate the intentional use of illegal drugs, illicit chemical analogues, or prescription drug misuse. This includes ingestion of hemp oil or products made with hemp seed oil; however, does not include food items regulated and approved by the Federal Drug Administration (FDA) that contain hemp ingredients. Coast Guard members are expected to comply with the law and not use illegal drugs; additionally, as law enforcement agency members, to maintain a life-style that neither condones substance abuse by others nor exposes the Service member to accidental intake of illegal drugs. Impairment puts members, crews, and missions at risk and is not a behavior consistent with the Coast Guard culture and Core Values.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).
3. The applicant alleged that his CORC EER dated June 19, 2019, should be expunged because it is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed evaluation in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence

that it is erroneous or unjust.¹ Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.² To be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.³

4. The Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."⁴ The Board has authority to determine whether an injustice exists on a "case-by-case basis."⁵ Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"⁶ and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."⁷

5. The applicant put forth three arguments to support his assertion that the CORC is unjust. The applicant first argued that the CORC EER is unjust because he did not witness his subordinate using drugs while he was on leave. The Board finds, however, that there is a reporting requirement, and it does not require actual witnessing of wrongdoing, but requires reporting of all actual, alleged, or suspected felony-level violations of the UCMJ.⁸ The applicant received the CORC for failing to report his subordinate's admission of having used drugs to his command or other senior person in accordance with Coast Guard policy and for discussing the admissions of drug use with another subordinate, which according to the Page 7, his OIC considered "even worse" conduct. The applicant had a mandatory obligation to report the suspected UCMJ violation, especially because the applicant's response to his subordinate also indicated that the applicant believed his subordinate was asking him to provide a false urine sample. According to the Coast Guard Investigative Service (CGIS) Roles and Responsibilities Manual, members must report all actual, alleged, or suspected felony violations of the Uniform Code of Military Justice (UCMJ) to CGIS. The UCMJ does not distinguish between felonies and misdemeanors.⁹ However, CGIS, as the criminal investigative arm of the Coast Guard, investigates actual, alleged, or suspected felony-level violations. In this case, a CGIS investigation was conducted regarding the subordinate's

¹ 33 C.F.R. § 52.24(b).

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

³ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

⁴ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); but see 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

⁵ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

⁶ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

⁷ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

⁸ Article 7.a. of the Coast Guard Investigative Service Roles and Responsibilities Manual, COMDTINST 5520.5F.

⁹ According to 18 U.S.C. § 3559, federal law defines felonies as offenses that may result in prison sentences of more than one year, while misdemeanors carry sentences of one year or less.

alleged use of an illegal substance.¹⁰ As such, the subordinate's alleged use of a controlled substance was considered a felony-level violation and should have been reported to CGIS. Moreover, according to Article 5.D. of the Military Drug and Alcohol Policy Manual, Coast Guard members, as law enforcement agency members, are expected to maintain a lifestyle that does not condone substance abuse by others. Given the Coast Guard's zero tolerance policy on drugs, it does not shock the sense of justice that the OIC would expect the applicant to report his subordinate's admission of illegal drug use. Nor does it shock the sense of justice that the OIC thought that the applicant should not be recommended for advancement into a higher leadership position after having discussed one subordinate's alleged drug use with a different subordinate.

The applicant also argued that the CORC is unjust because a single incident does not warrant a determination that he was having good order and discipline issues. However, the applicant did not provide any evidence to support his assertion that good order and discipline issues could not arise from a single incident. In fact, the Board has upheld in several cases that a violation of Article 134 of the UCMJ, which is the general article that makes punishable all disorders and neglects to the prejudice of good order and discipline, could arise from a single incident.¹¹ Finally, the applicant argued that the CORC is unjust because he was blamed for the actions of other people. Contrary to the applicant's assertion, he was not blamed for his subordinate's drug use. Instead, the applicant received the CORC for his own inaction of failing to report his subordinate's drug use to his command and for discussing it with another subordinate. Therefore, the applicant has not proven by a preponderance of the evidence that the CORC is unjust.

6. The applicant argued that the CORC EER is erroneous because the comments fail to provide clear guidelines as to how he could earn a ready for advancement. According to Article 4.D.3.e of the Enlistments, Evaluations, and Advancements Manual, if a member is not recommended for advancement, the comments should outline the steps necessary to earn a ready for advancement. The applicant received the CORC in response to a particular incident in which he failed to report a subordinate's drug use and discussed it with another member. The Reviewer's comments specifically state that the applicant was not recommended for advancement because his failure to inform the command that a subordinate used drugs while on leave negatively had impacted the good order and discipline of the unit. The applicant was then advised that in order to earn a Ready for Advancement, he must "take responsibility for their actions, demonstrate better judgment, and do the right thing when presented with a challenging circumstance." The Board finds that the CORC EER sufficiently outlined the steps necessary for the applicant to earn a mark of ready for advancement.

¹⁰ According to Article 112a of the UCMJ, the maximum punishment for the wrongful use of a controlled substance includes a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 or 5 years depending on the controlled substance.

¹¹ In BCMR Docket No. 2019-106, the applicant received nonjudicial punishment (NJP) for violating Article 134 of the UCMJ for yelling at his Command Senior Chief that he would hurt/kill anyone who spoke to him like he had, and for striking an air compressor with his fist and arm; in BCMR Docket No. 2016-170, the applicant received NJP for having sexual intercourse with a prostitute on one occasion; in BCMR Docket No. 2019-126, the applicant received NJP for violating Article 134 of the UCMJ for leaving her duty vacant on December 5, 2009; in BCMR Docket No. 2018-176, the applicant received NJP for violating Article 134 of the UCMJ for being drunk and disorderly on June 5, 2016.

7. The applicant insinuated that the CORC is erroneous or unjust because it is inconsistent with his end of tour award. The applicant received a Letter of Commendation for his performance of duty from July 2016 to May 2019. The applicant did not receive the CORC until June 19, 2019, which was influenced by his conduct that had occurred three days earlier. As such, the applicant's Letter of Commendation was awarded for a period of service that did not include the date that he received the CORC. Therefore, the Board finds that the applicant's CORC is not inconsistent with his end of tour award.

8. The Board notes that the applicant has not alleged a misstatement of fact in the CORC EER, nor has he asked the Board to remove the corresponding Page 7 that he received on June 19, 2019. Specifically, the applicant did not contest that a subordinate admitted to him that he smoked an illegal substance or that he discussed the matter with another subordinate. To recommend a member for advancement, a CO must consider both past performance and "the member's potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, personal integrity, and adherence to the Service's core values."¹² In this case, as evidenced by the first sentence in the Page 7, the OIC was no longer personally satisfied with the applicant's qualities of leadership, personal integrity, or his adherence to the core values. Specifically, the OIC criticized the applicant's failure to report his subordinate for illegal drug use, but more strongly admonished the applicant's unwise decision to discuss the matter with a different E-3 member. In addition, advancement is not an entitlement and, to recommend a member for advancement, the OIC must be fully confident that the member is not only ably performing the duties of his current grade, but ready and able to perform the duties of the next higher grade.¹³ In this case, the OIC explicitly stated that the applicant's conduct was not appropriate for his current grade, much less a First Class Petty Officer. The Board finds that the applicant has not proven by a preponderance of the evidence that his OIC abused his discretion by changing his advancement recommendation.

9. The fact that the applicant received better EERs before and after the reporting period for the disputed EER is not evidence that the disputed evaluation does not accurately reflect his performance during the reporting period.¹⁴

10. The Board therefore finds that the applicant has not proven by a preponderance of the evidence that the disputed EER is erroneous or unjust. There are no grounds for removing the disputed EER because he has not proven by a preponderance of the evidence that it was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.¹⁵

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

(ORDER AND SIGNATURES ON NEXT PAGE)

¹² Article 4.D.3.a. of the Enlisted Accessions, Evaluations, and Advancements manual, COMDTINST M1000.2.

¹³ Article 4.D.3.b. of the COMDTINST M1000.2.

¹⁴ *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.").

¹⁵ *Hary*, 618 F.2d at 708.

ORDER

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

April 1, 2022

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