DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-011

Xxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxx

FINAL DECISION

ANDREWS, Deputy Chair:

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 docketed on November 25, 2002, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated May 29, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a chief warrant officer (CWO2) in the Reserve, asked the Board to correct his military record by removing negative comments he received on an officer evaluation report (OER) for the period July 1, 2000, through June 12, 2001.

SUMMARY OF THE APPLICANT'S RECORD

The applicant enlisted in the Reserve on December 8, 1988, advanced to chief boatswain's mate, and was appointed a warrant officer on June 1, 1998. He was assigned to serve as the Reserve Officer Liaison for Station Xxxxxxxx. On the first OER that he received in this position, covering his service from June 1, 1998, to June 30, 2000, the applicant received five marks of 4 and thirteen marks of 5 (on a scale of 1 to 7, with 7 being best) in the various performance categories and a mark of 4 on the comparison scale.[1] This first OER contained many laudatory comments, including high praise for his efforts to increase reserve members' qualifications and involvement in boatcrew

[1] There are seven possible marks on the scale from 1 (unsatisfactory) to 7 (a distinguished officer). The third, fourth, and fifth marks denote "one of the many competent professionals who form the majority of this grade."

training, his managerial skills, his operational judgment, his communications, and his tenacity and commitment. The OER also noted that he submitted his OER input "well ahead of due date." It was signed by the Deputy Group Commander as supervisor, the Group's Senior Reserve Officer as reporting officer, and the Group Commander as reviewer.[2]

In June 2001, the applicant transferred to the IRR Active Status Pool. Thereafter, he was informed that his command was supposed to prepare a "departure" OER. At the time, his published rating chain was his station's commanding officer (CO) as supervisor, the Group's Senior Reserve Officer as reporting officer, and the Group Commander as reviewer. However, in October 2001, the disputed OER was entered in his record, signed by the Group Operations Officer as supervisor, the Deputy Group Commander as reporting officer, and the Group Commander as reviewer. The disputed OER has one mark of 3, for the performance category "Evaluations," fourteen marks of 4, three marks of 5, and a mark of 4 on the comparison scale. In addition, the disputed OER contains the following negative comments:

(a) "OER being provided for departure of member from Selective Reserve to Individual Ready Reserve when member did not desire to continue SELRES and shift work site from Station to Group to better support Group-wide operations and gain ops experience."

(b) "Failed to submit supporting documentation or input to OER."[3]

(c) "Took initiative to assist in solving reserve issues at Station, but more is expected of a CWO (bosn) at a CG Small Boat Station. Did not take the initiative or put in the necessary time to become more involved in the day-to-day operations of the unit. Only concerned with administrative duties associated with station … although important, the unit needed an operational focused CWO assigned. When the Group attempted to better utilize skill set on the Group Staff, [he] refused to drill and chose to go into IRR instead."

(d) "[The applicant] is enthusiastic when dealing face to face with CG reserves but his total commitment toward the Coast Guard has been in question. Although [he] was an above average manager of personnel, his skill set did not meet the requirements of the Small Boat Station, i.e., qualified small boat cox'n, SAR planner, etc., and [he] did not show the necessary desire to obtain the necessary skill set. He has been reliable, but needs more experience before given more advanced staff and/or leadership responsibilities. If brought back into SELRES, should not be assigned to Small Boat Station. Future assignment should be to a larger staff, such as a Group."

---

[2] Articles 10.A.2.d.1., e.1., and f.1. of the Personnel Manual provide that each OER is prepared by the reported-on officer's "rating chain" of three senior officers: the supervisor (usually the officer to whom the reported-on officer answers on a daily basis), the reporting officer (usually the supervisor's supervisor), and the reviewer (usually the reporting officer's supervisor). Under Articles 10.A.2.b.2.b. and 10.A.2.g., the rating chain is established and published by the commanding officer, who can designate a new rating chain in writing if one or more members of the previous rating chain is unavailable or disqualified.

[3] Article 10.A.2.c.2.e. of the Personnel Manual allows officers to submit to their rating chains information about their achievements during the evaluation period prior to the preparation of an OER.

In November 2001, with the disputed OER in his record, the applicant was not selected for promotion to CWO3 by the promotion year (PY) 2002 selection board.

In December 2001, the applicant received a copy of the disputed OER and submitted a reply.[4] Regarding comment (a), the applicant stated that it is misleading. He stated that, when told that his billet might be transferred to the Group office, he supported the transfer but discovered that he could not continue to fill that billet because he lives in xxxxxxxxxxxxxx and does not have a car. What little public transportation was available was insufficient to allow him to drill at the Group office or reach berthing. Therefore, when told by the Deputy Group Commander that his choices were to transfer with the billet to the Group office or go into the IRR, he chose the latter.[5] He stated that comment (a) should more properly be stated as, member "chose to go into the IRR due to personal transportation and berthing problems."

Regarding comment (b), the applicant stated that he had twice submitted bulleted input for his OER. He stated that he submitted it once by email and a second time as an attachment to an email after the Personnel Command informed him that no OER had been received from his command.

Regarding comment (c), the applicant stated in his reply that, when he first took the job, he was told by the Personnel Command, by his CO, by his predecessor in the position, and by other senior reserve liaisons in the Group that the position was strictly administrative with no operational duties. His CO had explained to him that he had relieved all senior reserve enlisted members of operational duties after "the Morning Dew incident." He alleged that before receiving the OER, no one had ever mentioned operational duties to him or suggested that he gain more operational skills. He pointed out that his official duties, as listed in section 2 of the OER, are purely administrative. He asked how he could be deemed deficient for duties that he was never asked to perform and skills he was never asked to exercise.

Regarding comment (d), the applicant stated that, when he was assigned to the station, there was only one qualified reserve boat crewman and no coxswains, and that by the time he left, there were thirteen reserve boat crewman and two coxswains. He

---

[4] Article 10.A.4.g. of the Personnel Manual allows the Reported-on Officer to file a reply to any OER within 14 days of receiving it to "express a view of performance which may differ from that of a rating official." The reply is forwarded up the rating chain so that each member has a chance to respond to the Reported-on Officer's statements. The reply and any responses by rating chain members are filed in the officer's record with the OER.

[5] Under Article 2.B.5. of the Reserve Policy Manual, reserve members such as the applicant who reject assignment orders which would require travel beyond a reasonable commute distance are supposed to be assigned to another unit within a reasonable commute distance or transferred into the IRR. A "reasonable commute distance" for a unit without berthing and dining facilities is defined as 50 miles or a 1.5 hour car ride. The Group office is more than a 50-mile/1.5-hour ride from xxxxxxxxxxxxxxxxxx.

also stated that participation in correspondence courses had doubled during his tenure. He stated that, at his prior station, he "had been an OOD [watchstander] and ops qualified" and that he had never done so at Station Xxxxxxxx only because he had been told by the CO that his job was to be purely administrative.

On January 10, 2002, the Group Operations Officer, who signed the OER as the supervisor, responded to the applicant's reply by stating that "[a] member's transportation issues to and from the drill site or berthing are not the responsibility of the Command" and that the applicant "was verbally counseled on this matter after it was learned he was having duty personnel pick him up at the train station on his drill dates and take him to Station Xxxxxxxx." He further stated that the rating chain never received any supporting input from the applicant for the OER and that, when asked about it, his CO denied having received any input.

On January 11, 2002, the Deputy Group Commander, who signed the OER as the reporting officer, responded to the applicant's reply by stating that he was supposed to assist the CO with training and development of the reserve members to support the missions of the station, including search and rescue, maritime law enforcement, boating safety, and pollution response. The Deputy Group Commander stated that the applicant did not work toward qualifying on the station's boats or as an OOD and resisted transferring to the Group office. He stated that the applicant's administrative duties were supposed to be his collateral duties, not his primary duties. He also stated that the applicant's transportation problems might be expected of a non-rate, but not of a CWO, and that if "this type of problem" is keeping him from drilling, "then his total commitment should come into question."

On January 14, 2002, the Group Commander, who signed the OER as the reviewer, forwarded the reply and responses to the Personnel Command, stating that the OER "accurately represents the supervisor's and reporting officer's opinions and observations of [the applicant's] performance and potential in the organization."

In November 2002, the applicant was not selected for promotion by the PY 2003 CWO selection board. On January 30, 2003, he was notified that because of his second failure of selection for promotion, he would be discharged on June 30, 2003.

SUMMARY OF THE APPLICANT'S ALLEGATIONS

The applicant stated, "I have never met, worked with or have I been directly observed by any of the officers who have signed the [disputed] OER." He stated that he exchanged a total of four emails with the Group Operations Officer after he had already transferred to the IRR, as well as one telephone conversation and two emails with the Deputy Group Commander. He stated that the rating chain that signed the disputed OER was not the proper rating chain and had no basis for evaluating him. As

a result, he stated, several comments in the disputed OER are inaccurate and grossly misleading, and the OER is unjust.

Regarding comment (a), the applicant stated that early on, he had looked into the possibility of moving his drill site from the station to the Group office in order to gain increased operational experience. However, he was told that all but one reservist at the Group office had been removed from operational duties and assigned to "special projects," which were largely "make work." Moreover, the applicant discovered that there was not adequate public transportation to the Group office, and he was living in xxxxxxxxxxx and did not have a car. He submitted train schedules showing that the only morning trains he could have used left the city at 12:35 a.m., arriving at the station closest to the Group location (but still ten miles away) at 2:27 a.m., and at 7:27 a.m., arriving at 9:13 a.m., one hour and thirteen minutes after the start of the work day at 8:00 a.m. In addition, the closest berthing was ten miles from the Group office and cost $229.00 per night. Therefore, in November 2000, when the Group's Senior Reserve Officer spoke to him about moving his billet to the Group office, he told him that he agreed that the billet should be moved but that, because of his transportation problems, he was not a suitable candidate. In December 2000, he was told that he would not be required to move his drill site because of the transportation problems. However, sometime thereafter, the Deputy Group Commander told him that his only two options were to drill at the Group office or go into the IRR and try to get another position in the next assignment cycle. In light of his transportation and berthing problems, he stated, he chose the latter option. He alleged that comment (a) is an entirely unjust characterization of the problems that led to his transfer to the IRR. He also noted that his billet had not actually been transferred to the Group office after he left.

Regarding comment (b), "Failed to submit supporting documentation or input to OER," the applicant alleged that in July 2001, he emailed the necessary bulleted information about his duties and achievements to his commanding officer (CO) at the station. However, the email and the OER his CO prepared were apparently lost. He recompiled the information, saved it as a Word document on a floppy disk, and, with the help of a neighbor, re-sent the information as an attachment to an email to the CO in either late August or early September. However, the CO was unable to open the attachment and never mentioned this fact to the applicant even though they were in frequent communication. The applicant alleged that in writing his OER, his command had "more than ample opportunity to ask about the 'missing bullets'."

In support of these allegations, the applicant submitted a letter signed by his neighbor, who stated that, after the applicant's computer crashed in July 2001, he helped the applicant put the bulleted information on a floppy disk as a Word document and also showed him how to send the document as an attachment to an email to the CO. In addition, the applicant submitted a copy of four pages of bulleted information

that he had sent his CO. He stated that a comparison of the bullets to the disputed OER suggests that whoever prepared the OER did have his bullets.

The applicant also submitted a series of emails between him and his CO. In the first, dated September 16, 2001, the applicant stated that he had been told that his "departure OER" was still missing and that he was sending the necessary bulleted information as an attachment, and that he had sent it once. In response, the CO stated that he had completed the applicant's OER "some time ago" and would try to trace it. He also stated that the "reserve unit personnel are performing flawlessly." On October 5, 2001, the CO told the applicant that he had "re-done the OER" and forwarded it to the reporting officer. On October 8, 2001, in an email to the Reserve Officer Evaluation System Manager, the applicant stated that "[i]n early September, I had sent my 'bullets' to my former command who apparently had to re-do the OER. Perhaps it got lost in the shuffle of paperwork."

Regarding comment (c), the applicant stated that when he took the position in June 1998, it was described by the Personnel Command as "administrative liaison" and no mention was made of operational duties. In addition, the outgoing liaison and two other reserve liaison officers in the Group told him that the position was strictly administrative. He stated that he was disappointed with the position description, and asked the CO about it. The CO told him that he had relieved all reservists of any operational responsibilities "due to the fall out from the Morning Dew incident." The applicant stated that he had recently checked with the reserve liaison for the fourth small boat station in the Group, who confirmed that his duties were entirely administrative. Therefore, the applicant alleged, the job as defined and as practiced at all four small boat stations in the Group was entirely administrative, and he performed his duties with that understanding. At no time did his CO or anyone else ever mention that he should assume operational responsibilities. The applicant pointed out that his prior position had had heavy operational requirements, and he would not have ignored them entirely if they had actually been part of his billet. In addition, he pointed out that his first OER in this position made no mention of operational responsibilities and yet it was signed by the same lieutenant commander, as supervisor, who served as the reporting officer for the disputed OER.

Regarding comment (d), the applicant stated that it was unfair for his reporting officer to state that he did not have the required skill set when his billet did not encompass operational skills and when he was never asked to exercise those skills because his duties were understood to be entirely administrative. He also argued that it was unfair for his reporting officer to question his commitment to the Coast Guard merely because he lived in xxxxxxxxxxxx and had to rely on public transportation to get to a drill site. He stated that in his one and only telephone conversation with the Deputy Group Commander, when he explained his transportation problem, he was treated in a curt,

dismissive, and insulting manner. He stated that in light of his accomplishments at Station Xxxxxxxx, his commitment to the Service should not be in question.

In support of his allegations, the applicant submitted the following statements:

The CWO who was the CO of Station Xxxxxxxx when the applicant was first assigned there stated that because of the heavy administrative load on the applicant, he never expected the applicant to qualify as a duty officer or OOD. He stated that he had no complaints about the applicant's service and that the applicant's efforts resulted in a "marked increase in the number of reservists that achieved qualification."

A reserve senior chief petty officer (SCPO) at the station signed a statement on March 25, 2002, stating that, because there was no reserve command structure, the applicant's billet was "basically administrative in nature" and that the applicant had never been tasked with any operational duties. The SCPO stated that he himself had stood duty as OOD until the "Morning Dew" incident, when all of the reservists were relieved of their operational duties. Since then, his duties have been mostly administrative. Moreover, he stated, the CO's policy against reservists standing watches is still in effect at Station Xxxxxxxx. The SCPO stated that several statements in the OER are false, misleading, or absurd and that the applicant's commitment to the Coast Guard should not be in question just because he lives in xxxxxxxxxxx and does not have a car. The SCPO stated that the applicant was always on time for every drill and never left until the work was completed. He also stated that to his knowledge, the officers who signed the disputed OER never observed the applicant's performance.

A chief boatswain's mate (BMC) stated that the applicant "provided the necessary leadership skills and administrative expertise" even though the reserve's mission at the station was not quite clear. He stated that if the applicant had ever been asked to acquire operational skills, he would have done so.

A master chief boatswain's mate (BMCM) who worked at the Group office stated the applicant had once inquired about transferring his billet to the Group so that he could increase his operational experience but that the BMCM had to tell him that all but one reservist at the Group office had been removed from the Operations Department and put on "special projects." Therefore, the BMCM stated, the applicant's request was moot. Moreover, he stated, public transportation to the Group office, berthing, and dining facilities were "practically non-existent." He stated that the applicant's billet and the billets of the Senior Reserve Liaisons for the other stations in the Group were administrative in nature. In addition, the BMCM stated that the applicant's dedication and hard work had enabled him to advance quite quickly and that any suggestion that he is not dedicated "is absurd and spiteful."

Three other reservists at the station stated that the applicant's job was purely administrative, that he did his job well, and that the station COs did not expect him to perform operational duties. Two other officers who had worked with the applicant at a previous unit stated that he had shown extraordinary dedication in regularly commuting over 120 miles each way by public transportation in order to drill.

DECISION OF THE PERSONNEL RECORDS REVIEW BOARD

On May 28, 2002, before submitting his application to the BCMR, the applicant exhausted his administrative remedies by asking the Coast Guard's Personnel Records Review Board (PRRB) to correct the disputed OER. On October 24, 2002, the PRRB found that the evidence "support[ed] the conclusion that the challenged OERs represent the honest professional judgment of those responsible for evaluating Applicant under the Coast Guard Officer Evaluation System." The PRRB concluded that the marks and comments in the disputed OER were consistent and recommended that the applicant's request be denied. The recommendation was approved the same day.

VIEWS OF THE COAST GUARD

On March 19, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case, in accordance with the findings and recommendation of the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant's proper rating chain included his CO as supervisor, the Group's Senior Reserve Officer as reporting officer, and the Group Commander as reviewer. However, the OER was signed by the Group Operations Officer as supervisor, the Deputy Group Commander as reporting officer, and the Group Commander as reviewer. CGPC stated that "[t]he Applicant's direct supervisor, CO of Station Xxxxxxxx, who was in a position to best judge the Applicant's performance, did not sign as Supervisor on [the disputed] OER. … [The] senior reserve officer for Group … , who was in a position to best judge the Applicant's performance in relation to reserve-specific policy, did not sign as Reporting Officer … ." CGPC stated that both of these officers were present and available when the OER was prepared, and neither had been disqualified for any reason.

CGPC stated that because the comments in the disputed OER are not those of the applicant's assigned rating chain, whether he was criticized for not performing duties that he was not assigned "cannot be established." CGPC stated that the disputed OER "is invalid because the published rating chain did not evaluate Applicant. Therefore, the opinions and decisions of the PY02 and PY03 CWO In-Grade promotion boards are also invalid."

CGPC stated that the members of the applicant's proper rating chain are still available and recommended that the Board grant relief by removing the disputed OER and failures of selection from the applicant's record and requiring the correct rating chain to submit a replacement OER by August 1, 2003.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 24, 2003, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond. On April 3, 2003, the applicant responded, stating that he concurred with the findings and recommendation of the Coast Guard.

FINDINGS AND CONCLUSIONS

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

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

2. All Coast Guard records and actions by rating chain officials are accorded a presumption of regularity by the Board.[6] However, the applicant has proved that the disputed OER was prepared by an invalid rating chain, in violation of Articles 10.A.2.b.2.b. and 10.A.2.g. of the Personnel Manual. The officers who signed the OER as the supervisor and reporting officer were not on the applicant's published rating chain. The Coast Guard has admitted that the applicant's CO and the Group's Senior Reserve Officer, who were supposed to prepare the OER and who were best positioned to observe and evaluate his performance, were available and qualified to serve on the rating chain when the OER was being prepared. The Board finds that the applicant has overcome the presumption of regularity with respect to the disputed OER.

3. The preponderance of the evidence in the record indicates that the preparation of the OER by the invalid rating chain was prejudicial to the applicant.[7] Instead of being evaluated by his CO, who assigned him his duties and observed his performance, and by the Group's Senior Reserve Officer, he was evaluated by officers who had had no opportunity to observe his performance (other than to learn that he could not commute to the Group office because he did not have a car) and who apparently were unaware that the CO of the station had limited him (and his predecessor) to adminis-

---

[6] 33 C.F.R. § 52.24(b); *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 (Cl. Ct. 1980) (holding that an OER should be removed when the applicant proves that it was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation."

trative duties. The Board notes that the applicant's prior OER in this billet was significantly better than the disputed OER and that the CO was apparently quite happy with the results of the applicant's work, since he reported to the applicant by email that the reservists were "performing flawlessly."

4. The Board finds that the applicant has proved by a preponderance of the evidence that the disputed OER was prepared in violation of regulation and is not reliable as a report of his actual performance during the evaluation period. Although he originally asked the Board merely to remove the disputed comments from the OER, he has concurred in the Coast Guard's suggestion that the members of his proper rating chain, who are still available, be required to prepare a new OER to replace the disputed OER by August 1, 2003. The Board finds the relief recommended by the Coast Guard to be appropriate.

5. The applicant asked the Board to remove from his record his failures of selection by the PY 2002 and 2003 CWO selection boards. To determine whether the applicant's failures of selection should be removed because the invalid OER was in his record when it was reviewed by those boards, the Board must answer two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [he] would have been promoted in any event?"[8]

6. Several of the comments in the disputed OER cast a very negative light on the applicant's performance and commitment to the Service. The Board finds that his record was clearly prejudiced by those comments. In light of the fine quality of the applicant's first OER as a CWO, the Board cannot find that, without the disputed OER in his record, it is unlikely that he would have been promoted in any event. Therefore, the Board finds that the applicant's failures of selection to CWO3 should be removed from his record.

7. Given the Board's decision to remove the applicant's failures of selection, he should no longer be slated for discharge on June 30, 2003.

8. Accordingly, relief should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

---

[8] *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted as follows:

His OER, OER reply, and the accompanying endorsements for the evaluation period from July 1, 2000, through June 12, 2001, shall be removed from his record.

Within one month of the date of this final decision, the applicant shall provide CGPC with input concerning his achievements during the evaluation period, pursuant to Article 10.A.2.c.2.e. of the Personnel Manual. Within three months of the date of this final decision, his published rating chain for the evaluation period July 1, 2000, through June 12, 2001, shall prepare and submit to CGPC a new OER reflective of his performance during the evaluation period.

His failures of selection to CWO3 by the PY 2002 and 2003 CWO selection boards shall be removed from his record, and he shall not be discharged on June 30, 2003.

Julia Andrews

Christopher A. Cook

Patrick Judd Murray