

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-084

FINAL DECISION

ANDREWS, Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was commenced on May 14, 1998, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated May 6, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant, a xxxxxxxxxxxxxxx in the Coast Guard, asked the Board to correct his record by removing three officer evaluation reports (OERs). The disputed OERs cover the periods May 5, 199x, to April 30, 199x (OER1); May 1, 199x, to December 15, 199x (OER2); and December 16, 199x, to June 26, 199x (OER3). These disputed OERs, particularly OER2 and OER3, have significantly lower scores than the applicant's other OERs (see the chart on page 8, below). If removed, the three disputed OERs would be replaced with three "For Continuity Purposes Only" OERs.

The applicant also requested that the Board remove from his record his failures of selection, which, he alleged, resulted from the three disputed OERs. If, after the OERs and failures of selection are removed from his record, the applicant is selected for promotion by the next selection board, he wants his date of rank to be backdated to the date of rank he would have received had he been selected by the first board to consider him for promotion to commander. The applicant also asked for back pay and allowances.

APPLICANT'S ALLEGATIONS

The applicant alleged that he received three inaccurate OERs while serving as the executive officer (XO) of the Coast Guard cutter xxxx. The commanding officer (CO) of the xxxx acted as both the supervisor and the reporting officer for all three disputed OERs. The applicant alleged that the reviewer for the OERs was an officer who had no opportunity to observe the applicant's performance in person and who received all input regarding the applicant's performance from the CO.

The applicant alleged that the disputed OERs were inaccurate because his CO had very poor judgment. He did not present any evidence of his CO's poor judgment, but he alleged that it was later documented in a Coast Guard investigation. He further alleged that, after the investigation, the CO was charged but then allowed to retire in lieu of appearing before a captain's mast. The applicant did not explain the nature of the investigation or the charges against the CO.

The applicant stated that he had filed OER replies for OER2 and OER3 because they were "unwarranted and inaccurate." He explained that he did not file an OER reply for OER1 because the report was "average" even though it was significantly worse than his previous OERs. He alleged that his OER replies were insufficient remedies for the presence of the inaccurate OERs in his record because regulations prevented him from discussing the true source of the OERs' inaccuracy: his CO's poor judgment.

The applicant presented several graphs revealing how much lower the marks in the three disputed OERs are than the marks in the rest of his OERs. He alleged that his failures of selection were caused by the presence of the disputed OERs in his record.

VIEWS OF THE COAST GUARD

On February 18, 1999, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant's request for relief for lack of proof. The Chief Counsel alleged that the Board should apply the following standards in determining whether to remove the disputed OERs:

To establish that an OER is erroneous or unjust, the applicant must prove that the challenged OER was adversely affected by a clear, material error of objective fact, factors "which had no business being in the rating process," or a clear and prejudicial violation of a statute or regulation. Germano v. United States, 26 Cl. Ct. 1446, 1460 (1992); Hary v. United States, 618 F.2d 11, 17 (Cl. Ct. 1980); CGBCMR Dkt. No. 86-96. In proving his case, an applicant must overcome a strong presumption that his rating official acted correctly, lawfully, and in good faith in making their evaluations under the Coast Guard's Officer Evaluation System. Arens v. United States, 969 F.2d 1034, 1037 (1992); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979).

The Chief Counsel argued that the applicant failed to meet these standards because he did not allege “a misstatement of hard fact or any procedural defect in the disputed OERs nor has he provided evidence, much less prima facie proof, of any violation of a statute or regulation in this regard. . . . The Applicant’s assertion that his OER Rating Chain should have been disqualified on the basis of some non-specific military discipline matter subsequent to the time period in dispute is not evidence of error or injustice.”

The Chief Counsel also argued that the applicant had provided

no explanation or theory regarding how the alleged subsequent military discipline matter involving his then Commanding Officer might have had a deleterious effect on the documentation of his performance in the disputed OERs. . . . Additionally, the Applicant has not shown the relevance of such matters considering that the matter Applicant addresses is contained in another officer’s record, the disclosure of that person’s personnel record information without their consent would violate the Privacy Act. Therefore, the Coast Guard may not comment on, nor release this information to the Applicant.

The Chief Counsel also alleged that, “as a matter of law, the Board may not consider Applicant’s previous and subsequent performance in evaluating and assessing the Applicant’s performance during the period in dispute.” He quoted from Grieg v. United States, 640 F.2d 1261, 1269 (Ct. Cl. 1981), that “the fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.”

The Chief Counsel attached to his advisory opinion a memorandum dated February 1, 1999, from the Chief of the Officer Evaluations Branch concerning the applicant’s case. The Chief stated that regulations permit a cutter’s CO to act as both supervisor and reporting officer for a cutter’s XO. In addition, the regulations do not require a reviewer to have personally observed a reported-on officer’s performance.

On March 4, 1999, the Chairman of the BCMR wrote to the Chief Counsel requesting copies of any reports concerning the CO’s alleged misconduct or poor judgment which led to his retirement. The Chairman stated that “[w]ithout access to these records, the Board cannot determine whether they have any relevance to the applicant’s OERs.”

On April 2, 1999, the Chief Counsel of the Coast Guard responded to the Chairman’s letter by refusing to deliver the documents. The Chief Counsel refused to provide the requested documents “because (1) the Board does not have the authority to consider any such record unless it also discloses any such record to the Applicant per 33 C.F.R. § 52.82, which would constitute a violation of the Privacy Act, and; (2) the Coast Guard has no legal duty to provide this information to the Board.” The Chief Counsel further argued that

a vague allegation regarding another officer's performance in 199x has no logical connection or relevance to the Applicant's 199x-9x performance. That nonspecific and unsupported allegation is insufficient as a matter of law to make some alleged incident in 199x relevant or to shift the burden of production or the burden of proof to the government to affirmatively rebut his non-specific allegation.

. . . Bald assertions of some poor judgment of a rating official at some unconnected time and place should not result in a fishing expedition of the reporting officer's record by the Applicant. In the absence of any showing of the relevance of some alleged nonspecific lack of judgment to the Applicant's case with an appropriate "in camera" proceeding to protect any materials that might exist and a stipulation that the Office of the Secretary would bear any fees, costs or penalties associated with allegations of unlawful disclosure of any such records, the Coast Guard will not . . . confirm or deny that any record of some poor judgment of this officer in 199x exists.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 23, 1999, the BCMR sent a copy of the Chief Counsel's advisory opinion to the applicant and invited him to respond. On March 23, 1999, the applicant responded in a letter in which he alleged that his CO had ignored his achievements and failed to inform the reviewer of them. He stated that the regulations had not permitted him to submit evidence of his achievements with his OER replies. Therefore, his reviewer remained ignorant of his actual performance. The applicant also argued that the good evaluations he received as the XO of the cutter xxxxxx showed that the evaluations of his performance as XO of the xxxx were inaccurate.

The BCMR also sent the applicant a copy of the Chief Counsel's memorandum concerning the Privacy Act. On April 21, 1999, the applicant responded stating that he waived his right under 33 C.F.R. § 52.82 to see any part of the CO's record or investigation. Furthermore, the applicant stated that disclosure of the record of investigation was compatible with the Privacy Act, 5 U.S.C. § 522a(b)(3) because documentation of his CO's judgment was one of the purposes for which the records were compiled.

RELEVANT REGULATIONS

OER Provisions

Article 10.A. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) governs the preparation of OERs. Normally, each OER is prepared by the reported-on officer's "rating chain" of three senior officers: the supervisor (the officer to whom the reported-on officer answers on a daily basis), the reporting officer (the supervisor's supervisor), and the reviewer (the reporting officer's supervisor). However, Article 10.A.2.e.(1)(b) provides that "[c]ommanding officers and division and branch chiefs . . . may be both Reporting Officer and Supervisor for their immediate subordinates. (Ex-

ample: A commanding officer will normally be both Reporting Officer and Supervisor for the executive officer)”

According to Article 10.A.2.f.(2) of the Personnel Manual, which governs the responsibilities of the reviewer, the reviewer “[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential” and “[c]hecks for obvious errors, omissions, or inconsistencies between numerical evaluations and written comments and any failures to comply with instructions” but need not have personally observed the reported-on officer’s performance.

Article 10.A.2.g.(2)(b) of the Personnel Manual provides for removal of a rating chain member if the officer is “disqualified,” which is defined as follows:

“Disqualified” includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation.

Article 10.A.4.h. allows the reported-on officer to reply to any OER and have the reply filed with the OER if they are submitted within 14 days of receipt of the OER copy from the commandant. The provision for reply is intended to “provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official.” However, “[c]omments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member serve no purpose and are not permitted.”

BCMR Provisions

Section 52.24 of title 33 of the Code of Federal Regulations states that “[i]t is the responsibility of the applicant to procure such evidence, including official records, as the applicant desires to present in support of his case.”

Section 52.82(b) of title 33 states that “[t]he Board may request the Coast Guard to submit any additional pertinent facts not disclosed in an application and its supporting documents.” Section 52.82(d) states that “[a] copy of each submission made by the Coast Guard under this section shall be transmitted to the Board, which shall promptly send a copy to the applicant involved.”

SUMMARY OF THE APPLICANT’S RECORD

In May 197x, the applicant received his commission and began his first tour of duty aboard the cutter xxxxxx. In 1980, he was promoted to lieutenant junior grade and transferred to the cutter xxxxxx, where he served as the XO for two years. In the six OERs that reflect his performance during this assignment, he received the next to

highest or highest mark on the comparison scale. Thereafter, he attended postgraduate school in xxxxxx and was promoted to xxxxx.

From December 198x to July 198x, he served as the commanding officer of the cutter xxxxxx. In the six OERs that reflect his performance as CO, he received five marks of 5 on the comparison scale and then a mark of 6.¹ The comments he received in those OERs describe him as an “aggressive young officer” with “force and initiative” and “excellent potential.”

In August 198x, the applicant began working at Coast Guard headquarters as an xxxxxx and later as Chief of the xxxxx of the xxxx Branch. The OERs numbered 1 through 5 in the chart on page 8, below, covered this service. In July 199x, he was promoted to xxxxxxx.

In May 199x, the applicant began serving as the XO of the xxxx. The three disputed OERs (numbered 6, 7, and 8, in the chart below) covered his service aboard the xxxx. OER1 contains comments criticizing the applicant’s listening, conversational, and writing skills. OER2, a “special” OER issued to document his weak performance, contains many negative comments supporting the poor marks, including the following:

Effectively delegates to subordinates, but fails to adequately monitor progress and get timely, satisfactory results; does not hold subordinates accountable. . . . interest in operational activities has been limited. All complex/non-routine staff work is inadequately researched and ill-prepared. . . .

Not particularly ambitious Remains content to let things happen rather than make them happen. Has considerable difficulty in successfully organizing, managing and directing the ship as a whole. Has not fully earned the respect of some officers and CPO’s. Style is much too lenient

Conversational abilities have improved, but still has some annoying habits. Writing skills are deplorable Nearly all written material must be returned for revision.

Not always attentive to details; has to be reminded about crew’s grooming, adherence to uniform regulations and shipboard housekeeping. . . . Within weight standards, but exercises little dietary control. No observable exercise or conditioning program.

[The applicant] is one of the most loyal and uncompromising officers I’ve worked with. Despite his best efforts, unfortunately, he continues to be plagued by several performance shortcomings for which others have had to compensate. . . . For his next assignment I recommend a less demanding position where he

¹ The new comparison scale is not actually numbered. However, there are seven possible marks, and a mark in the fourth, or center, position is considered average.

can improve these skills without burdening others and enhance his potential for promotion. He is not recommended for command afloat/XO assignment.

The applicant wrote a reply to OER2 in which he contradicted most of his CO's comments but admitted that he had "shortcomings." The CO forwarded the reply with a letter of his own stating that the

assigned marks are an accurate appraisal of his performance. . . . Midway through the Special OER period I contemplated relief for cause I elected not to pursue relief, and worked with him in an effort to elicit improvement. To his credit, improvement was later shown in nearly all areas, but it did not obviate my responsibility to document the performance observed during that period.

The reviewer concurred in the CO's comments when he forwarded the applicant's reply to the Commandant: "While I have no first hand observations of his performance, I have discussed his performance with [the CO] on several occasions and I am convinced that [the applicant] has been given wide opportunity to succeed."

Upon the applicant's detachment from the ship on June 26, 199x, he received OER3, which included the following comments:

Orchestration of unit activities has been ultimately successful, but not without difficulty and much dissention; considerable friction between him and dept heads. . . .

Uniforms are clean and properly worn, but fails to make the extra effort to achieve a "polished" look; have received unfavorable comments about his appearance from subordinates.

[The applicant] has made an earnest effort to improve in those areas previously noted, and has been successful in most. Additional improvement is recommended; unfortunately, his new assignment as a xxxxxx at HQ will not afford him the group dynamics/leadership & management opportunities essential for further development. At this time I cannot unequivocally recommend him for promotion or future command assignments.

The applicant submitted a reply for OER3, as well, in which he rebutted each of the negative comments and detailed his achievements during the reporting period. The CO forwarded the reply with a letter in which he stated that the applicant's "personal impact on the completion of mission objectives, as well as his influence and involvement in achieving the listed accomplishments, were all factored into the marks assigned." The reviewer forwarded the reply to OER3 and the CO's letter to the Commandant and attached his own letter containing the following statements:

[The applicant's] performance has been the subject of discussion between [the CO] and me for more than one year. . . . With the regular coaching and counseling that has been provided, I am satisfied that [the CO] has made a strong effort

APPLICANT'S MARKS IN 13 OERs FROM 1/1/8x THROUGH 4/30/9x

CATEGORY^a	1	2	3	4	5	6^b	7^b	8^b	9	10	11	12	13	AVE^c
Being prepared	5	6	6	5	6	4	4	5	6	6	6	6	6	5.8
Using resources	6	6	6	6	6	4	3	4	5	6	6	6	7	6.0
Getting results	5	5	6	6	6	4	2	3	5	7	7	7	7	6.1
Responsiveness	6	6	6	7	7	5	3	3	5	5	5	6	6	5.7
Work-life sensitivity ^d									4	4	4	4	4	4.0
Specialty expertise	5	6	6	6	6	4	3	4	5	5	6	6	7	5.8
Collateral duty ^d			6	5	5	4	2	4	5	6	5	5	6	5.4
Warfare expertise ^d			NO ^e	5	5	NO	NO	NO						5.0
Working with others	6	5	5	5	6	4	3	3	5	6	6	6	7	5.7
Human relations/ Workplace climate	5	5	5	5	6	4	4	4	4	5	5	6	6	5.2
Looking out for others	6	6	5	5	6	4	4	4	5	6	6	6	6	5.7
Developing subordinates	4	5	5	5	5	4	3	4	6	6	6	6	7	5.5
Directing others	5	5	5	NO	5	4	2	3	5	5	5	6	6	5.2
Evaluations	NO	5	5	NO	NO	4	2	4	4	4	4	4	5	4.4
Speaking & Listening	5	5	5	6	6	4	4	3	5	6	6	6	6	5.6
Writing	5	6	6	5	5	3	2	3	4	5	5	6	6	5.3
Articulating ideas ^d	5	6												5.5
Initiative	6	6	6	5	6	4	4	4	6	6	6	6	6	5.9
Judgment	5	5	5	6	6	4	3	3	5	6	6	6	6	5.6
Responsibility	5	5	6	6	6	5	3	4	6	6	6	6	6	5.8
Stamina	6	6	6	6	6	4	4	4	5	6	6	6	6	5.9
Health & Well-being	4	4	4	4	4	4	4	4	5	5	5	5	5	4.5
Military bearing	4	4	5	4	5	4	3	3	5	5	5	5	5	4.7
Customs /Courtesies ^d	6	6												6.0
Professionalism	5	5	6	5	6	5	4	4	6	6	6	6	6	5.7
Dealing with public	5	5	5	5	6	5	4	4	5	5	6	6	6	5.4
Comparison scale ^f	6	6	6	5	6	3	2	2	5	5	5	5	5	5.4
Total	120	129	126	117	131	94	72	83	121	132	133	137	143	128.9
Average for OER	5.2	5.4	5.5	5.3	5.7	4.1	3.1	3.6	5.0	5.5	5.5	5.7	6.0	5.4

^a Some categories' names have changed slightly over the years.

^b Disputed OER.

^c Average score of all OERs except disputed ones, which are shaded. Averages have been rounded.

^d Category nonexistent until later years, or category discontinued.

^e Score given was "NO," which means there was no opportunity to observe this trait.

^f The Comparison Scale is not actually numbered. In this row, "6" means the applicant was "strongly recommended for accelerated promotion." A "5" means the applicant was rated to be a "distinguished performer; give tough, challenging, visible leadership assignments." A "3" means the applicant was an "excellent performer; recommended for increased responsibility." A "2" means "good performer, but limited potential."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code. Under Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 1994), the application was timely.

2. The applicant alleged that three of his OERs were inaccurate due to a lack of judgment on the part of his CO, who served as the supervisor and the reporting officer for the three disputed OERs. The applicant presented statistical analyses revealing that the three disputed OERs are significantly worse than the other OERs in his record. He alleged that the Coast Guard had proof of his CO's lack of judgment because the CO was forced to retire several years after the reporting periods in question. The applicant did not present any evidence of his CO's alleged lack of judgment.

3. The Chief Counsel of the Coast Guard urged the Board to deny the applicant's request because the applicant failed to prove any inaccuracy or procedural defect in the disputed OERs. The Chief Counsel stated that the applicant had not proved the relevance of the alleged misjudgment on the part of his CO long after the reporting periods in question were over to his CO's ability to evaluate him during the reporting periods. The Chief Counsel refused to provide the Board with any information relating to the CO except that he was retired in 199x. He argued that 33 C.F.R. § 52.24 places the burden of proof on the applicant and that the applicant had not provided enough evidence to shift the burden of proof to the Coast Guard. Furthermore, he argued that if he provided such information, the Board would be required to reveal it to the applicant pursuant to 33 C.F.R. § 52.82(d), which would be a violation of the Privacy Act.

4. The Chief Counsel's arguments for denying the Board access to any extant reports of the CO's alleged misconduct or misjudgment are unconvincing. The Board is as bound by the Privacy Act as is the Coast Guard, and its regulation 33 C.F.R. § 52.82(d) cannot trump the statute. The Board has many times in the past received and relied on unredacted copies of Coast Guard investigations that were not provided to the applicants. Furthermore, the Board must decide for itself what evidence is relevant and cannot rely on the Chief Counsel's assurances. The Board must have access to evidence to determine its relevance.

5. The applicant did not present any evidence of his CO's lack of judgment. He claimed all proof is in the hands of the Coast Guard. The Chief Counsel refused to confirm or deny the existence of such evidence and to provide the Board access to any such evidence. Therefore, in making its final decision, the Board will assume that evidence exists that may support the applicant's allegation concerning the circumstances of his CO's retirement in 199x. Nevertheless, even assuming the applicant's CO was

forced to retire in 199x, the Board is not persuaded that he erroneously evaluated the applicant in the three disputed OERs covering May 5, 199x, to June 26, 199x. Other than asserting that his CO lacked judgment, the applicant provided no details as to how the alleged lack of judgment affected his performance on the xxxx, biased the CO against him, or caused the CO to fail to appreciate the applicant's performance.

6. The fact that the disputed OERs are significantly worse than the others in the applicant's record does not prove that they are erroneous. Grieg v. United States, 640 F.2d 1261, 1269 (Ct. Cl. 1981). The applicant has not established by a preponderance of the evidence that his performance as XO of the xxxx was other than as described in the disputed OERs.

7. Article 10.A.2.g. of the Personnel Manual requires "disqualified" members of a rating chain to be replaced. It defines "disqualified" as "includ[ing] relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation." The applicant has not proved that, pursuant to this article, his CO was disqualified from serving on his rating chain.

8. The applicant has failed to prove that the Coast Guard committed error or injustice by including the three disputed OERs in his record. He has not shown by a preponderance of the evidence that, during the reporting periods in question, his CO was unable accurately to evaluate his performance.

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

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of XXXXXXXX, USCG, is hereby denied.

Mark A. Holmstrup

Walter K. Myers

Pamela M. Pelcovits