

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-085

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on April 7, 2006, upon receipt of the applicant's completed application.

This final decision, dated December 14, 2006, is 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 asked the Board to correct his record by removing his officer evaluation report (OER) for the period April 1, 200x, to March 31, 200y, while he was serving as the xxxxxx of the Coast Guard's xxxxxxxxxxxxxx at one of the Coast Guard's training centers. The disputed OER contains five marks of 3 (on a scale of 1 to 7, with 7 being best), ten marks of 4, and three marks of 5 in the various performance categories and a mark in the fourth spot on the comparison scale. While serving in the same billet, the applicant had previously received OERs with marks of 4, 5, and 6 from a prior supervisor and reporting officer. The disputed OER contains the following written comments by the Chief of the training center's Operations Training Branch, CDR X, who served as the applicant's supervisor, to support the low marks of 3 he assigned in the performance categories "Results/Effectiveness," "Adaptability," "Looking Out for Others," "Teamwork," and "Workplace Climate":

- 1) Block 3: "Resources sometimes not used to full potential ... senior staff mbrs often not clued in on plan. Needed information not always presented to supervisor/followers. Many class critiques not forwarded, had to be searched for."

- 2) Block 3: "Sometimes slow to take action on important personnel issues ... crew office moves ... MCPO recall from retirement ... frocking of petty officer ... required supervisor assistance/intervention. With O-x filling O-y billet for entire marking period, performance/growth of school and its stature in xxxxx community less than expected. Opportunities for professional growth outside of xxxxxx assignment existed but were not seized."
- 3) Block 4: "At times does not listen appropriately to others ... tends to dismiss others' opinions."
- 4) Block 5: "Occasionally lax in attending to needs of staff. With questions/encouragement from supervisor will take appropriate actions. Inability to think/act beyond scope of school sometimes limits effectiveness. When motivated, produces good product ..."
- 5) Block 5: "After supervisor became involved, [he] strongly supported recall of mbr reaching mandatory retirement ..."
- 6) Block 5: "Teamwork not usually visible, often operations and training seem fragmented. Supervisor's perception is that team members are usually awaiting decision/action from [him]. Workplace climate not always conducive to professional growth ... staff usually waits for direction ... some apparent stifled growth opportunities. School operation requires more attention from supervisor than expected from O-x xxxxxx. Often feedback from students/pending correspondence must be sought out/searched for. Again, when motivated will reach beyond xxxxxx responsibilities ..."

The commanding officer of the training center, CAPT X, who served as the reporting officer (RO2) for the OER, wrote the following comments in his part of the OER:

- 7) Block 7: "Do not concur w/ Supervisor marks [of 3] in: Results/Effectiveness; Adaptability; Looking Out for Others; Teamwork; and Workplace Climate. I would assign a mark of 4 in all of those qualities. [The applicant] has produced mostly acceptable results but not what the CG expects from an O-x filling an O-y billet; could have done much more. Some improvement has been noted in the last few months but there is still room for professional growth. [He] has the skills and talents to do the job. He only needs to bring them to bear to succeed."
- 8) Block 8: "Produces good work but appears content with O-x level of responsibilities." This block also includes a summary of the applicant's accomplishments not included in Block 3, where accomplishments are usually listed by the supervisor.

- 9) Block 10: "A dedicated officer contributing to the TRACEN mission & CGHQ Program goals but not reaching own full potential. Missed opportunity to lead xxxxx school and the associated training & Standardization Teams to even higher levels of performance. While [the applicant] fully accomplished the normal daily work of this O-x position, he is capable of much more as evidenced by previous command & shipboard experience. Extensive technical knowledge of challenges facing xxxxx program makes [him] well suited for positions of responsibility within the xxxxx program such as District, Area, or Headquarters xxxxx staff."

The applicant stated that in March 200y, at the very end of the evaluation period, his rating chain was suddenly changed so that the officer who had been his designated reporting officer (RO1) was removed from his rating chain. His new reporting officer, RO2, had had no opportunity to observe his performance. As a result, the applicant stated, RO2 relied on negative comments made by his supervisor, CDR X, when preparing the OER. He stated that at a meeting with his supervisor and RO1, RO2 had admitted to relying on the supervisor's assessment and said he would change some of the marks and comments in the disputed OER in response to what he had learned from RO1 during the meeting. In support of this allegation, the applicant submitted a copy of a memorandum dated March 10, 200y, which announced a reconfiguration of the rating chains at the training center.

The applicant also alleged that his new supervisor, who arrived during the middle of the evaluation period, did not appear to take into account the work he accomplished prior to the supervisor's arrival. Moreover, the new supervisor never mentioned to him any of the concerns discussed in the disputed OER and never expressed dissatisfaction with his performance during the evaluation period. The applicant stated that the supervisor himself was preoccupied with two other schools at the training center and was minimally involved in the xxxxx School. The applicant stated that he reported on the status of various training sessions, events, and projects at weekly xxxxxs' meetings with the supervisor and accepted the supervisor's lack of inquiry or involvement in the xxxxx School as a sign that he was satisfied with the applicant's work as a xxxxxx.

The applicant further alleged that there "is a significant disparity between the accomplishments of the xxxxx School expressed in my evaluation and the evaluation of [LCDR Y], the Assistant Xxxxxx." The applicant alleged that his leadership and guidance contributed significantly to LCDR Y's success and to the accomplishments of the school's staff described in LCDR Y's OER for the same period. The applicant stated that in LCDR Y's OER, the applicant's supervisor (who served as LCDR Y's reporting officer) gave LCDR Y the credit for "transitioning the school to the new enlisted marking system" where as it was the applicant himself who managed the transition. In fact, to streamline the process, enlisted evaluations "were routed directly to [the applicant] and were no longer required to go through the Assistant Xxxxxx. This type of discrepancy is present in many of the inaccurate statements made by the supervisor in my

OER.” The applicant submitted a copy of LCDR Y’s OER. In it, the applicant’s supervisor described LCDR Y as follows:

Dynamic leader: bolstered xxxxx School during tenure of weak xxxxxx. Provided crew with focus and direction in potential leadership vacuum. Improved school, TRACEN, & CG through active and enthusiastic leading participation in major initiatives including Provided critical recommendations based on sound, logical thinking & rock solid judgment. Impressive command presence; the “go to” officer. ...

Outstanding leadership & management skills; can always be counted on for mission success: Tactfully and diplomatically kept school running smoothly while serving as Asst. Xxxxxx. Personal efforts kept school and crew on track despite having a weak supervisor. Has my strongest possible recommendation for command afloat or ashore Highly recommended for promotion to O-y ahead of peers.

Regarding another inaccuracy in his own OER, the applicant stated that he endorsed and forwarded a first class petty officer’s request to be frocked as a chief petty officer so that he could attend a Chief Petty Officers’ Academy the same day he received the request. However, his supervisor questioned whether they should frock someone just so the member could attend training. After the applicant verified the requirement with the Academy and the Personnel Command, he again forwarded the request, which was approved by the commanding officer of the training center despite his supervisor’s opposition.

The applicant described several significant projects underway at the xxxxx School during the evaluation period that the supervisor apparently omitted from the OER. The applicant also submitted nine statements from officers who worked with him during the evaluation period:

- 1) CDR A, who was an xxxxx program manager at Headquarters, described at length some of the projects and problems that the applicant successfully handled during the evaluation period.
- 2) CDR B, an xxxxx signal manager at Headquarters who served as the liaison to the xxxxx School, wrote about some significant changes taking place in the xxxxx program during the evaluation period and stated that “xxxxx and [the applicant] were responsible for developing and fielding the training that was going to be required at the unit level xxxxx was charged with developing a new curriculum, integrating the new program into program courses at all levels, [and] upgrading the current facilities to allow for the new training workload.”
- 3) CWO A, an xxxxx technical advisor at the xxxxx School, stated that during the evaluation period the applicant “was fully involved in the stand-up of the ... Standardization Team, the development of the ... Training Team Course, and the ... Supervisor Course. [He] always displayed a high interest in the training being given to xxxxx units and participated on deck during visits to units. ... He successfully

worked to upgrade and update the courseware and transition to the ... format. Realizing a potential leadership gap with the exportable sections, he established a new section within xxxxx School to supervise the ... Teams. ... [The applicant] supported the xxxxx community outside of xxxxx School through the Technical Advisor's inclusion to the ... Team that resulted in better support for xxxxx weight handling and rigger safety. Additionally, he hosted a meeting of the Standardization Team Chiefs and Headquarters program managers at xxxxx School to review the ... Manual ... [The applicant] encouraged and supported professional growth of xxxxx personnel. ..." CWO A also cited several examples of how the applicant had assisted subordinates in their professional growth.

- 4) CWO B stated that during the evaluation period, he worked at the xxxxx School "standing up and running the ... Team under the direction of [the applicant]." CWO B described some of the work the applicant accomplished and stated that the applicant's support was "critical" to the success of the Standardization Program and to CWO B's own promotion from chief petty officer to chief warrant officer.
- 5) Mr. A, a trainer and curriculum branch chief at the training center, stated that during the evaluation period, he worked with the applicant to review and update the xxxxx School's curriculum outlines. Mr. A stated that the applicant directed each of his course managers to update their curricula and then reviewed them all. The applicant also worked with the curriculum staff to "hammer out" a review process for formatting and reviewing all curricula. Mr. A noted that the applicant also developed a Branch Chief Indoctrination Training Program for the training center, which was well received.
- 6) Mr. B, a project manager at the training center's technology center, praised the applicant's dedication in ensuring the development of "accurate and valid curriculum outlines."
- 7) CDR C, the facilities engineer at the training center, stated that the applicant did not delay the move of the xxxxx School in any way. He stated that "all of the moves did not occur according to the original schedule for a number of construction and logistics reasons, but I can't think of any which were impacted by a customer (such as [the applicant] or his school)."
- 8) MCPO A, a section chief at the xxxxx School during the evaluation period, described how the applicant positively endorsed and supported his request for a two-year waiver of the 30-year High Year Tenure retirement rule and then positively endorsed and supported his request to be recalled to active duty and intervened to have a policy reviewed by the Personnel Command to ensure that MCPO A would have no break in service upon recall.

- 9) CDR D, a branch chief at the training center, stated that during the evaluation period the applicant spearheaded the development of a comprehensive indoctrination training course for new xxxxxs. The applicant led numerous meetings over a four-month period and “effectively tapped the talents” of the team members to develop course objectives and a course schedule and to identify appropriate instructors.

In addition, the applicant submitted a copy of a declaration signed by RO2, who wrote the following in pertinent part:

After reviewing the statements of personnel directly involved with [the applicant’s] performance during the marking period, I do not feel that the marks and comments in [his] OER for the above period accurately reflect his accomplishments during the period. The statements provide a substantially different picture than the information I was provided by [his] supervisor.

During the period, I do not believe [the applicant’s] supervisor adequately conveyed the programmatic issues that [the applicant] was actively working to resolve. As a result, I was not made aware of [his] efforts to successfully resolve many of these issues. In addition, the supervisor failed to inform me of [the applicant’s] efforts to standardize curriculum development within the Training Division.

Likewise, I do not believe the supervisor provided an accurate portrayal of [the applicant’s] effort to support the [xxxxx] staff. The statements provided by the personnel who worked for [him] show that he encouraged and supported their professional growth and their personal needs. This again is inconsistent with the information provided in the OER.

IEWS OF THE COAST GUARD

On August 8, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case by replacing the disputed OER with one prepared “for continuity purposes only.” The JAG based his recommendation on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC), which the JAG adopted.

CGPC stated that under Article 10.A.3.a.2. of the Personnel Manual,¹ if an officer has not received an OER within 182 days when his reporting officer departs or changes,

¹ Article 10.A.3.a.2. of the Personnel Manual, titled “Detachment or change of the Reporting Officer,” states the following:

- a. OERs for officers on a biennial submission schedule are required if more than 12 months have elapsed since the ending date of the last regular OER or the date reported present unit, whichever is later.
- b. OERs for officers on an annual submission schedule are required if more than six months (i.e., 182 days) have elapsed since the ending date of the last regular OER or the date reported present unit, whichever is later.
- c. OERs for officers on a semiannual submission schedule are required if more than three months (i.e., 92 days) have elapsed since the ending date of the last regular OER.
- d. OER submission is optional in other situations.

an OER must be prepared upon the departure or change of the reporting officer. Therefore, when the applicant's rating chain was changed on March 10, 200y, three weeks from the end of the evaluation period, the departing reporting officer should have prepared an OER for him, in which case no OER would have been prepared on March 31, 200y, by the new rating chain. CGPC stated that "[a]ll comments and marks within the disputed OER cannot be viewed with merit because the rightful Reporting Officer did not have the opportunity to exercise his legitimate rating chain responsibilities. Therefore the entire OER should be expunged and replaced with a Continuity Only OER."

CGPC submitted three declarations signed by members of the applicant's rating chain. RO1, who served as the applicant's reporting officer until March 9, 200y, stated in a declaration that when the memorandum was issued on March 10, 200y, he

specifically told the CO and XO that I should sign the OER ending on 200y/03/31 as reporting officer since it was so close to the end of the period or I should do a change of reporting officer OER effective 200y/03/09. They replied that it wasn't necessary since I would be reviewing the OER for content purposes while it was enroute to the CO. ... [After meeting with RO1 and the supervisor, RO2] retrieved the original OER from [Headquarters] and had me draft new comments for the Reporting Officer section of the OER which I did that day and forwarded to him. He basically signed what I prepared and sent it to [Headquarters] for review.

I disagree with [RO2's] statement that he was unaware of [the applicant's] efforts at the school. Everything addressed by [the applicant] in his statement was included in the OER package he submitted to [the supervisor]. [The supervisor] disagreed with [the applicant's] level of involvement or success but the documentation from [the applicant] was in the OER package. On a number of occasions both before and during the OER period under consideration, [RO2] would ask me what [the applicant] was doing at the school. He would comment that he never hears anything about the school or what is going on there. I would reply that the school was doing fine and the program manager ... never contacted me with concerns. (I would definitely get calls from the program manager of a school if they either "heard" something or did not like something that took place at a school.) On one occasion during the fall of 200x, [RO2] contacted [the program manager] to make sure he was OK with how things were going at the xxxxx School. I remember [RO2] saying the program was satisfied with the school's performance.

My personal observation is that [the applicant] was inwardly focused as the xxxxx Xxxxxx and did not actively "market" himself outside of the school. He supported his staff when it was appropriate and let the staff get the credit for what was done at the school. This type of personality is a direct opposite of both [the supervisor and RO2] who were outwardly focused in their roles.

The supervisor signed a declaration in which he stated that he could not address the applicant's more specific allegations of error because he only has vague memories of the events three years after the fact. He alleged that after he drafted the disputed OER, he discussed it with RO1, the departing reporting officer, and that RO1 shared his reasoning and his opinions. He stated that when he gave the OER to the applicant he tried to answer his questions but "did not provide satisfactory explanations ... and he rightfully sought them further up the chain of command." Later, RO1 told him that RO2

wanted him to reconsider the marks and comments he had made in the OER but he refused because he had already “given it a tremendous amount of thought and consideration and was comfortable that it was an accurate reflection of [the applicant’s] performance as I saw it.” The supervisor alleged that in the summer of 200y, after the end of the evaluation period, RO2 relieved the applicant of his duties based upon a joint recommendation from himself and RO1. The supervisor admitted that during the evaluation he “did not provide [the applicant] much task direction and little to no performance counseling or feedback until he was presented with the OER in question.” He stated that the other four commissioned xxxxxs kept him “well informed of their successes and challenges. They all sought out my opinion on how they were progressing. All four have since [been] promoted to O-5. In my experience silence from the boss does not indicate success and I always seek out my boss’s feedback as to whether I am on the right path or not. ... If [the applicant] had taken the time to inquire, I would have made the time to counsel him. ... I stand by the evaluation I gave him.”

The captain who served as the reviewer of the disputed OER stated in a declaration that as Chief of the Office of Training and Performance Consulting at Headquarters, he had no opportunity to observe the applicant’s performance.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 28, 2006, the applicant responded to the Coast Guard’s recommendation by saying that he concurred with it.

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. Article 10.A.1.b.1. of the Personnel Manual provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." The applicant alleged that the disputed OER is erroneous and unjust and asked the Board to remove it from his record. To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by a "misstatement of significant hard fact," factors that "had no business being in the rating process," or a "clear and prejudicial violation of a statute or regulation."² The Board must begin its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that the OER was prepared "correctly, lawfully, and in good faith."⁴

3. The Coast Guard has admitted that upon the alteration of the applicant's rating chain on March 10, 200y, an OER should have been prepared with RO1 as the reporting officer instead of RO2. The command's failure to do so constituted a clear violation of Article 10.A.3.a.2.b. of the Personnel Manual since RO1 was the designated reporting officer throughout all but the last few days of the evaluation period and more than 182 days had passed since the end date of the applicant's previous annual OER. The Board notes that although the command was entitled to change the applicant's rating chain, they were required to abide by the provisions of the Personnel Manual when doing so.

4. The Board must also determine, however, whether the clear violation of Article 10.A.3.a.2.b. was prejudicial to the applicant's record—i.e., whether the change in the reporting officer caused the applicant to receive a worse OER than he otherwise would have—and, if so, whether the entire OER must be removed or just that portion prepared by the reporting officer, which is actually the best part of the disputed OER. In BCMR Docket No. 151-87, it was held that "an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect

² *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 F.2d 704 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96.

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.”

5. Under Article 10.A.2.e.2.b., the responsibilities of the reporting officer include completing the final part of an OER based on direct observations of the reported-on officer and reliable reports provided by the supervisor and others. The reporting officer’s part of the OER includes block 7, in which the reporting officer comments on the supervisor’s evaluation of the officer; block 8, in which the reporting officer assigns numerical marks for the categories “Initiative,” “Judgment,” “Responsibility,” “Professional Presence,” and “Health and Well-being” and provides written comments to support those marks; block 9, the comparison scale, in which the reporting officer compares the officer to all others of the same rank whom the reporting officer has known; and block 10, in which he writes comments about the reported-on officer’s potential to assume greater leadership roles and responsibilities and makes recommendations about promotion, if any. The reporting officer also “[e]nsures the Supervisor fully meets responsibilities for administration of the OES. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor’s submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer may not direct that an evaluation mark or comment be changed.”

6. According to the declaration of the outgoing reporting officer, RO1, he actually prepared the reporting officer’s part of the disputed OER: “[After meeting with RO1 and the supervisor, RO2] retrieved the original OER from [Headquarters] and had me draft new comments for the Reporting Officer section of the OER which I did that day and forwarded to him. He basically signed what I prepared and sent it to [Headquarters] for review.” However, it is clear that RO1 prepared the reporting officer’s part of the OER not for his own signature but for that of RO2 and knew, after meeting with the supervisor and RO2, what marks and comments RO2, his commanding officer, wanted in the OER. RO1’s declaration also shows that he knew that RO2’s opinion of the applicant’s performance was not as favorable as his own and attributed that lower opinion at least in part to personality differences between the applicant and RO2. Moreover, RO2 himself has stated in a declaration on behalf of the applicant that he does not believe he received accurate information about the applicant’s performance before he signed the disputed OER. Therefore, the Board is persuaded by a preponderance of the evidence that had RO1 prepared his part of the OER for his own signature, the marks and comments would have been better.

7. In his declaration for the advisory opinion, the supervisor stood by his part of the disputed OER and stated that he was asked to reconsider his marks and comments but refused to do so. Article 10.A.2.e.2.b. does not permit a reporting officer to direct a supervisor to change a specific comment or mark, but it does state that a reporting officer “shall return a report for correction or reconsideration, if the Supervi-

sor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments." RO1 observed the applicant's performance throughout the evaluation period and clearly did not agree with the supervisor's evaluation. The record includes substantial evidence showing that the applicant's performance was significantly better than indicated by the supervisor's marks and comments in the disputed OER. Had RO1 not been removed from the rating chain, he might well have exercised his authority under Article 10.A.2.e.2.b. to insist that the supervisor's part of the evaluation more accurately reflect the applicant's performance. Moreover, had RO1 not been removed from the rating chain, the supervisor might have been more inclined to revise his marks and comments to more closely reflect RO1's opinions. Therefore and in light of all the circumstances of this case, the Board is persuaded that, had RO1 been allowed to exercise his authority and perform his duties as the applicant's reporting officer, the marks and comments in the supervisor's section of the disputed OER might well have been better.

8. Therefore, the Board finds that the violation of Article 10.A.2.3.2.b. was prejudicial to the applicant's record in that marks and comments throughout the disputed OER would likely have been better had the correct officer exercised his full authority as the applicant's reporting officer. Moreover, as stated in BCMR Docket No. 151-87, the entire OER appears to have been "infected" by the error and it is "impossible or impractical to sever the incorrect/unjust material from the appropriate material."

9. Accordingly, the applicant's record should be corrected by removing the disputed OER and replacing it with one prepared "for continuity purposes only."

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

His officer evaluation report for the period April 1, 200x, through March 31, 200y, shall be removed from his record and replaced with one prepared "for continuity purposes only."

Randall J. Kaplan

Donald A. Pedersen

Adrian Sevier