

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-265

**XXXXXXXXXXXX
XXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application September 30, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 16, 2011, 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 lieutenant (LT) in the Reserve, asked the Board to remove from his record his Officer Evaluation Report (OER) covering his service from October 1, 2005, to October 31, 2006, when he was assigned to a Naval Coastal Warfare Squadron (NCWS). The applicant alleged that the OER was completed inaccurately and unjustly and that he was recently denied an extended active duty contract by the Personnel Service Center (PSC) because of it.

The applicant stated that when first assigned to the NCWS, he was put in the Intelligence Department and did pre-deployment work for three months before the NCWS deployed to Xxxxx. Upon arrival in Xxxxx, however, the commodore of the squadron, CAPT X, assigned him to Xxxxx, 15 miles south of the naval base, to live and work as a liaison to the Army command there. Because the officer housing at the camp was filled, he stayed in the enlisted barracks. His supervisor was an Army lieutenant colonel, LTC X, who lived at the naval base, and every morning the applicant commuted from Xxxxx to the naval base to report to LTC X and CAPT X.

The applicant stated that on April 13, 2006, he was in the barracks when an intoxicated Army private (E-4) entered and punched him in the chest. Alcohol is illegal in Xxxxx. The applicant evaded the private and reported the incident to camp security and the Criminal Investigations Division (CID), who arrested the private. He also reported the incident to LTC X and CAPT X the next morning. The private was punished by the termination of his weapons quali-

fication, restriction to living quarters, suspension of his advancement, required alcohol counseling, and documentation of his misconduct in his military record.

The applicant stated that when the private was punished, he immediately requested transfer back to the naval base because he feared for his safety and wanted to live in proper officer quarters. After CAPT X denied this first request, the applicant received threats and had his personal property destroyed, so he submitted another request, but CAPT X insisted that he stay at the camp. Therefore, the applicant contacted a military legal aide at the camp and CDR F, a Navy legal advisor, for advice. CDR F scheduled a meeting with the applicant, LTC X, and CAPT X, and the applicant was allowed to move back to the naval base four months after his arrival in XXXXX, reassigned to the Intelligence Division under the supervision of CDR Y, and assigned to officer berthing.

The applicant alleged that there are several errors in the disputed OER, which documents his performance while assigned to the NCWS. He complained that he received a below-average mark of 3 for “Adaptability”¹ from his second supervisor, CDR Y, based on his performance as liaison to the Army camp even though CDR Y was not in his chain of command when he was assigned to the camp. The applicant argued that CDR Y did not have sufficient information to judge his performance at the camp and that he should not have been marked down because a drunk private assaulted him.

The applicant also alleged that the mark of his reporting officer,² CAPT X, in the third spot on the comparison scale³ denoting him as a “fair performer” on the disputed OER is erroneous and unjust. The applicant alleged that CAPT X made a mistake because the comparison scale on a Navy fitness report is different than the comparison scale on a Coast Guard OER, where a mark of 3 is not satisfactory and will prevent his opportunities for promotion and active duty assignments.

The applicant pointed out that in preparing the reviewer’s page, a Coast Guard officer, CDR X, assigned him a mark in the fourth spot on the comparison scale, denoting a “good performer,” and recommended him for promotion. The applicant alleged that the difference between CAPT X’s and CDR X’s marks and comments sent a confusing message to OPM, and someone at OPM told him that he was not selected for an EAD contract because of the negative impression created by the disputed OER.

¹ Coast Guard officers are evaluated on numerous aspects of their performance, such as “Adaptability,” “Teamwork,” “Responsibility,” and “Professional Competence,” on a scale of 1 (worst) to 7 (best).

² Each Coast Guard officer is evaluated by a rating chain of three superior officers: a supervisor, who is normally the person to whom the officer reports on a daily basis; a reporting officer, who is normally the supervisor’s supervisor; and a reviewer, who reviews the OER to ensure consistency and compliance with regulations and who may add a page of comments to the OER. Personnel Manual, Article 10.A.2.e.1.e.

³ The comparison scale is not numbered but contains seven possible marks from the first (“Performance unsatisfactory for grade or billet”) to the seventh (“BEST OFFICER of this grade”). The OER form instructs the reporting officer to complete the comparison scale by comparing the officer to all of the other officers of the same rank whom the reporting officer has known throughout his career.

The applicant also alleged that when any officer reviews the summary of his numerical marks in the Coast Guard’s Direct Access database, it is CAPT X’s erroneous comparison scale mark of 3 that shows up, instead of CDR X’s mark of 4. He alleged that because CDR X raised his comparison scale mark from 3 to 4, the 4 should appear in the summary of his marks.

The applicant alleged that after he was denied an extended active duty contract, he spoke to someone in the Officer Personnel Management branch of the PSC on September 2, 2010, who pointed out the problems in the OER and told him that the OER caused him not to receive an active duty contract and might prevent him from being promoted in the future. The applicant also alleged that, as a reservist, he does not have regular access to Coast Guard files, computers, documents, or contacts.

In support of his allegations, the applicant submitted a copy of the disputed OER; a copy of a summary page from the Direct Access database showing only his reporting officer’s marks; and an email he wrote to the PSC on September 7, 2010, in which he said that he understood that the negative OER was a contributing factor in his failure to receive an extended active duty contract; that his OER reviewer had changed his comparison scale mark from the third spot to the fourth spot; that the OER “sends a conflicting message”; and that he would follow proper procedures to rectify the OER.

SUMMARY OF THE RECORD

The disputed OER, which was validated by the PSC on April 13, 2007, is attached. In the various performance dimensions, the applicant received one mark of 3 (for “Adaptability”) and twelve marks of 4 from his supervisor, Coast Guard CDR Y. The criteria for the numerical marks for “Adaptability” that appear on an OER form are reproduced below with the mark assigned by the applicant’s supervisor, a 3, filled in:

<u>Adaptability</u> Ability to modify work methods in response to new information, changing conditions, political realities, or unexpected conditions.	1 <input type="radio"/>	Unable to gauge effectiveness of work, recognize political realities, or make adjustments when needed. Overlooked or screened out new information. Overreacted or responded slowly to change in direction or environment. Ineffective in ambiguous, complex, or pressured situations.	3 <input checked="" type="radio"/>	Receptive to change, new information, and technology. Effectively used benchmarks to improve performance and service. Monitored progress and changed course as required. Effectively dealt with pressure and ambiguity. Facilitated smooth transitions. Adjusted direction to accommodate societal trends or political realities.	5 <input type="radio"/>	Rapidly assessed and adjusted to changing conditions, political realities, new information and technology. Very skilled at using and responding to measurement indicators. Championed organizational improvements. Effectively dealt with extremely complex situations. Turned pressure and ambiguity into constructive forces for change.	7 <input type="radio"/>
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The supervisor supported this mark of 3 with the following comment: “Assignment proved extremely challenging; ... unable to resolve organizational issues w/ army supervisors; interpersonal skills fully challenged w/ conflict w/ enl soldier; realigned goals and reassigned to Intel Dept for remainder of deployment.” Most of the other OER comments written by the supervisor are not critical, but he also included the following comments in the Leadership Skills section of the OER: “Required asst from supervisor to solve numerous low level BO [boarding

officer] sched/pers problems; readjusted leadership approach; achieved complete independence from oversight. ... Challenged in theater by weapon conditions boarding procedures; outspoken critic of AOR specific policies; worked through difficult issues w/ supervisor; achieved suitable solution.”

The applicant’s reporting officer, Navy CAPT X, assigned him four marks of 4 and one mark of 5 (for “Responsibility”) in the various performance dimensions and a mark in the third spot on the comparison scale, which means that in comparison with all of the other lieutenants CAPT X has known throughout his career, he found the applicant to be a “fair performer, recommended for increased responsibility.” CAPT X included many non-critical comments in his section of the OER, but also wrote the following:

Concur with supervisor comments. [The applicant] has had a personally challenging tour with Naval Coast Warfare. He was initially given the opportunity to work directly with Army SECFOR & supervise 45 enlisted personnel ISO OIF. He was provided opportunity to receive mentoring to solve interpersonal issues w/ Army but elected for reassignment back to NCW Intel Dept. He has been a contributing member of the NCW Intel Dept ...

Aligned priorities w/ command after multiple mentoring sessions; reacted to supervisor’s concern for new boarding procedures and training; ...

[The applicant] has performed adequately as an Intel Officer and lead Top Side Boarding Officer. ... personally challenged by the integrated military environment; personally elected to be reassigned out of the position and reverted back to the Intel Department. ... Challenged by the complexities of joint military environment; will achieve success w/ proper focus, dedication, and teamwork. With time & continued hard work on improving interpersonal skills, he will be ready for promotion with his peer group.

Because CAPT X is a Navy officer, the reviewer, Coast Guard CDR X, was required to add a separate page with comments and an additional comparison scale mark to the OER. CDR X assigned a mark of 4 on the comparison scale, which means that in comparison with all of the other lieutenants CDR X has known throughout his career, the applicant is a “good performer; give tough, challenging assignments.” CDR X also wrote the following comment: “Concur with reporting officer marks and comments. [The applicant], though challenged in the joint military environment, provided solid performance when reassigned as the intelligence officer. Personal adjustments made within the period allowed [the applicant] to move beyond reassignment and provide positive results and aid the unit execute their missions. [He] is recommended for promotion with peers.”

VIEWS OF THE COAST GUARD

On February 2, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG alleged that the applicant has not submitted sufficient evidence to rebut the presumption that the disputed OER is fair and accurate and that his rating chain “carried out their duties fairly and objectively by accurately marking the applicant in accordance with the Coast Guard Personnel Manual.” The JAG stated that the comment page and extra comparison scale mark provided by the reviewer, CDR Y, were required by the Personnel Manual and are reviewed

in conjunction with the rest of the OER when an officer's record is considered by a promotion board or an assignment officer.

The JAG adopted the findings and analysis provided in a memorandum on the case prepared by the PSC. The PSC argued that the application is untimely and that the applicant had access to his military record "via a regular computer. Most importantly, Applicant has been on Active Duty Operational Support orders for a total of 466 days from 24 Aug[ust] 2007 to 30 Sep[tember] 2010 which makes the claim of unable to access CG documents or contacts a false statement."

With regard to how the disputed OER is summarized in the Direct Access database, the PSC stated that the database correctly shows all of the numerical marks assigned by the applicant's supervisor and reporting officer. The PSC noted that promotion boards and assignment officers and panel review the entire OER, not just the numerical marks in the Direct Access summary.

The PSC stated that its review indicated that "[a]ll policies and procedures that govern the Officer Evaluation System were followed with regard to the applicant's OER from 01 Oct[ober] 2005 to 31 Oct[ober] 2006 and are reflected accurately in the applicant's Personnel Data Record and in Direct Access."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 16, 2011, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 10.A. of the Personnel Manual governs the preparation of officers' OERs. Article 10.A.1.b.1. states that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." Article 10.A.4.c.4. instructs supervisors to assign marks and write comments for the first thirteen performance categories on an OER as follows (nearly identical instructions appear in Article 10.A.4.c.7. for reporting officers, who complete the rest of the OER):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

• • •

d. In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

• • •

g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. ...

Article 10.A.2.g.2.a. states that when an officer's supervisor changes during an evaluation period for an OER, the departing supervisor leaves the new supervisor a draft evaluation covering the period of observation for the new supervisor to consider when preparing the OER.

Article 10.A.4.c.8.a. of the Personnel Manual states that to complete the comparison scale on an OER,

[t]he Reporting Officer shall fill in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known. NOTE: This section represents a relative ranking of the Reported-on Officer, not necessarily a trend of performance. Thus, from period to period, an officer could improve in performance but drop a category.

Article 10.A.2.f.2. of the Personnel Manual describes the duties of an OER reviewer as follows:

- a. Ensures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential.
- b. Adds comments as necessary, using form CG-5315 (series), that further address the performance and/or potential of the Reported-on Officer not otherwise provided by the Supervisor or Reporting Officer. For any officer whose Reporting Officer is not a Coast Guard commissioned officer, member of the Coast Guard Senior Executive Service (SES), or a USPHS flag officer serving with the Coast Guard, Commandant (CG-11), the Reviewer shall describe the officer's "Potential" and include an additional "Comparison Scale" or "Rating Scale" mark. The comparison scale is not to be completed unless the Reviewer comments are mandatory.
- c. Ensures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer may not direct in what manner an evaluation mark or comment be changed (unless the comment is prohibited under Article 10.A.4.f.).

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. The disputed OER was validated by the PSC for entry in the applicant's record on April 13, 2007, and his application was not received until September 30, 2010. However, according to the PSC, the applicant has served on active duty for a total of 466 days between August 24, 2007, and September 30, 2010. Therefore, his application is timely because the Board's three-year statute of limitations is tolled whenever a member is serving on active duty.⁴

3. The applicant asked the Board to correct his military record by removing his OER for the period October 1, 2005, to October 31, 2006. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁵ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁶ When challenging an OER, an applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁷

4. The applicant has submitted insufficient evidence to overcome the presumption of regularity accorded the disputed OER and his rating chain.⁸ He alleged that his mark of 3 for "Adaptability" is erroneous and unjust because the supervisor who prepared the OER, CDR Y, was not his supervisor while he served as the liaison to the Army at Xxxxx, and the comments show that the mark of 3 was based on that service. However, under Article 10.A.2.g.2.a. of the Performance Manual, when an officer's supervisor changes in the middle of an evaluation period, the new supervisor receives input from the past supervisor and may base marks and comments in an OER on the officer's performance under the past supervisor. Therefore, the fact that CDR Y was not the applicant's supervisor when he served as the liaison to the Army does not render marks and comments based on his performance as the liaison erroneous or unjust because CDR Y presumably based his marks and comments, at least in part, on input from LTC X, who was the applicant's supervisor while he worked as the liaison.

5. The applicant alleged that the mark of 3 for "Adaptability" is unjust because he was marked down for objecting to his assignment to Xxxxx after he was punched by a private and received threats. Several comments in the OER, however, show that the mark of 3 was based primarily on problems he had working with his Army supervisors, not on his reaction to

⁴ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁷ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

⁸ 33 C.F.R. § 52.24(b); *Arens*, 969 F.2d at 1037.

the private's assault and threats. The comments show that the applicant was an "outspoken critic" of many policies and required "multiple mentoring sessions." The Board finds that the applicant has not proved by a preponderance of the evidence that the mark of 3 he received for "Adaptability" is erroneous or unjust.⁹

6. The applicant alleged that CAPT X's mark in the third spot on the comparison scale, denoting him as a "fair performer," is erroneous because it was assigned by a Navy officer more familiar with Navy fitness reports, wherein a mark of 3 is an average mark, rather than below average.¹⁰ However, the fact that Navy fitness reports are very different from Coast Guard OERs and use a different scale does not prove that CAPT X did not intend to mark the applicant as a "fair performer" on the comparison scale. Navy performance evaluations do not have comparison scales, and the applicant has not shown that CAPT X assigned the applicant a mark in the third spot on the comparison scale while mistakenly believing it to be a better mark.

7. The applicant alleged that CAPT X's mark in the third spot on the comparison scale is erroneous because it was raised by the Coast Guard officer who served as his reviewer, CDR X. However, when a reviewer adds a page with comments and a comparison scale mark to an OER, he is not changing the evaluation of the supervisor or reporting officer but adding a third point of view to the OER. Under Article 10.A.2.f.2. of the Personnel Manual, an OER reviewer is not allowed to change the marks or comments of a supervisor or reporting officer, but he may add a page with his own assessment to the OER, and when the reporting officer is not a commissioned Coast Guard officer, a member of the Coast Guard Senior Executive Service (SES), or a USPHS flag officer serving with the Coast Guard, Commandant (CG-11), the reviewer is required to do so. The applicant's reviewer, CDR X, expressly stated in the OER that he concurred with the supervisor's and reporting officer's marks and comments. CDR X's determination on the comparison scale that, in comparison with all of the lieutenants that CDR X had met in his career, the applicant was a "good performer" does not contradict CAPT X's determination that the applicant was merely a "fair performer" in comparison with all of the lieutenants CAPT X had known throughout his career. The Board finds that the applicant has not proved by a preponderance of the evidence that the mark of 3 he received from his reporting officer on the comparison scale is erroneous or unjust or that the addition of the reviewer's page to the OER creates confusion or prejudices his record when it is reviewed by promotion boards or assignment panels or officers.

8. The applicant alleged that it is unfair that the marks summary page in the Direct Access database reflects the comparison scale mark he received from his reporting officer, instead of the mark his reviewer made. It is unfortunate that the Direct Access summary page does not include both comparison scale marks when there are two marks, which is not normally the case. However, because the entire OER is provided to and presumably reviewed by promo-

⁹ For the purposes of the BCMRs, "[i]njustice", when not also "error", is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

¹⁰ Navy officers are rated on a five-point scale, instead of a seven-point scale, in just seven performance categories, and receive a mark on a promotion scale ranging from "significant problems" to "early promote." See NAVPERS 1610/2 (Rev. 3-02).

tion boards and assignment panels and officers, the applicant has not shown that he has been unfairly prejudiced by the database form.

9. Accordingly, the applicant's request that the disputed OER be removed from his record should be denied because he has not proved by a preponderance of the evidence that it is erroneous or unjust. He has not shown that the OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.¹¹

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹¹ *Hary*, 618 F.2d at 708.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

Donna M. Bivona

Bruce D. Burkley

Randall J. Kaplan