

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-037

██████████
ET1

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 January 25, 2022, and assigned the case to an attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 3, 2024, 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 First Class Electronics Technician (ET1/E-6)¹ on active duty asked the Board to correct his record by: (1) removing the negative CG-3307 (Page 7) he received dated April 6, 2020; (2) removing an April 30, 2020 Enlisted Employee Review (EER), in which he received a “Not Recommended” for advancement and “unsatisfactory” conduct mark; (3) removing an April 30, 2021 EER or, in the alternative, correcting the EER by removing “Not Ready” and replacing it with “Ready”; (4) advancing him to ET1 as of June 1, 2021, the date the applicant would have advanced in ALCGENL 071/21 if he had not received a “Not Recommended” for advancement and “unsatisfactory” conduct mark on his April 30, 2020 EER; and (5) back pay and allowances consistent with his retroactive advancement.

In support of his application, the applicant provided a personal statement in which he claimed that he received the negative EER on April 30, 2020 as retaliation by his Commanding Officer, LT, who disliked him because he did not fraternize with him and his inner circle, partying and drinking in excess with other members of the cutter at ports of call, and returning to the cutter drunk after liberty expired without consequence. The applicant claimed that there were a handful of people on the cutter who did not partake in the wild, heavy drinking lifestyle with the LT, of

¹ At the time the applicant filed his application with the Board, he was an ET2/E-5.

which he was one, and so he was branded an outcast and retaliated against, as were others who did not partake of the LT's partying circle.

According to the applicant:

[T]he command climate was considered extremely toxic by the entire crew. The LT [] regularly partied and drank in extreme excess with members of his inner circle at port calls and often came back to the ship drunk after liberty expired. These members of his inner circle would arrive at work late, still drunk from the previous night, with zero repercussions because they were drinking alongside the LT. He claimed that the entire crew knew the dynamic and knew that if you weren't a member of the 'CO's frat house' (as some called it), then he would aggressively see to it that your career would be damaged to the best of his ability. Because I never went out with my CO (who was married) at port calls to get drunk and look for women to have sex with, I was seen as a problem to be silenced and punished if necessary for speaking out. I saw many of the injustices happening to other people and spoke out against it to the Chief of the Board [], who was also a member of LT['s] inner circle. As soon as I suggested that an additional DEOCS survey be conducted to address these problems, [the Chief] informed LT [], who immediately called the Sector Command Master Chief to tell his side of the story before anyone had the chance. LT [] declared that the members should receive NJP under a thinly veiled threat that if I talked to our CMC about command climate problems, that we would be masted. Later, LT [] made a false and unsubstantiated claim that I made a racist remark about him, which I never said, and would never say under any circumstance. When I had a private meeting with him later to call him on it, he shouted me down and said I should have been masted for what he claimed I said. Because I refused to 'roll over' and apologize for something I never said, and I refused to adopt his wild patterns of behaviors, he believed I was someone who needed to be silenced. Because I didn't participate with LT [] getting drunk at port calls and inappropriately touching multiple female crew members and instead stayed sober onboard the cutter, I was a problem to be dealt with. To summarize, because we had completely different personal moral codes, I was one of LT['s] targets.² Even though he was passed over for promotion to LCDR for his out-of-control behavior during his tenure as my Commanding Officer, he left a wake of destruction in his path, which is what I request to be corrected by the Board.

The applicant alleged the following is what led his chain of command to start negative administrative actions against him:

In early March of 2020, I was [located at a shipyard with CGC] while it was in a routine dry dock maintenance period. This was also the period of time that COVID-related news was just starting to dominate the news and mass panic was beginning to ensue around the pandemic. I was scheduled to leave directly from the shipyard and drive to meet my family about an hour away near Disney World and take earned leave. They had scheduled a vacation about two years prior and the Disney World parks were scheduled to be closed for the initial lockdown period due to COVID on 16MAR20. On 12MAR20, a 'safety stand down' was conducted at the dry dock shipyard which was led by BMC (then-BM) [], during which he called together the few members who were present and read from a piece of paper information about COVID-19. The entire safety stand down lasted about two minutes, and according to LT [], that paper stated that Coast Guard members were required to inform their chain of command immediately if their family members were feeling ill with possible COVID-19 symptoms. BMC [] then immediately threw the paper in the trash after reading and no further discussion about it occurred. This piece of paper was not made available to read for any of the members who were present, and it was never disseminated in writing for the rest of the crew. To this day, the information on that piece of paper has not been reproduced in any format. The only forms of documentation that indicate a change in policy surrounding COVID-19 at the time is in [COVID-19 Guidance dated March 3, 2020 and COVID-19 Chart, Version 1.0, dated March 5, 2020]. However, neither of the

² In his application, the applicant provided a list of names and phone numbers to "verify" his statement that LT "damaged solely on the basis of not being in his 'frat house' clique". According to the applicant, "[e]ach has a number of stories to tell that further back my claim that he bullied and harassed those around him and I was one of the many who fell victim to his behaviors." The applicant provided declarations to support this claim in his reply to the AO.

aforementioned references mandated notification of a member's chain of command if a family member got sick.

The applicant alleged that the following occurred while on leave:

- On 13MAR20, I visited Disney World with my family for three days, through the evening of 15MAR20, taking all CDC recommended precautions such as social distancing, hand washing, and using hand sanitizer.
- Late at night 15MAR20, my daughter, [], developed a mild fever of 100 degrees. That was also the final night that we were planning on being in the Disney World parks and no further presence in crowded areas was planned. Due to her temperature being such a low fever that the thermometer might have been wrong, we decided to monitor her overnight rather than pursue further medical treatment. On 16MAR20 at 0500, I checked her temperature, and it was 106 degrees. I immediately gave her fever-reducing medicine and took her to a local children's hospital emergency department. By the time we had arrived at the hospital, her fever had gone away because of the medicine. [My daughter] tested positive for influenza A, and after pressing the ER doctor, they stated that she lacked the symptoms to be eligible to take a COVID test. She was discharged from the emergency room within a few hours with a Tamiflu prescription and a recommendation of bedrest.

During the time my daughter was feeling ill with the flu, I self-quarantined in the house that my family rented and spent the entire time taking care of my daughter while she recovered from the flu, only leaving the house for essential needs, such as groceries and drug store necessities.

- On 19MAR20, my wife [] also developed a fever. Out of an abundance of caution, she was taken to a local emergency room for evaluation that same day, and also tested positive for influenza A. The doctor repeated the same claim as the one previously: [She] was ineligible to take a COVID test because she lacked the required symptoms. She was subsequently discharged from the emergency department with a Tamiflu prescription and recommendation of bedrest. Furthermore, neither ER doctor instructed any of us to quarantine on the grounds of the presented symptoms.

The applicant stated that, in his opinion, the claim that he was required to inform his chain of command immediately upon any family member exhibiting COVID-19 symptoms was the critical factor that his commanding officer relied on to justify negative administrative actions against him. In his defense, he asserted that he followed the COVID-19 guidelines provided to him just before he departed on vacation, including the March 5, 2020 chart, which required command notification only if a family member tested positive for COVID-19. The applicant further asserted that he had zero awareness that he was under any requirement to inform his chain of command because he himself was not experiencing COVID-19 symptoms. The applicant alleged that as a result he was presented with a negative CG-3307 and EER.

The applicant stated that later, in speaking with his Second in Command Master Chief about the events that transpired, he was told that the alleged misconduct may be characterized as a "one-time minor infraction", which is not normally classified as an adverse remark, referencing COMDTINST M1000.2C:

Insufficient Grounds for Adverse Comments. A one-time, minor infraction (e.g. late to work) is normally not to be classified as an adverse remarks entry. Adverse entries dealing with minor infractions that could affect good conduct eligibility upon submission of a regular EER should focus on patterns of unacceptable behavior rather than a one-time minor infraction.

The applicant alleged that he did not initially challenge the actions taken against him at the time of the allegations for fear of further retaliatory actions by the LT or others in his chain of command. The applicant further alleged that CGIS later conducted an investigation, and the LT was removed from his position.

In addition, the applicant claimed that the Coast Guard violated HIPAA by requiring him to provide medical information about his family, and that the Military Command Exception does not apply to his family members.

The applicant claimed that he did not challenge what happened until now because he was afraid of retaliation. He stated that he considered reporting the issues with his LT to his Command Master Chief and the Inspector General's Office, but that he decided not to after learning that an investigation would take at least 6 months and that confidentiality could not be ensured. He also stated that he tried to report the issues in the cutter's DEOCS survey but that this failed to result in any change.

Finally, the applicant raised the following points for consideration by the Board.

A final important factor to consider in this case is whether, I, the member, was exposed to COVID19, which is an impossibility to know due to the invisible nature of viruses. Since nobody knows, one could easily assume anything. I was indeed exposed to family members who had one COVID symptom (fever) but were assured by two separate doctors that because of their influenza diagnoses and the lack of other (and more severe) symptoms, the chances of them having COVID-19 were very small given the circumstances and they were ineligible to receive COVID tests. Regardless, I chose to voluntarily self-quarantine days prior to informing my command of my family's private medical information. I chose to inform them in order to give them a 'heads up' because of the state of the pandemic and felt they ought to know but was under no obligation whatsoever due to HIPAA protections. Even if my command was legally allowed to access my family's protected healthcare information, they failed to present any evidence that a policy existed which was used as the sole basis for negative administrative action against me. If the imaginary policy that I allegedly broke was indeed violated, it's my belief and that of my Command master Chief that it is not tantamount to adverse marks and a 'not recommended' and 'unsatisfactory' mark in accordance with Coast Guard policy because it was a one-time event, despite an attempt to paint this as a pattern of behavior. After over 10 years of honorable service and 8/3 years of sea time, I have never once received negative administrative action for anything conduct-related and have worked hard and served only to be denied the advancement I deserve.

It is worth noting that MAR2020 was when COVID-19 was just beginning to dominate the news headlines, and it was an unprecedented time in history. New policies and procedures were being promulgated at a breakneck pace, and the Coast Guard as we once knew it was changing extremely rapidly to stay effective while mitigating the operational impacts of the novel coronavirus. If I had known that there was a policy where I was required to share my family's medical condition as it pertains to these events I absolutely would have done so. I have always been a high-performing and dedicated Coast Guardsman who unfortunately happened to work in a toxic command climate. I have never had problems with submitting to authority, which is evidenced by my entire history of high marks in the Coast Guard. The only period of time that I've ever had a single mark under a '4' was while serving under this particular Commanding Officer. All administrative actions against me were motivated from a desire to vindictively silence anyone who might speak out against his out-of-control pattern of behavior. All related paperwork against me was due to his prejudice and vendetta against me and should be removed from my record.

The applicant also asked the Board to remove or alter his April 30, 2021 EER, for which he received a “Not Ready” for advancement mark. According to the applicant, he received a “Not Ready” because the required RPQ signatures from the previous year that were required to be eligible to compete on the next servicewide exam had changed and he had not completed the updated RPQs in time to compete in the following SWE. The applicant stated that he was above the cut for ET1 and therefore he would not have needed to compete in the SWE and would have been able to advance unimpeded on June 1, 2021 if it were not for the negative Page 7 and associated EER in his record. The applicant argued that the EER he received was erroneous and unjust on the grounds that he would not have received a “Not Ready” mark if he had not first received a “Not Recommended” mark. He stated that if the Board grants his request to remove the April 30, 2020 EER from his record, then it logically follows that the Board would need to determine whether his April 30, 2021 EER should be corrected to a ‘ready’ mark or, in the alternative, removed altogether.

In support of his application, the applicant provided an email from his father dated December 6, 2021, in which he stated generally that the family’s five-day visit to the parks was to commence on Sunday March 15, and that he and the applicant’s sister who was traveling from the west coast arrived on March 12 to have time to acclimate to the time change before visiting the parks. He explained that the family’s plans changed, however, when it was announced that March 15th would be the last day that the parks would be operational and since they all had flexible park tickets they went to the parks instead March 13th through 15th. In the email, his father stated that his daughter was diagnosed with the flu, not COVID, and that once she was sick they quarantined at home except for necessities. He also stated that he was aware that the applicant was in touch with his Command about the flu symptoms in his immediate family.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 24, 2011, where he trained as an Electronics Technician and advanced to ET2/E-5 on March 1, 2017. While the applicant’s application was pending with the Board he was promoted to a First Class Electronics Technician (ET1/E-6) on January 10, 2022.

As detailed below, the applicant was published on the advancement list following the November 2019 SWE, making him eligible for advancement to E-6. The applicant was issued a negative CG-3307 and associated April 30, 2020 EER in which he received an ‘unsatisfactory conduct mark’ and was “Not Recommended” for advancement for failure to report potential exposure to COVID-19 following a family vacation in March 2020. This rendered him ineligible for advancement and required him to re compete, via the SWE, for advancement. He received a “Not Ready” for advancement mark on a April 30, 2021 for failure to complete required RPQs in order to compete in the following SWE.

By memorandum dated December 13, 2019, the applicant’s name was published on the advancement list as determined by final multiple rankings from the November 2019 SWE, making him eligible to advance from E-5 to E-6. The applicant’s name was listed second for advancement to ET1 on a May 2021 enlisted personnel announcement. The November 2019 memorandum stated that the eligibility list became effective July 1, 2020 and expired December 16, 2020, and

that a member became ineligible for advancement if the CO withdrew the advancement recommendation or mark of 'ready'.

The Commanding Officer's recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. The CO's recommendation and mark of 'ready' for advancement must be maintained for the entire period from the recommendation to date of advancement. Personnel failing to maintain the CO's recommendation and mark of 'ready' for this entire period are not eligible for advancement from the November 2019 SWE. The CO's recommendation and mark of 'ready' for advancement must be renewed to participate in succeeding competitions.

In March 2020, COVID emerged as a world-wide health issue.

On March 3, 2020, the applicant's base Command Front Office, LCDR of Health, Safety, and Work-Life Department Head, issued the following COVID-19 Guidance via email, that included:

COVID-19 Guidance

4) The criteria currently for a Person Under Investigation (PUI) are:

- (A) Fever or signs/symptoms of lower respiratory illness (e.g. cough or shortness of breath) and close contact with a laboratory confirmed COVID-19 patient within 14 days of symptom onset.
- (B) Fever and signs/symptoms of a lower respiratory illness and a history of travel from affected geographic areas within 14 days of symptom onset. These areas as of today are China, Iran, Italy, Japan, and South Korea. Please note that while other areas have had cases of COVID-19 they are not considered affected areas because there is no evidence of sustained transmission.
- (C) Fever with SEVERE acute lower respiratory illness (e.g. Pneumonia, ARDS) requiring hospitalization and without alternative explanatory diagnosis (e.g. influenza) and no source of exposure has been identified.

If a member has these symptoms please have them contact the clinic for verbal screening. If it is determined that the patient is a [PUI] then we will refer them to an Emergency Room. The clinic is required to make numerous phone notifications prior to referring a patient to the emergency room.

If you have any other questions pertaining to Coast Guard Guidance, please contact your local clinic or sickbay. Up to date guidance can also be found on the CDC website: <https://www.cdc.gov/coronavirus/2019-nCoV/infection-control/control-recommendations.html>.³

This guidance does not apply to the applicant's situation because his wife and daughter (A) did not have a laboratory confirmed diagnosis of COVID-19; (B) had never traveled to one of the specified geographic areas (The guidance specifically identified the affected areas as China, Iran, Italy, Japan and South Korea and stated that "while other areas have had cases of COVID-19 they are not considered affected areas because there is no evidence of sustained transmission.); and (C) the guidance specifically excluded an explanatory diagnosis of influenza from the reporting requirements. The applicant and his father never became ill.

³ The CDC website lists the following symptoms as being associated with COVID-19: fever or chills; cough; shortness of breath or difficulty breathing; fatigue; muscle or body aches; headache; new loss of taste or smell; sore throat; congestion or runny nose; nausea or vomiting; diarrhea.

Shortly thereafter, on or about March 5, 2020, the Coast Guard also provided the following situational guidance, the relevant portions of which are copied below:

Situation	Guidance
<p>Coast Guard Member Becomes Ill (below COVID-19 criteria met)</p> <ul style="list-style-type: none"> • Fever (100-103) with signs/symptoms of lower respiratory illness (e.g. shortness of breath, not just a cough) AND close contact with a lab-confirmed COVID-19 patient within 14 days of symptom onset. • Fever with signs/symptoms of a lower respiratory illness AND a history of travel from affected geographic areas within 14 days of symptom onset. These areas of today are China, Iran, Italy, Japan, and South Korea. • High Fever (104+) or fever with severe acute lower respiratory illness (e.g. Pneumonia, ARDS (Acute Respiratory Distress Syndrome), acute shortness of breath) 	<ul style="list-style-type: none"> • Notify Chain of Command • [call local VA] Emergency Department [] • Go To DoD MTF or a civilian Emergency Department (No CG Clinic) • Call in advance of showing up at the MTF or Emergency Department for specific guidance and notify Chain of Command • The Nurse Advice Line (1-800-Tricare, option 1) can be utilized for effective triage by symptomatic patients • Military personnel should use sick leave IAW CIM 1000.8, § 2.A.2.E • Civilian personnel should use sick leave
<p>Coast Guard Member Becomes Ill (above COVID-19 criteria NOT met)</p>	<ul style="list-style-type: none"> • Notify Chain of Command • Go Home-Stay at Home • See doctor/urgent care/ER as needed • Return to work when fever free for at least 24 hrs • Military personnel should use sick leave IAW CIM 1000.8, § 2.A.2.e • Civilian personnel should use sick leave
<p>COVID-19 Confirmed (self or household)</p>	<ul style="list-style-type: none"> • Notify Chain of Command • Anticipate quarantine for 14 days or greater • Use sick leave or telework if able
<p>Coast Guard Member Exposed to COVID-19</p>	<ul style="list-style-type: none"> • Notify Chain of Command • Anticipate Self-Quarantine for 14 days

Similarly, the March 5, 2020 situational guidance chart is inapplicable to the applicant’s situation because neither he nor his family had close contact with a confirmed COVID-19 patient.

On March 12, 2020, the applicant was present at a command safety stand down regarding Center for Disease (CDC) COVID-19 guidelines led by BMC-1. At that time, the only guidance provided by the applicant’s command regarding COVID-19 was the March 3, 2020 criteria regarding a PUI and March 5 Guidance in chart form that applied only in the case of a confirmed COVID-19. Neither of the aforementioned references mandated notification of a member’s chain of command if a family member got sick but was not diagnosed with COVID-19.

On March 13, 2020, the applicant visited Disney World with his wife and daughter for 3 days, through the evening of March 15, 2020. According to the applicant, he and his family took all CDC recommended precautions, such as social distancing, hand washing, and using hand sanitizer.

On March 15, 2020, late at night, the applicant's daughter started to develop a mild fever of 100 degrees.

On March 16, 2020, the applicant's daughter's fever reached 106 degrees, at which time the applicant reported that he gave her fever-reducing medicine and took her to the local children's hospital emergency department. At the time his daughter was seen at the emergency department, her fever had gone away because of the medicine. Nonetheless, the applicant reported, he took his daughter to the emergency department, where she was seen and tested positive for Influenza A. According to the applicant, his daughter was not tested for COVID-19 because the ER doctor stated that she lacked the symptoms to be eligible for a COVID-19 test, which at the time of the emergence of COVID were in short supply. According to the applicant, his daughter was discharged from the emergency room within a few hours with a Tamiflu prescription and recommended bedrest. The applicant stated that he self-quarantined in the rental house and spent the entire time taking care of his daughter while she recovered from the flu, only leaving the house for essential needs, such as groceries and drug store necessities.

On March 19, 2020, the applicant's wife also developed a fever. According to the applicant, he also took his wife to the local emergency room for evaluation that day out of an abundance of caution. The applicant reported that his wife was seen, and she also tested positive for Influenza A. The applicant stated that his wife, like his daughter, was ineligible to take a COVID-19 test because she lacked the required symptoms. According to the applicant, his wife was subsequently discharged from the emergency department with a Tamiflu prescription and recommended bedrest. The applicant alleged that neither ER doctor instructed him or any of his family members to quarantine based on the symptoms they presented at that time.

On March 19, 2020, the applicant informed his supervisor, LTJG, of the situation with his family's health. According to the applicant, the LTJG thanked him for being forthcoming and for adhering to quarantine guidelines.

By memo dated March 20, 2020, the applicant was ordered to home quarantine for 14 days, until April 2, 2020. The memo noted that the applicant may have been exposed to COVID-19 on March 19, 2020.

A few days later, the applicant's command changed their position and stated that they did not initially understand the timing of events reported by the applicant.

On April 9, 2020, the applicant received the following CG-3307, which he refused to sign:

Entry:

06APR2020: This counseling serves as formal documentation for your inexcusable negligence in exercising proper judgment, failing to follow Coast Guard policy, and displaying a blatant disregard for the safety, health and well-being of others.

On 12 March 2020, you were educated during a unit safety stand-down on the [CDC] defined symptoms of COVID-19, social distancing guidelines, Coast Guard promulgated notification procedures if potentially exposed to someone with symptoms or confirmed diagnosis of COVID-19. On 14 March 2020, you went on vacation to Disney World with out-of-town family members who flew in from two separate high-risk states experiencing rapid COVID-19 outbreaks. Based on the information you provided in your COVID-19 Personnel Readiness Survey and in a subsequent conversation with the Executive Officer, it became apparent you neglected to inform your Chain of Command of your potential exposure to COVID-19. Despite your family members exhibiting flu-like symptoms you continued your vacation throughout heavily populated Orlando, FL. In addition, your immediate family began developing severe symptoms on 15 March 2020, which required you to take them to the Emergency Room for evaluation and again you failed to notify your Chain of Command of the situation to avoid disrupting your vacation. The first notification made to your Command was on 19 March, four days after the onset of symptoms and the evening before your return to [home]. Your deliberate inactions inhibited safety measure from being enacted and further exposed yourself, your family, and the general public to potentially severe health risks and complications.

The applicant next received a counseling receipt for the period November 1, 2019 through April 30, 2020, the relevant entries are noted below:

Accountability/Responsibility: Assigned rating of 3, Below Standard; Failed to adhere to Coast Guard and local Sector policies set forth regarding COVID-19 reporting guidelines & precautions potentially placing self & others at risk and diminishing mission readiness.

Effective Communications: Assigned rating of 3, Below Standard; Failed to promptly communicate to chain of command when mbr was exposed to persons w/potentially severe COVID-19 symptoms during pandemic. Mbr is vehemently resistant to receiving feedback from supervisors.

Conduct: Assigned rating of U, Unsatisfactory, with the following comment:

MBR received negative 3307 for actions that violated Coast Guard [] policies. Mbr was educated on [CDC] defined symptoms of COVID-19, social distancing guidelines, and Coast Guard promulgated notification procedures following potential exposure to persons exhibiting symptoms commensurate with COVID-19. Despite this, member neglected to inform their Chain of Command for 4 days when multiple family members began exhibiting symptoms in order to avoid disrupting a planned family vacation to Disney World. The member failed once again to notify their Chain of Command immediately of their exposure once symptoms worsened and required Emergency Room evaluation for multiple persons. The deliberate inactions inhibited safety measures from being enacted and further exposed the member, their family, and the general public to potentially severe health risks and complications.

Future Potential: Assigned rating of Y, with the following comment:

Mbr displays advanced technical knowledge and expertise within rate, an ability to work independently to solve complex issues, and a passion to develop and train jr mbrs, however, mbr requires further maturation in personal accountability, leadership, and professional qualities to meet the minimal standards of a First Class Petty Officer. Mbr has the potential to perform at the next paygrade and take on additional responsibilities with continued development in judgment, accountability, and respect for others.

Advancement Potential: Assigned rating of N, Not Recommended, with the following comment:

Not recommended for advancement. Mbr was educated on [CDC] defined symptoms of COVID-19, social distancing guidelines, and Coast Guard promulgated notification procedures following potential exposure to

persons exhibiting symptoms commensurate with COVID-19. Despite this, member neglected to inform their Chain of Command for 4 days when multiple family members began exhibiting symptoms in order to avoid disrupting a planned family vacation to Disney World. The member failed once again to notify their Chain of Command immediately of their exposure once symptoms worsened and required Emergency Room evaluation for multiple persons. The deliberate inactions inhibited safety measures from being enacted and further exposed the member, their family, and the general public to potentially severe health risks and complications. In order for member to earn a recommendation for advancement, the mbr must demonstrate on a consistent basis better decision-making, judgment, and improve communications between self, supervisor, and Command. This instance highlights a pattern of a lack of judgment and accountability not commensurate with the expectations of the next paygrade. In order to earn a recommendation for advancement, member must demonstrate a strong adherence and support of Coast Guard and unit policies, improved communication with the Chain of Command, diligent management of departmental work items and equipment, and a willingness to accept feedback and take ownership of actions and conduct.

By email dated March 8, 2021, the applicant's name was removed from the SWE eligibility list, referencing the CO's EER effective April 30, 2020, and that the applicant "failed to remain eligible or no longer possesses command recommendation for advancement."

The applicant received a counseling receipt for the time period November 1, 2020, through April 30, 2021 with an Advancement Potential of "Not Ready" because "mbr has not yet completed all pre-requisites for advancement to the next higher pay grade. Mbr must complete all RPQs/EPQs to earn recommendation of 'ready.'"

On May 18, 2021, the Coast Guard promulgated a message noting that the applicant may be advanced to ET1 effective June 1, 2021, provided the requirements set out in COMDTINST M1999.2, Enlistments, Evaluations, and Advancements, were met.

On May 28, 2021, the applicant completed his Enlisted Rating Advancement Training System (ERATS), which included the PRQ's requirements.

The applicant was not advanced on June 1, 2021.

On June 22, 2021, the applicant's command sent in a Change of Commanding Officers Recommendation (CORC), marking the applicant recommended for advancement.

VIEWS OF THE COAST GUARD

PSC recommended not granting relief, stating:

It is not within PSC's purview to determine whether the Commanding Officer . . . unfairly punished the applicant for not adhering to COVID-19 protocols. PSC reviewed if all applicable policies were followed in the [EER] for the applicant and its subsequent effects on his removal from the advancement eligibility list. The rating chain did not err in completing a 4/30/2020 and 4/30/2021 Regular EER, policy mandated both. Nor did the Approving Official err in awarding an Unsatisfactory Conduct and Not Recommended on the 4/30/2020. The matters of record presented, clearly show the Approving Official operated [within] the scope of policy, including supporting documentation via a CG-3307. While the Applicant disagrees with their decision, they have presented no matter of record that supports their position that policy wasn't followed, or an injustice occurred. Further, the Approving Official was required by policy to award a Not Ready on the 4/30/2021 EER due to the Applicant not completing their RPQ until after the period end date of that marking period. Finally, the member had the right to appeal both EERs, but failed to do so.

The JAG argued that the applicant's allegations that he was erroneously punished for failing to inform his command in March 2020 of his potential exposure to COVID-19 lacked merit and that the applicant failed to carry the required burden of production and persuasion, making the following points, referring to COMDTINST M1000.2B (2018):

1. Absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith, and the applicant bears the burden of proving error. See 33 C.F.R. § 52.54
2. The applicant's allegations that he received the administrative actions [negative 3307 and EER] because his CO had prejudice and a vendetta against him lack merit because he provided no corroboration of this claim by way of statements from former shipmates or other supporting documentation. . . . [T]he record supports the fact that the applicant was advised on COVID notification protocols, the applicant went on vacation where his family started experiencing flu-like symptoms that necessitate trips to the emergency room, and that the applicant delayed notifying his command approximately 4 days from the first onset of symptoms experienced by his family. The applicant's command documented the applicant's actions on a CG-3307 and presented it to him for counseling. The applicant failed to show where in policy or law his command was prohibited from taking this action. Nor did the command actions in issuing the applicant a CG-3307 rise to the level that would 'shock the sense of justice.' The applicant claims that the CG-3307 contained false information such as stating that his family's condition continues to worsen. However[,] this is not false. The member notes that at first his daughter started experiencing flu like symptoms, and then a few days later his wife did as well. Going from a single family member requiring a trip to the emergency room to two family members requiring a trip to the emergency room could be considered a worsening situation and as such is not erroneous information. As such, the applicant fails to prove that it was erroneous or unjust for the command to document the applicant's failure to timely notify the command on a CG-3307.
3. [Regarding the applicant's claim that] the command violated policy regarding his 30 April 2020 EER because policy set out in section 4.D.2.c.(1)(d)[3] states that a one-time infraction such as being late to work would be insufficient for an adverse remark that could affect good conduct eligibility. This same policy, however, also notes that adverse comments are not prohibited when discussing a pattern of behavior. Further, Commanding Officers are officials responsible for the safety, health, and wellbeing of those under their command. They are also the individuals responsible for the administration of the Enlisted Employee Review system for the individuals under their command and providing the recommendation for advancement. Significant deference is provided to the commanding officer's recommendation, so much so as to make it so that it cannot be appealed. In this case, the Commanding Officer specifically remarked on the 30 April 2020 EER that this incident was part of a pattern of behavior causing the commanding officer to lose confidence in the applicant's ability to serve at the paygrade; and may have presumed that this isolated event was the reason for the not recommended for advancement mark, his commanding officer specifically noted this incident as part of a pattern. As this particular incident was part of a pattern, the commanding officer was not prohibited from including it in his justification for marking the member not recommended. Consequently, the applicant fail[ed] to prove that the mark of Unsatisfactory Conduct and mark of Not Recommended for Advancement on the 30 April 2020 EER were erroneous or unjust.
4. [Regarding the applicant's claim that] even if he did violate policy, he should be granted relief because the command was still not legally entitled to access private medical information about his family, [t]his argument is not on point because that was not what the applicant was required to do. The applicant was never required to inform the command of details of family diagnosis. The applicant was required to promptly inform the command of his own potential exposure. This requirement does not necessitate disclosure of any particularized protected health information regarding his family or others. As such, the requirement for the applicant to promptly inform his command and the Coast Guard of potential exposure was not erroneous or in violation of law and does not necessitate relief.
5. [Regarding the applicant's claim that] it was erroneous for the command to mark him not ready on his 30 April 2021 EER because he was not required to complete his RPQs. The applicant alleges that he did not need to complete the RPQ's because he did not need to compete in the May 2021 SWE due to being

authorized to advance already. This is incorrect. The applicant was required to maintain eligibility up until the date of advancement, which he failed to do, per the 30 April 2020 EER. The mark of not recommended on the 30 April 2020 EER invalidated the applicant's eligibility and required the applicant to have to re-compete, via the SWE, for advancement. The applicant admits as much in his supplemental statement declaring 'Ultimately, even though I was on the advancement list to make ETI, my advancement was passed over because of the 'not recommended' that I was given. I was scheduled to advance to ET1 on 01JUN2021, but was not ineligible.' In order for the applicant to have been eligible to re-compete in the November 2020 SWE (the May 2020 SWE was suspended due to COVID), the applicant would have had to have completed all eligibility requirements no later than 01 August 2020. This would have required the applicant to have received a special evaluation marking the applicant as recommended for advancement. However . . . the applicant did not receive a set of EERs with a mark of recommended until his 31 October 2020 evaluation, which was too late to compete in the November 2020 SWE. The next SWE available to the applicant then was the May 2021 SWE. In June 2020, however, the Coast Guard promulgated new requirements (RPQs) that needed to be completed prior to competing in the May 2021 SWE. The applicant was therefore required to complete these RPQ's, and when he had not completed those requirements by his 30 April 2021 EER, his command had to mark him Not Ready. As such, it was not erroneous or unjust for the applicant's comment to mark 'not ready' on his 30 April 2021 EER, when he had not completed his RPQs by that time.

The applicant successfully passed the Service Wide Exam (SWE) in November and became eligible for advancement to E-6 via message in December 2019; however, he was required to keep a positive command recommendation until advancement. Due to the failure to inform his command regarding the potential COVID exposure, the applicant's command issued him a negative CG-3307 form and marked the applicant as 'unsatisfactory conduct' and 'not recommended' on his 30 April 2020 Enlisted Employee Review (EER). These 'not recommended' and 'unsatisfactory conduct' marks removed the member from advancement eligibility and required the member to re-compete for advancement via a Service Wide Exam (SWE). To compete for the November 2020 SWE he was required to complete Rating Performance Qualification (RPQ) Standards prior to 01 February 2021. He did not, and as such, was ineligible for the May 2021 SWE. Due to his ineligibility, the applicant's command marked the member 'Not Ready' on his 30 April 2021 EER.

For all of these reasons, PSC recommended that the Board deny relief because the applicant failed to establish that the Coast Guard committed an error or injustice.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The applicant provided a personal statement, in which he disagreed with the Coast Guard's advisory opinion, to which he attached corroborating statements from a former supervisor, a former shipmate, and his wife as summarized below.

The applicant disagreed with the Coast Guard's claims that he provided no corroborating evidence regarding his claim that LT was trying to vindictively silence him from speaking out. The applicant argued that he did offer names and contact information, and he did request a hearing that, if granted, would have allowed him the opportunity to present witnesses and evidence but his request was denied. In his response to the AO, the applicant provided statements from a former supervisor, a former shipmate, and his wife. The applicant also provided further proof in the form of an email to his supervisor, BM1; in this email, he documents an incident where LT attempted to tarnish his reputation and tried to establish an untruthful pattern of behavior in an effort to hurt his career. In addition, the applicant alleged that the fact that the LT was permanently passed over for LCDR for his actions as CO casts doubt on the presumption that he carried out his duties 'correctly, lawfully, and in good faith.'

The applicant provided a statement from a former shipmate who corroborated his claims regarding the command climate onboard the cutter, where she was stationed from July 2020 through July 2022, during the second year LT T was CO.

Immediately upon my arrival, I could tell the morale and overall atmosphere from the crew was unwelcoming. Everyone seemed like they were on edge and angry about being at work. At first, I thought that it was due to the operations. I was wrong, it was much less the operations but rather the leadership that was the root cause. The command atmosphere was extremely toxic. I observed that the crew was divided into different social groups. Those social groups consisted of (1) the command cadre and those who were trying to ensure that they were on the command's good side, (2) the ones the command didn't like, and (3) the rest of the crew who managed to stay under the radar. No one could say anything negative, because if someone went to the Chief of the Boat with concerns, whatever was being said would be disregarded as if it were a joke. Alternatively, the Chief would relay the information to LT [], and LT [] would view the member as complaining and destroy them. LT [] picked and chose who he liked each week, each day, based on how much said person would play nice with him. If anyone told him that he looked good and asked how much he was lifting each day, then suddenly they became his new best friend. Watching that (frequently) happen shocked me. There were members that would leave the mess deck when the topic of working out would come up in conversation because they knew that they weren't 'fit enough' and would soon be getting ridiculed by LT []. Or they would choose to make fun of themselves in order to deflect and attempt to control the situation.

During our dry dock, my subordinate, CS2 [], was in [LT's] preferred social group. She called me at one point during the height of the COVID to let me know she was feeling sick, achy and unwell overall. It took her two days of feeling ill before calling me, and during that time she was spending all day, every day together with the crew. She called me on the road with another crewmember, believing she may have COVID-19. I let the command know immediately, and it turned out that she did test positive for COVID-19. Upon hearing this, my supervisor, LTJG [], became mentally unglued because CS2 had not followed any of the protocols we were instructed to do. He was worried that she would receive the same fate that [the applicant] received, or even worse because she actually had COVID. We went back and forth trying to figure out the best course of action between making sure she was ok, contact tracing, and overall hoping she wouldn't get in trouble because of the big deal that this was. She broke the rule, textbook-style, of 'failure to inform the command as soon as you felt even slightly sick.' LTJG [] and I overreacted, her relationship with LT [] was a great one and she was in [LT's] clique. He took it upon himself to be in contact directly with CS2, constantly checking in on her to ensure she was recovering, even though that was not the protocol he was having other members follow who had COVID. I know that if I was ever sick, LT [] never would have personally checked in on my wellbeing. If I was the one that got sick instead of my CS2 and waited to say anything for two days, I know that I would have been masted because I wasn't a member of [LT's] inner circle.

At one point, LTJG [] divulged to me what he observed [LT's] 'command clique members' . . . do at port calls: get drunk and viciously trash talk the crew behind their backs. I was so disappointed to hear that from my own immediate supervisor, especially when I was trying to figure out how to survive in that work atmosphere. When I went to ask for advice from a Master Chief from my own rating, I found out LT [] had already talked to him about me in order to make me look bad. The Master Chief told me to keep my head down for the rest of LT's tour, because I was fighting a losing battle. He said that once [LT] didn't like you, you had a target on your back you were done. That was the case for [the applicant] – he had a target on his back, and it was obvious that LT [] disliked [the applicant] because [he] is a critical thinker and if he voiced his questions or opinions, LT [] imagined that he was being challenged and treated [the applicant] accordingly whenever the opportunity arose.

The applicant provided a statement from ET1, who was the applicant's supervisor from July 2021 until June 2022:

During that time, I counseled him on his 31OCT21 EER and his 30APR22 EER. In both marking periods, he received a '6' in 'Accountability and Responsibility' and a '6' in Effective Communication, which is a stark contrast from his 30APR2020 EER, in which he received a '3' in both categories.

I am aware of the nature and severity of the things alleged against him by his former Commanding Officer, [LT T]. I have reviewed all negative documentation that he has received during that time, and find the allegations diametrically opposed to the level of character that ET2 demonstrated. The statements made about him attempting to hide his family's health condition in March 2020 are highly inconsistent with what I witnessed about his character. As [the applicant's] supervisor, I witnessed him demonstrate outstanding responsibility, and he was highly receptive to feedback at all times, being immediately responsive whenever correction was necessary. He consistently made sincere, concerted efforts to learn from his mistakes to ensure they don't happen again, meanwhile taking full responsibility whenever mistakes were made. [The applicant] was never argumentative when receiving criticism and had held a high level of respect for those in authority positions above him. He consistently exemplified a natural willingness to follow orders even when nobody was watching. He never once hesitated to help those who needed it, never made excuses for his shortcomings, and never hesitated to admit when he lacked knowledge or clarity. [The applicant] would often come to me for guidance and feedback in the spirit of full transparency. He carried himself with respect, maturity, and his actions were consistently in line with the Coast Guard's core values and consistently led by example. For that reason, I have zero reason to believe that the negative documentation about him was accurate.

I am fully aware of the severity of the allegations made against him by his former Commanding Officer, and understand that if true, he should be held accountable for his actions. In my professional opinion as his former supervisor, mentor, and witness to his moral character, I truly believe [sic] [the applicant] is an excellent asset to the US Coast Guard and the adverse comments about him are unlikely to be true.

The applicant provided a statement from his wife who corroborated his factual account of what happened when he was traveling and his family members became sick.

I saw that the Coast Guard's Advisory Opinion agreed with [the LT's] claim that our family's condition continued to worsen. They said that because the influenza virus was transmitted from my daughter . . . to myself. What both [the LT] and the Coast Guard JAGs failed to ask was whether or not we were sick at the same time. If we were, then one MIGHT construe that our condition 'worsened,' but that's not the case. [My daughter] had already recovered from her illness before I started having flu symptoms. For that reason, our 'family condition' did not 'worsen' beyond [my daughter's] initial state of illness. The Emergency Department doctors determined that we were not eligible candidates for COVID-19 tests. This was because other than having a fever, we had zero other similar symptoms to COVID-19, and our condition did not worsen. We were not ordered by the doctor to quarantine, but we all did so anyway (including the applicant) despite not being ordered to do so by the doctor.

The exact same evening that [my daughter] began complaining about feeling sick, [the applicant] acted responsibly by going into quarantine at the guest house we had rented. From that moment onward, he followed every precaution that the CDC had recommended at the time. [He] did not 'continue to vacation.' His time was far too consumed by taking care of my daughter and me to spend doing tourist activities. I remember him expressing how inconsiderate it would be to go out into public unnecessarily, even though it was just the flu (not COVID-19).

I was an eyewitness to all of the events that [the LT] claimed to know all about, and I have read the negative page 7. I can tell you that the negative page 7 is so full of misrepresentations and outright lies that it would be more accurate to call it fairytale. [My husband] did not EVER travel 'throughout heavily populated Orlando, FL' – before OR after our flu symptoms began. In fact, neither one [sic] of us have ever been inside Orlando our entire lives. The guest house that we stayed at was far from the crowds, not that [my husband] ever went among crowds in the first place after the onset of flu symptoms. The only place [my husband] went 'throughout' was the guest house that we all quarantined in to take care of his family.

The applicant also takes issue with the Coast Guard's statement that 'the record supports the fact that [he] was advised on COVID notification protocols.' The applicant argues that he followed every single COVID notification protocol down to the letter, stating:

The reporting requirements set forth in policy applied only to the member, not the illness of family members. There was no notification protocol requiring ‘potential’ exposure to COVID-19. Yet this was the exact false assertion made by LT [] in my CG-3307 and subsequently echoed in the AO. The policy states that I was required to notify my chain of command if either I or a member of my household had a confirmed COVID-19 case, if I am ‘exposed to COVID-19’. It’s important to note that it does not say ‘potentially exposed’ and because due to a virus’ microscopic nature, all people at all times have potential expose, which is neither measurable nor verifiable outside of a laboratory setting. However, the AO says that ‘potential’ exposure was required to be reported, despite the word ‘potential’ not being found in policy. The only location where ‘potential’ exposure was found in writing is in my CG-3307, which was a paraphrase of the policy with the word ‘potential’ was capriciously and falsely added.

The applicant argued:

[T]he word ‘exposure’ was never defined or described in the policy. All people at all times are potentially in contact with COVID-19 without knowing it, which could be considered ‘exposure’, so a clear understanding would need to be made in order to avoid capricious enforcement of this policy. Essentially, one can’t throw the term around without a clear definition. Instead, the term ‘exposure’ was subjectively applied to my case by my command in a claim that I violated policy to fit the narrative. As legal professionals, the board understands the importance of specificity in order to leave as little wiggle room for ambiguity as possible. The fact that [LT T] arbitrarily added the word ‘potential’ to [the] Sector[s]’ COVID 19 policy – and subsequently the AO agreed with it – is an atrocious error that shocks the senses.

The applicant argued that since his family had confirmed cases of influenza, the claim of ‘potential exposure to COVID-19’ ought to have been dropped. According to the applicant, the ‘statistical chances of co-infection with flu and COVID-19 are incredibly low.’

In two separate peer-reviewed studies, the chances of getting co-infected with influenza and COVID-19 at the same time are 0.54%⁴ and 0.4%⁵, respectively. This further weakens the claim that my family members may the same time as having influenza, which they had positive tests. The doctor’s declined to give my family members COVID-19 tests, because they lacked the requisite symptoms, but that was ignored as well by the AO. Given this information, one can safely conclude that my family did not have COVID-19 at the time with a statistical 99.2% certainty (0.4% x 2 family members). Based on the statistical chances of them having COVID-19, this bolsters the case that if I was indeed required to notify my command regarding my family’s influenza, to would fall under the category of a ‘one time, minor infraction’ which should not affect good conduct eligibility.

In response to the Coast Guard’s claim in the AO that the applicant ‘failed to show in policy or law his command was prohibited from [presenting him with a negative 3307],’ the applicant argued that Article 107 of the UCMJ specifically prohibits false official statements and alleged that the 3307 he received had many false statements.

I am directly accusing [LT T] of violating UCMJ 107 by signing a false record, while knowing it to be false with the intent to deceive, and then punishing me accordingly. The CG-3307 alleged an unfounded presumption of intent, claiming that I failed to notify my Chain of Command of the situation in order ‘to avoid disrupting my vacation.’ I was never asked about my intent, nor did I ever claim that was my intent. This was an unfounded claim that was made by my commanding officer, then stated as if it was a fact. This segment of the CG-3307 was written in a slanted manner to be loaded against me, but it is a fabrication that is unsupported by evidence. Even if I did have the intent to prevent my vacation from being disrupted, my ability to do so would have been prevented by the fact that my family was ill. Yes, my vacation was already

⁴ <https://onlinelibrary.wiley.com/doi/10.1002/jmv.26125>

⁵ <https://www.frontiersin.org/articles/10.3389/fmed.2021.681469/full>

heavily disrupted by self-quarantining for multiple days, even prior to notifying my chain of command. During that time I stayed inside in a rental house until the end of my leave, which is supported by eyewitness statements by his [father and wife]. This factual error was not addressed in the AO, instead being ignored and unchallenged. [LT T] knew this was the case because I told him so verbally, but this fact was ignored instead, and I was shouted down again by him again that day. Then, despite knowing these facts, those same dishonest statements were paraphrased/repeated in my 30APR2020 marks. He knew that my vacation was already disrupted based on the information I had already provided but went forward punishing me on that false pretense. Clearly, failure to address this portion in the AO would invalidate the AO's frequent assertion that the CG-3307 was accurate.

The applicant alleged that the CG-3307 he received included a second false statement: that his 'deliberate inactions inhibited safety measures from being enacted and further exposed myself, my family, and the general public to potentially severe health risks and complications.'

This was refuted in my original BCMR request, but was not addressed by the AO. . . . [D]espite not violating any policy, I voluntarily chose to self-quarantine, which was corroborated by two separate direct eyewitness statements made by [my father and wife]. In the CG-3307, another work of fiction was the statement that 'despite my family members exhibiting flu-like symptoms I continued my vacation throughout heavily populated Orlando, FL.' Contrarily, I never once entered Orlando during that time. I was in the greater metropolitan area . . . , but never once entered the city of Orlando. Furthermore, I did not go 'throughout' the area. This is a direct insinuation that I flagrantly disregarded my family's illness and the general public's health and participated in tourist activities 'throughout' the Orlando metropolitan area, spreading a plague to the unsuspecting public. However, in reality, this was not the case . . . Even if I did have the desire to 'continue my vacation throughout' the Orlando area, I would have been unable to do so due to nearly all nonessential businesses shutting down at an extremely rapid pace. This was corroborated in my original statement by [my father], who was an eyewitness to these events. However, this statement was ignored in the AO. If it wasn't ignored, then the AO would have acknowledged my eyewitness-corroborated claim that I did not 'further expose the general public to potentially severe health risks and complications.' The rampant inaccuracies in the negative CG-3307 merits removal of it from my record.

The applicant argued that it is inaccurate to say that his family's symptoms worsened as stated in the CG-3307 he received, and that this statement is not supported by fact or evidence. He alleged that "the AO took this misquotation and built an entire argument based on that." In response to the statement in the AO that 'requesting medical treatment at an Emergency Room could be considered to be a worsening situation and as such it is not erroneous information. He contended, that [s]ince only one person was ill at a time, it follows that my family's condition did not worsen and argued that accordingly this inaccuracy should also be removed from his CG-3307.

The applicant argued that there was no policy in place requiring notification of potential exposure to COVID-19 at the time of the events at issue.

I was under no obligation to communicate any potential exposure to COVID-19. The AO states that I was 'required to promptly inform the command of my own potential exposure'. This is false. There is no evidence to support this assertion, and this requirement was not made in any document in any official policy until after these events occurred. There was no policy in place that required members to report 'potential' COVID-19 exposures to their chain of command until after this particular incident, and again the AO neglected to specifically state which policy was violated. What [the sector's] policy had in place was a requirement for me to report my own exposure to COVID-19. Furthermore, a policy was put in place about 'potential' exposures only afterward and as a direct result of these events. This flies in the face of the allegations made in the AO that I violated a policy which was already in place. In essence, I was arbitrarily punished for violating a policy that did not exist at the time, and thus 'shocks the sense of justice.'

The applicant alleged that the CG-3307 he received incorrectly states that he failed to timely notify the command and noted that a timeliness requirement was never set forth at any point and, regardless, he was already on approved regular leave. The applicant also alleged that the Coast Guard provided no definition for what is ‘timely’ and that he received disparate treatment by his command.

Even if all else was correct, a timeliness requirement was never set forth at any point. Additionally, a definition of ‘timely’ was never given either. Since I was already on approved regular leave at the time, and away from all other military members, the timeliness of keeping my command informed may be dictated by my proximity to the crew and other military members. I did indeed inform my command of my family’s flu diagnoses several days before I was scheduled to return to work, and since no specific expected timeframe was given, my command took their one subjective interpretation of ‘timely reporting requirements’ and punished based on their own individual standard which was not communicated to anyone beforehand. Therefore, without further illumination of clearly defined terms, it is reasonable to conclude that a person cannot be punished for something which was not communicated or made clear. In the absence of even the vaguest of defined reporting timeframes (if I was required to report at all), I went above and beyond by reporting my family’s influenzas prior to returning from leave. Furthermore, in the statement by [my former colleague], she showed how [LT T] held her subordinate [] to a different standard because she was ‘in a different social group.’ She waited approximately 2 days while in direct contact with the crew while experiencing symptoms, before informing our chain of command while having a confirmed case of COVID-19, and thus directly violating the policy and a direct order. Instead, she got special treatment from [LT T] over the matter, caring much more for her wellbeing instead of destroying her career prospects. Clearly, reporting timeliness was never made clear with any member of the crew because the standard was changed subjectively. These facts soundly refute the validity of the 3307 and negative remarks.

The applicant claimed that that he and his family voluntary chose to self-quarantine, prior to being ordered to do so by his command, and that the Command inaccurately stated on his CG-3307 that his ‘deliberate inactions inhibited safety measures from being enacted and further exposed himself, his family, and the general public to potentially severe health risks and complications.

At no point was it articulated what further safety measures would (or could) have been enacted if I did report my family’s flu diagnoses immediately. As stated previously, I had already been voluntarily self-quarantining for several days and was already voluntarily strictly following all CDC-recommended guidelines at the time, even before reporting the illness to my chain of command. There were no other safety measures that could have been enacted beyond what I was already doing prior to being ordered to quarantine. As a result of this, the net impact is zero. Even if I had reported it to my command during the first night, nothing different would have happened, nor was anything posited specifically that would have been done differently. This refutes the assertion that if I reported their flu soon enough for their subjective standards, then different measures would have been taken. I want to repeat for emphasis that all CDC-recommended precautions were being followed, voluntarily and immediately, prior to being ordered to do so. However, this fact was conveniently ignored by the AO in support of denying the relief instead. Since I was already voluntarily self-quarantining, and therefore the net impact was zero, this further proves that this falls under a ‘one-time, minor infraction’ (if I ever committed an infraction at all).

The applicant alleged that there is no evidence to support ‘a pattern of behavior’ as stated in the CG 3307. The applicant alleged that he was falsely accused of the failure to load T1 internet cable onto the cutter when he was over 100 miles away at the time of the incident. The applicant explained that LT is a bad actor; that he received NJP for his behavior while the applicant’s commander, and that he was passed over twice for promotion to Lieutenant Commander (during PY 22 and PY 23). The applicant further argued that, consistent with COMDTINST M1000.2C, that if for some reason the Board determined that that he did in fact engage in misconduct that the

misconduct amounts to a one-time infraction, such as being late to work, and that such a determination should not affect his good conduct eligibility.

[I]n the email sent on 13APR20 to BMI [] (my supervisor), I specifically noted that ENS [BM1's supervisor], was very pleased with the work that I had been doing. ENS [] stated that he was ordered to write a verbal counseling email to establish a false paper trail against me against his wishes. As I predicted, this event would be used shortly as ammunition by [LT T] to give me 'not recommended' for advancement. Note that the date in which this documentation email is written is just prior to receiving my 30APR2020 EER. Additionally, I have attached a character witness statement from my most recent supervisor, which directly contradicts the false narrative that [LT T] painted about me.

The applicant argued that that AO incorrectly stated that he 'had the right to appeal both EERs, but failed to do so.'

My 30APR2020 EER was the first set of marks that I did not appeal, because of the cutter's high operational tempo, and my workload was extremely high with very little time to prepare an appeal. I was still reeling from the last time I appealed my marks based on the damaging fictional story he wrote about me in my 31OCT2019 EER appeal. During that appeal process, [LT T] made numerous blatantly false and wildly exaggerated claims about me. As a result of his lies about me, no relief was given, and my reputation was dragged through the mud to the District [] Admiral and Command Master Chief. I knew it would be an exercise in futility if I were to appeal yet another set of marks where [LT T] would demonize me to an Admiral and the Command Master Chief again. His defamations about me succeeded in preventing me from getting relief in my marks. Consequently, demoralized me to the point where I couldn't mentally bring myself to work hard to appeal my marks only to be lied about again. I did not want to have my reputation dragged through the mud again, because I knew he would say more false things about me and I feared that he would retaliate further against me. Since he did already threaten the crew once with NJP and CG-3307s for speaking out against his behavior, I was afraid to pursue that matter further until he was no longer in my chain of command. I knew that at a bare minimum, I would have been shouted down and belittled at best. At worst, he might have taken further aim at harming my career. This was not a risk I was willing to take.

The applicant alleged that the AO is rife with inaccuracies.

Regarding the receipt of a 'not ready' mark in my 30APR2021 EER, that was not a point of major contention for me. I stated in my original request, 'This EER is erroneous on the grounds that I would not have received a 'not ready' mark if I had not first received a 'not recommended' mark. If the 30APR2020 EER is removed from my record, then it logically follows that the 30APR2021 EER would have to be corrected to a 'ready' mark or have the EER removed altogether. There appears to be a misunderstanding on the AO's behalf, and I may not have been clear enough in my initial statement, so please allow me to clarify. The AO stated that I argued that I was not required to complete my RPQ's. This is incorrect. I stated that if I had not received a 'not recommended' mark in my 30 APR2020 EER, then I would not have been required to complete the RPQs within that timeframe, since I was above the cut for advancement. The AO misquoted me, saying 'I was scheduled to advance to ET1 on 01JUN21 but was not ineligible.' The AO then proceeded to articulate an argument why I was ineligible based on that misquotation – another straw man fallacy shown in the AO. However, what I actually said was that I was 'now ineligible,' due to receipt of the 'not recommended' mark in the previous EER. For that reason, I did not appeal this EER, because it was done correctly. I addressed this in my original request on the basis that if I was granted relief for the 'not recommended' EER, then it follows that my 'not ready' mark would necessarily change as well as a result. The 'not ready' mark was given strictly on the basis of the preceding 'not recommended.'

The applicant alleged that his conduct did not meet the requirements to receive an 'unsatisfactory' mark in his April 30, 2020 EER.

The circumstances must only be assigned when a member fails to meet the standard of conduct ‘as prescribed in this article’ and do not allow provisions for arbitrarily adding reasons to assign an unsatisfactory conduct mark to a member. The scope of provisions for assigning an unsatisfactory conduct mark is limited to these specific circumstances [as listed in Enlistments, Evaluations, and Advancements; M 1000.2C at 4.D.4.b:

1. Non-Judicial punishment;
2. Court-Martials;
3. Civil Conviction;
4. Financial Irresponsibility;
5. Non-support of dependents;
6. Alcohol Incident;
7. Permanent Relief for Cause; not complying with civilian and military rules, regulations, and standards.

A one-time minor infraction (e.g. late to work) is insufficient grounds for an unsatisfactory conduct mark. Rating chains will focus on majority of infractions or patterns of unacceptable behavior vice a one-time infraction.

8. The sum of marks in an individual factor on a member’s enlisted evaluation report is less than that shown in the following chart: (not shown due to inapplicability)

It is important to note that ‘not complying with civilian military rules, regulations and standards’ is inextricably tied to permanent relief for cause. Even if I was non-compliant, I would need to be non-compliant with those things in connection to a Permanent Relief for Cause according to the manual. If this was a separate line item, then one might have an argument in favor of assigning an unsatisfactory conduct mark if it could be proven that I was non-compliant with policy. Clearly, since I was not involved in NJP, Court Martial, civil conviction, financial irresponsibility, non-support of dependents, alcohol incidents, or permanent relief for cause, the requirements for an unsatisfactory mark were not met. More importantly, since I did not receive a Permanent Relief for Cause, this criteria was not met, and therefore an unsatisfactory conduct mark was not merited on that basis.

Furthermore, in a separate section in the manual, the criteria for an unsatisfactory mark in 4.D.2.c(d)(1) state: ‘This entry must either state an NJP, CM, civil conviction, or low factor mark occurred or gives specific examples of financial irresponsibility, non-support of dependents, alcohol incidents, and nonconformance to civilian and military rules, regulations, and standards that discredited the Coast Guard.’ This shows that the criteria for an unsatisfactory mark doesn’t merely necessitate the breaking of just any rule. Discredit upon the Coast Guard is also a necessary factor to require an unsatisfactory conduct mark. The Manual for Courts-Martial and Executive Order 13262 makes clear the definition of ‘discredit’:

Discredit means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem.

Based on the definition set forth by the UCMJ, I must have ‘injured the reputation of’ the Coast Guard – but no argument was made by my chain of command how my actions did so, nor was it addressed in the AO. In order to fit into that definition, an argument must be made about how the Coast Guard’s reputation was damaged, not how it could have been damaged based on theoretical scenarios about inadvertently possibly infecting the general public.

If I did indeed bring discredit the Coast Guard and injure its reputation, it would require convincing evidence showing not only what safety measures could have been enacted as a result if the situation played out differently, but also how I exposed the aforementioned people to severe health risks (not ‘potential’ health risks). I have conclusively shown already that my actions were as safe as possible according to CDC guidelines; I’ve shown the statistical likelihood of COVID/influenza co-infection, showed that I voluntarily avoided the general public while my family was ill, and due to the nature of this ordeal, it was inherently a fairly private matter. This truckload of evidence shows that my actions did not- and could not – injure the

Coast Guard's reputation in any way from these events. Not even the AO asserted that the Coast Guard's reputation was damaged as a result of these events.

Also, I request that the board review the criteria once more for meriting an unsatisfactory conduct mark. The AO states: 'A one-time infraction such as being late to work would be insufficient for an adverse mark that could affect good conduct eligibility. This same policy, however, notes that adverse comments are not prohibited when discussing a pattern of behavior. It is correct for the AO to say that adverse comments may pertain to a pattern of behavior. But nowhere is it found in that policy that a pattern of behavior was one of the criteria to receive such an unsatisfactory conduct mark. In order to receive an unsatisfactory conduct mark, I must have done something severe and egregious enough to discredit the Coast Guard or get Permanently relieved for cause which must be inextricably linked to a pattern of behavior. The policy never states that a pattern of unacceptable behavior alone is a standalone condition that, if satisfied, would merit an unsatisfactory conduct mark. Since neither of those conditions pertain to me, my unsatisfactory conduct mark cannot stand.

The applicant concluded his statement with the following:

[t]he foundation of the house of cards that is my 30APR2020 EER is the CG-3307 received 06APR2020. The entirety of my adverse marks are based on that false 3307, and everything rises and falls on that. If the CG-3307 is to be removed, then as a result the negative marks, unsatisfactory conduct mark, and 'not recommended' mark must necessarily be removed since the requirements outlined in policy for the aforementioned would not have been met. There is no room for subjectivity in a policy of the legal system to allow capricious policy enforcement such as this to stand, whether the policy is real or imagined. If the board's final decision is to deny relief in my request, I request that the board specifically address why the AO was justified in neglecting to address the flagrant inaccuracies that I detailed in my initial request, as well as a detailed explanation of specifically which policy was broken to merit poor marks. If a policy was indeed broken in regards to COVID-19, I request that the board compare my family's flu event to the double standard outlined in the confirmed COVID case in []'s statement. This alone is sufficient evidence which confirms not only [LT Ts] double standards, but also conclusively proves that he treated me unfairly over the matter.

The AO conveniently ignored critical components from my original request (such as citing the specific policy that I broke), claimed a lack of corroboration while ignoring the preponderance of evidence, provided, misquoted multiple things and build entire arguments on those false premises. Based on those things, I found the AO's intellectual dishonesty to be staggering. . .

APPLICABLE LAW AND POLICY

42 U.S.C.A. § 1320d-9(b) Definitions

(3) HIPAA privacy regulation

The term "HIPAA privacy regulation" means the regulations promulgated by the Secretary under this part and section 264 of the Health Insurance Portability and Accountability Act of 1996 ([42 U.S.C. 1320d-2](#) note).

(d) Enforcement

In addition to any other sanctions or remedies that may be available under law, a **covered entity** that is a group health plan, health insurance issuer, or issuer of a medicare supplemental policy and that violates the HIPAA privacy regulation (as revised under subsection (a) or otherwise) with respect to the use or disclosure of genetic information shall be subject to the penalties described in [sections 1320d-5](#) and [1320d-6](#) of this title in the same manner and to the same extent that such penalties apply to violations of this part.

42 U.S.C.A. § 1320d-6. Wrongful disclosure of individually identifiable health information

(a) Offense

A person who knowingly and in violation of this part

- (1) uses or causes to be used a unique health identifier;
 - (2) obtains individually identifiable health information relating to an individual; or
 - (3) discloses individually identifiable health information to another person,
- shall be punished as provided in subsection (b). For purposes of the previous sentence, a person (including an employee or other individual) shall be considered to have obtained or disclosed individually identifiable health information in violation of this part if the information is maintained by a covered entity (as defined in the HIPAA privacy regulation described in section 1320d-9(b)(3) of this title) and the individual obtained or disclosed such information without authorization.

COMDTINST M500.3b, COAST GUARD REGULATIONS (1992).

Section 4-1-2 notes that “The responsibility of the commanding officer for that command is absolute, except when, and to the extent relieved there from by competent authority, or as provided otherwise in these regulations. At the commanding officers discretion, portions of that authority may be delegated . . . but such delegations of authority shall in no way relieve the commanding officer of continued responsibility for the safety, efficiency, and well-being of the command.

Section 4-1-12 states: “[t]he commanding officer is responsibly for maintaining discipline on board the unit and to this end shall: (1) Initiate such inquiry as may be necessary to make a proper disposition of any reported offenses, in accordance with the Manual for Courts-martial and the Military Justice Manual (COMDTINST M5810.1 series). (2) Maintain a unit punishment book in compliance with the Military Justice Manual (COMDSINST M5810.1 series). (3) Describe the means by which members of the crew may make any request, report, or statements to the commanding officer for personal receipt and consideration.”

Section 4-1-15 states “[t]he commanding office of a Coast Guard unit is responsible for the well-being of all personnel in the command and shall . . . (5) Safeguard the health of all personnel by careful supervision of the sanitation of the units by preventing unnecessary exposure to disease or unhealthy conditions afloat of ashore . . . “

Section 9-1-7 states that “All persons in the Coast Guard shall report promptly to competent authority the existence or suspicion of communicable disease in themselves or in persons with who they are living or otherwise come in contact.

The Coast Guard Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2C (2020), ENLISTMENTS, EVALUATIONS AND ADVANCEMENTS, provides the following guidance at Chapter 3.A., Advancements, Reductions, and Changes in Rates and Status.

...

3. Servicewide Competition. Advancement by servicewide exam is applicable for competition to paygrades E-5 to E-8 and reserve E-9. . . .

- a. Servicewide Competition Equity. While it cannot be guaranteed that any one member will be advanced, the servicewide examination (SWE) process ensures a fair and impartial opportunity for advancement and a guarantee that all enlisted members, in paygrades E-4 through E-7, of a particular rating will have an equal advancement opportunity.
- b. SWE Schedule. Except as noted in Article 3.A.3.j. and Chapter 5 of this Manual, advancement in these pay grades is accomplished through taking a SWE following the schedule listed below which will be followed without regard to anticipated vacancies:

SWE	Applicable Pay Grades
May	E-7 and E-8
May and November	E-5 and E-6
October	Reserve (all pay grades)

- c. SWE Eligibility Date (SED). The SED is the deadline for which members must complete all eligibility requirements listed in Article 3.A.5. of this Manual. It is also used to compute various eligibility factors. The SEDs are:

SWE	SWE Eligibility Dates (SED)
May	1 February of exam year
October	1 July of exam year
November	1 August of exam year

- d. Terminal Eligibility Date (TED). The TED is the date the advancement eligibility list becomes effective. It is also used to compute various eligibility factors. The TEDs are as follows:

SWE	Terminal Eligibility Dates (TED)
May	1 January of the following year
October	1 January of the following year
November	1 July of the following year

- e. Cutoff Points. A cutoff point for advancement is established for each rating and rate based upon vacancies anticipated during a specific period of eligibility. Only those members whose name appears at or above the cutoff are guaranteed advancement if they remain eligible. Members who are below the cutoff point are encouraged to participate in subsequent SWEs in order to maintain eligibility. Members whose name appears at or above the cutoff, must have their name permanently removed from any subsequent advancement eligibility lists.

. . .

4. Responsibilities.

- a. Member. The member is solely responsible to ensure their eligibility in all respects for the SWE by verifying the accuracy of all Personnel Data Extract (PDE) information. Report any PDE discrepancies to your administrative office or SPO. The member must ensure corrective action was taken by verifying the online PDE reflects a status of “eligible”. If the online PDE has not been corrected, contact PPC (ADV) prior to the

PDE correction deadline listed in the ALCGENL or ALCGRSV SWE announcement. If, through administrative error, a member is deprived of the opportunity to compete in the scheduled SWE, a substitute examination may be requested from Commanding Officer (CG PPC(ADV)).

...

b. Commanding Officers/Officers in Charge. CO/OICs are responsible for the execution of the advancement program. . . .

(3) Advancement Recommendation. The CO/OICs 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/OIC will be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation and a mark of ready. Before providing an advancement recommendation, the CO/OIC will review the policy governing the advancement recommendation in Article 4.D.3. of this Manual which also provides guidance on when an advancement recommendation should be withdrawn.

Note: The CO/OICs recommendation or change in rating by participation in the SWE is valid only for a specific competition and must be renewed for each succeeding competition. To be valid for the SWE, the recommendation of ready must be on an effective EER dated after the SED of the previous SWE cycle and on or before the SED of the current SWE cycle. The Commanding Officer's recommendation for advancement must be maintained from the recommendation date up to the advancement date. Personnel failing to maintain the CO's recommendation of ready for this period must be invalidated from the Servicewide Exam(s) in which they participated. Personnel who have been invalidated must be recommended as ready and qualify again through a new SWE competition.

(4) Mandatory Removal of Recommendation of Ready. An advancement recommendation of ready must be removed for members who receive an unsatisfactory conduct mark, NJP punishment, a court-martial conviction, or a civil conviction. When applicable, notify Commanding Officer, (CG PPC (ADV)) to invalidate the recommendation for advancement of the candidate.

...

5. Basic Eligibility and Advancement Requirements. Each enlisted member must complete and meet the eligibility requirements listed below by the Servicewide Eligibility Date (SED) of the applicable SWE listed in Article 3.A.3.c. of this Manual. For additional Reserve specific requirements, refer to Reference (e), Reserve Policy Manual, COMDTINST M1001.28 (series). For eligibility and advancement requirements for E-9, refer to Chapter 5 of this Manual.

a. Complete required Rating Performance Qualifications Standard (RPQs) and Enlisted Professional Military Education (EPME) EPQs in accordance with Article 3.A.8. of this Manual.

b. Successfully complete service course, if required, for particular pay grade or rating in accordance with Article 3.A.9. of this Manual.

c. Meet citizenship or security clearance requirements for advancement in certain rates or ratings in accordance with Article 3.A.10. of this Manual.

d. Be in proper path of advancement in accordance with Article 3.A.11. of this Manual.

e. Fulfill special requirements for certain ratings in accordance with Article 3.A.12. of this Manual.

f. For 12 months prior to the terminal eligibility date and through the effective date of advancement, members in pay grades E-4 and E-5 must have no unsatisfactory

conduct mark, courts-martial (CM) or civil convictions, NJP punishments, or a mark of not recommended for advancement. See Article 3.A.13. of this Manual for additional guidance for members who lose their eligibility after participating in the servicewide exam.

g. Fulfill time in service, time in pay grade in present rating, and sea duty requirements in accordance with Articles 3.A.15. and 3.A.16. of this Manual.

h. Fulfill additional eligibility requirements for members competing in the E- 7 & E-8 examination in accordance with Article 3.A.6. of this Manual.

i. Maintain the minimum factor average on the last evaluation in accordance with Article 3.A.7. and 4.D.4.b.(8) of this Manual.

j. Be a graduate of a military recruit training center for advancement to E-2 in accordance with Article 3.A.22.b. of this Manual.

k. Have successfully completed all Commandant required competencies, for particular pay grade and rate.

l. Be recommended for advancement with a mark of ready by the CO/OIC. See Article 4.D.3. of this Manual for guidance on the advancement recommendation.

m. For advancement to first class petty officer, must have successfully completed a required Leadership and Management (LAMS) Course.

...

7. Evaluation Marks.

- a. Minimum Requirements. Members who were marked not ready by their commanding officer in accordance with Articles 4.D.3. and 4.D.4. of this Manual respectively, on their last enlisted evaluation report are ineligible to advance or compete for advancement. See Article 3.A.5. and 3.A.6. of this Manual for members who receive a not recommended or unsatisfactory conduct mark.

...

13. Circumstances Which May Render Members Ineligible for Advancement. Members must maintain advancement eligibility from the date of recommendation through the date of advancement. Members who fail to maintain advancement eligibility will be removed from any active advancement eligibility list, and will not appear on an advancement eligibility list which they have participated in, but the associated list has not been published. Additionally, members will be removed from all existing published and unpublished advancement eligibility lists or supplemental advancement lists under the following conditions.

- a. Disciplinary Status. Members who receive a courts-martial or civil conviction, NJP punishment, an unsatisfactory conduct mark, or a sum of marks in an individual factor is less than those provided for in Article 4.D.4.b. of this Manual are no longer eligible for advancement in accordance with Articles 3.A.5. and 3.A.6. of this Manual. Commanding officers will contact Commanding Officer (PPC (ADV)) copying Commander (CG PSC-EPM-1) or (CG PSC-RPM) as information addressee, to remove any member who meets these criteria from all existing advancement eligibility lists.
- b. Loss of Commanding Officer's Advancement Recommendation of Ready. Members whose commanding officer has withdrawn their advancement recommendation mark of ready are not eligible to advance. Commanding officers will notify Commanding Officer (CG PPC (ADV)) copying Commander (CG PSC-EPM-1) or (CG PSC-RPM) as information addressee, to remove from all existing advancement eligibility lists.

...

Chapter 4 ENLISTED EVALUATION SYSTEM (EES)

A. Overview. This Chapter states policies and standards for conducting performance evaluations for Coast Guard enlisted personnel. All enlisted members will be afforded accurate, fair, objective, and timely evaluations. To this end, the Service has made enlisted performance criteria as objective as possible, within the scope of jobs and tasks enlisted members perform. In using the Enlisted Evaluation System, strict and conscientious adherence to the specific wording of the performance standards is essential to realizing the purpose of the enlisted evaluation system process.

...

27. Eligibility List for Advancement or Change in Rating to Pay Grades E-4 through E-8. Advancement eligibility to the Pay Grade of E-9 will follow steps outlined in Chapter 5 of this Manual.

...

c. Effective Period of Eligibility List. The effective period of the advancement eligibility list will be identified in the list. Normally, each list will remain in effect until superseded by a new eligibility list resulting from a subsequent SWE competition. When the new list is published, all eligible members who were above the cutoff on the superseded list and have not yet advanced will be carried over to the top of the new list in their respective rates. If no competition was conducted in a particular rate, the old list will be reprinted.

...

f. Removal from Eligibility List. A member's name may be removed by Commander (CG PSC) as a result of disciplinary action, or for other good and sufficient reasons, whereby the member is no longer considered qualified for the advancement for which previously recommended. Commanding officers will withhold any advancement under such circumstances and advise Commander (CG PSC), info Commanding Officer (CG PPC (ADV)), of their intentions relative to removal from the list. A commanding officer may also direct that the member not be removed from an eligibility list but that advancement is being withheld for a definite period in accordance with Article 3.A.21.b. of this Manual. Members whose names are removed from an eligibility list must be recommended and qualify again through a subsequent SWE competition.

...

C. Occasion for Reports

...

2. Unscheduled Enlisted Evaluation Reports. While the EES focuses on regular evaluation reports, occasionally an unscheduled evaluation report is in order. Use the following to determine whether to complete an unscheduled evaluation report.

a. General Guidance. Complete an unscheduled evaluation report if the rating chain completed a regular or unscheduled evaluation report for a period ending more than 92 days for E-5 and below, 184 days for E-6 and above, and for all enlisted Reservists before one of the events listed below.

...

c. Performance Based. The following events require an unscheduled enlisted evaluation report, regardless of the time since the last evaluation report.

(1) On Receipt of Non-Judicial Punishment or Court-Martial. On the date a member is awarded non-judicial punishment (NJP) or convicted by a court-martial (CM).

...

3. The Advancement Recommendation.

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) 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 (Ex. "Member has not completed EPQ/RPQ, coxswain, etc."). 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. Members with an approved retirement/HYT waiver, without the ability to advance, shall be marked "Not Ready". Members with a pending retirement request or pending HYT results shall be marked according to standard policy.

c. Qualification and Eligibility Requirements. The only qualification and eligibility requirements that an approving official must consider when determining if a member is ready for advancement are Commandant specified qualifications and eligibility requirements, including rating performance qualifications.

...

4. An Unsatisfactory Conduct Mark.

a. General. An unsatisfactory conduct mark on the EER is required when a member fails to meet the standards of conduct prescribed by this Article and requires an advancement recommendation of not recommended. The EER must contain required comments as prescribed by Article 4.D.2 of this Manual.

b. Circumstances That Require an Unsatisfactory Conduct Mark. The rating chain must assign an unsatisfactory mark in conduct whenever any of the following occurs:

- (1) Non-judicial punishment;
- (2) Courts-martial;
- (3) Civil conviction;
- (4) Financial irresponsibility;
- (5) Non-support of dependents;
- (6) Alcohol incident (see Article 4.C.1.b.(4)(f) of this Manual for specific guidance on the evaluation report submission requirements in conjunction with an alcohol incident);
- (7) Permanent Relief for Cause; not complying with civilian and military rules, regulations, and standards. A one-time minor infraction (e.g., late to work) is insufficient grounds for an unsatisfactory conduct mark. Rating chains will focus on majority of infractions or patterns of unacceptable behavior vice a one-time infraction or
- (8) The sum of marks in an individual factor on a member’s enlisted evaluation report is less than that shown in the following chart:

GROUP	MIL	PERF	PROF	LDRSHP
E-1 – E-3	6	6	9	6 (E-3 only)
E-4 – E-6	6	9	12	12
E-7 – E-9	6	12	12	15

c. Impact of Unsatisfactory Conduct Mark

- (1) Advancement. Assigning an unsatisfactory conduct mark will negatively impact advancement to the next higher pay grade, change in rate, or participation in the SWE.

...

Article 8.j and l. of the Coast Guard Administrative Remarks Manual, COMDTINST M1000.14D (2019), provides the following guidance on the issuance of Page 7s:

- j. Authorized personnel may issue Administrative Remarks, Form CG-3307, documentation for incidents within two years of the date of the incident, or within two years of the date that the command knew, or should have known, about the incident.

...

- l. If a member refuses to sign an Administrative Remarks, Form CG-3307 entry, after being counseled regarding its content, the words “member refused to sign” must be entered in the member’s signature block along with the date counseled.

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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 requested a 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.⁶

4. At the outset, the applicant claimed that the actions of certain Coast Guard officials in his rating chain were in violation of the Health Insurance Portability and Accountability Act (HIPAA), which governs the confidentiality of medical records and regulates how and under what circumstances "covered entities" may use or disclose protected health information about an individual, *see* Social Security Act § 1177, 42 U.S.C.A. § 1320d-6. HIPAA applies only to the disclosure of protected medical information by a covered entity, defined by statute as a health plan, health clearing house, or healthcare provider. Social Security Act § 1177, 42 U.S.C.A. § 1320d-6. Accordingly, any claims by the applicant of a HIPAA violation by a member of his rating chain lack merit since they do not fit within the statutory definition. Nothing in HIPAA prevented the applicant's rating chain from requesting information from the applicant about whether the applicant's family had COVID-19 or symptoms of COVID-19. Section 9-1-7 of the Coast Guard regulations was intended to protect service members from exposure to COVID-19, consistent with Coast Guard statutory authority.

5. The applicant asked the Board to correct his record by: (1) removing a negative Page 7 dated April 6, 2020; (2) removing an associated EER dated April 30, 2020; (3) removing a April 30, 2021 EER or, in the alternative, correcting the EER by removing "Not Ready" and replacing it with "ready"; (4) advancing him to ET1 as of June 1, 2021, the date the applicant would have advanced in ALCGENL 071/21 if he had not received a "Not Recommended" for advancement and unsatisfactory conduct report on his April 30, 2020 EER; (5) back pay and allowances consistent with his retroactive advancement. Absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith, and the applicant bears the burden of proving error. *See* 33 C.F.R. § 52.54. Here, the applicant has provided substantial evidence in support of his claims. As discussed below, the Board finds the applicant has demonstrated by a preponderance of evidence the existence of an error or injustice warranting the requested relief.

a. Allegations of Bias and Retaliation: In the applicant's personal statement, he claimed that he received a negative Page 7 on April 6, 2020 and an associated EER on April 30, 2020 as retaliation by his CO, LT, who disliked him because he did not fraternize with him

⁶ *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).

and his inner circle, partying and drinking in excess with other members of the cutter at ports of call, and returning to the cutter drunk after liberty expired without consequence. In support of this allegation, the applicant provided a statement from a former colleague who served on the ship with him, who corroborated his claims of the climate onboard the cutter, and a pattern of bias and retaliation by his CO against him and others who were not in his inner circle; this former colleague also stated that another crewmember who was her subordinate was disparately treated and not punished by the CO even though she tested positive for COVID-19 and had failed to report her symptoms for two days while living and working amongst the crew. In his response to views of the Coast Guard, the applicant also provided substantial and detailed evidence of how the factual statements in the April 6, 2020, Page 7 did not support a violation of the COVID-19 policy in place at the time of the alleged misconduct. The applicant supervisor for the period July 2021 to July 2022 also provided a statement in support of his excellent character.

b. Page 7 and April 30, 2020, EER: The applicant claimed that it is erroneous and unjust that he received the negative Page 7 on April 6, 2020, and associated April 30, 2020, EER and argued that “[t]he scope of provisions for assigning an unsatisfactory conduct mark is limited to specific circumstances” citing the Enlistments, Evaluations, and Advancements Manual, M 1000.2C at 4.D.4.b. The applicant argued that this provision is limited to specific egregious conduct, not relevant here. The applicant further argued that his command violated policy regarding the April 30, 2020, EER because the policy set out in section 4.D.2.c.(1)(d)(3) states that a one-time infraction (such as being late to work) would not be sufficient for an adverse remark that could affect good conduct eligibility.

The Coast Guard responded that it was within policy for the applicant’s CO to issue the Page 7 and associated April 30, 2020 EER, and noted that this same policy also notes that adverse comments are not prohibited when discussing a pattern of behavior and that it was within the discretion of the applicant’s CO to determine if the applicant’s behavior could be characterized as a pattern of behavior. The Coast Guard argued that Commanding Officers are officials responsible for the safety, health, and wellbeing of those under their command and are also the individuals responsible for the administration of the Enlisted Employee Review system for the individuals under their command and providing the recommendation for advancement. The Coast Guard explained that significant deference is provided to the commanding officer’s recommendation, so much so as to make it so that it cannot be appealed, and that in this case, the Commanding Officer specifically remarked on the 30 April 2020 EER that this incident was part of a pattern of behavior causing the commanding officer to lose confidence in the applicant’s ability to serve at the paygrade.

The Board does not find the Coast Guard’s arguments persuasive and finds the applicant has proven by a preponderance of the evidence that the actions taken against him by his CO are erroneous and unjust. The record reflects that neither the applicant nor anyone within his immediate family with whom he came into contact had a confirmed case of COVID-19, only a confirmed case of influenza. The Board agrees with the applicant that the Page 7 in the applicant’s record is not supported by the applicable Coast Guard policies regarding COVID-19 in place at the time of the alleged misconduct and is rife with inaccuracies: (1) the Page 7 notes that he “went on vacation . . . with out-of-town family members who flew in from two separate high-risk states experiencing rapid COVID-19

outbreaks” although the March 5, 2020 situational guidance specifically specifies that the only areas considered high risk are China, Iran, Italy, Japan and South Korea; (2) his family members did not have a laboratory confirmed diagnosis of COVID-19; and (3) the applicant never became ill.

The Board finds the April 30, 2020, EER is similarly inaccurate. For example, for Accountability/Responsibility the applicant was assigned a rating of 3 for “failing to adhere to Coast Guard and local Sector policies set forth regarding COVID-19 reporting guidelines and precautions potentially placing self & others at risk and diminishing mission readiness.” The applicant in fact followed the Coast Guard COVID-19 policies in place at the time of his alleged misconduct because at the time of the applicant’s alleged misconduct, the Coast Guard issued a COVID-19 policy specifically only requiring notification upon a confirmed case of COVID-19. The applicant quarantined with his family, was never in contact with other Coast Guard members, and therefore did not place others at risk or diminish mission readiness. The Board further finds credible the declarations by the applicant’s wife and father that corroborate the applicant’s characterization of the events that transpired.

The Board finds that the only Coast Guard policy that the applicant potentially failed to follow was Section 9-1-7 of the Coast Guard regulations, but that given the policy guidance provided to Coast Guard members at the time of the alleged misconduct specific to COVID-19 the Board finds that the applicant acted appropriately in following the Coast Guard’s COVID-19 guidance as directed that specifically stated that reporting was not required unless the applicant himself was exposed to COVID-19, or the applicant or someone in his household had a confirmed case of COVID-19, which was not the case here.

It shocks the sense of justice for the applicant to be punished for following in good faith the Coast Guard COVID-19 policy at the time of the alleged infraction and therefore the Board finds that the negative Page 7 dated April 6, 2020 and associated EER dated April 30, 2020, should be removed from the applicant’s record, and the applicant’s record be corrected to reflect he was otherwise marked recommended for advancement.

c. April 30, 2021, EER: The applicant argued that the mark of “Not Ready” on the April 30, 2021, EER was similarly erroneous and unjust because he would have not received said mark if he had not first received a “Not Recommended” mark on the April 30, 2020, EER. The applicant contended that, if he had not received the original “Not Recommended” mark, then he would not have been required to complete the RPQs within the timeframe because he was above the cut for advancement.

The Coast Guard argued that the applicant was required to maintain eligibility up until the date of advancement, which he failed to do. The Coast Guard’s arguments are based on the mark of “Not Recommended” on the April 30, 2020, EER and the negative CG-3307, which had a domino effect on the applicant’s eligibility to compete for the November 2020 and May 2021 SWE. The Board finds that, because the applicant had been determined eligible to advance to E-6 by the ranks from the November 2019 SWE but for the negative GG-3307 and April 30, 2020, EER, he would not have been required to complete the RPQs

to be eligible to complete in the subsequent SWEs. Because the Board finds these documents should be removed from the applicants record, the Board further finds by a preponderance of evidence that the “Not Ready” mark on the April 30, 2021 EER should be corrected to reflect ‘ready’ for advancement.

d. Eligibility for Promotion: By memorandum dated December 13, 2019, the applicant’s name was published on the advancement list as determined by final multiple rankings from the November 2019 SWE, making him eligible to advance from E-5 to E-6. This memorandum stated that the eligibility list became effective July 1, 2020 and expired December 16, 2020, and that a member became ineligible for advancement if the CO withdrew the advancement recommendation or mark or ‘ready’.

A review of the applicant’s record shows that the applicant was scheduled to advance to ET1 by June 1, 2021, and was second in line on the placement list. Therefore, his promotion would have likely automatically occurred before August 2021 and he would not have needed to complete the RPQs but for the fact that he was marked “Not Ready” for advancement by his CO.

6. After a review of the evidence in this case, the Board finds that the applicant has demonstrated by a preponderance of evidence that the April 6, 2020, CG-3307 is erroneous and unjust and the applicant is entitled to relief. Accordingly, the April 30, 2020, EER associated with the CG-3307 and April 30, 2021 EER are also erroneous and unjust. As a result of these findings, the Board directs the Coast Guard immediately remove from the applicant’s record the CG-3307 dated April 6, 2020, and the EER dated April 30, 2020. The Board further directs the Coast Guard to correct the April 30, 2021, EER to reflect an advancement potential mark of ‘ready.’

7. The Board further finds that removal of the applicant’s name from the advancement list was erroneous and unjust. Therefore, given that the applicant was second on the advancement list at that time of his alleged misconduct, if PSC made more than one advancement off that advancement list then the applicant should be advanced to ET1 as of June 1, 2021. If advanced, the applicant is entitled to all back pay and allowances consistent with his retroactive advancement.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of ET1 [REDACTED] [REDACTED] [REDACTED] for correction of his military record is granted. The Coast Guard shall—

- Remove the CG-3307, dated April 6, 2020, from his permanent record.
- Remove the Enlisted Employee Review, for the period ending April 30, 2020, from his permanent record.
- Correct the Enlisted Employee Review, for the period ending April 30, 2021, to reflect a mark of “Ready” under Advancement Potential.
- Advance the applicant to ET1 as of the date the applicant would have advanced pursuant to ALCGENL 071/21, and pay him all back pay and allowances due as a result of these corrections.

July 3, 2024

[REDACTED]
Digitally signed by [REDACTED]
Date: 2024.07.15 19:00:28 -04'00'

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]
Digitally signed by [REDACTED]
Date: 2024.07.16 11:39:38 -04'00'

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]
Digitally signed by [REDACTED]
Date: 2024.07.16 11:55:59 -04'00'

[REDACTED] [REDACTED] [REDACTED]