

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-024

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 on November 20, 2008, upon receipt of the applicant's completed application, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated June 18, 2009, 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 asked the Board to correct his officer evaluation report (OER) for the period May 2, 2006, to March 31, 2007 (disputed OER) by raising his comparison scale mark in block 9 to show that he was marked as an "exceptional performer; give toughest and most visible leadership assignments" rather than as a "strong performer; very competent and respected professional." He further requested that his failure of selection before the promotion year (PY) 2009 captain selection board be removed and that his corrected record be placed before the next captain selection board convened to consider officers of that grade. Additionally, he requested that if selected by the first selection board to consider him for promotion to captain with a corrected record, that his date of rank once promoted be the date he would have had if he had been selected by the PY 2009 captain selection board.

The comparison scale portion of block 9 of the OER is where the reporting officer compares the reported-on officer with others of the same grade that the reporting officer has known. The applicant was marked the lowest of the three middle group categories. They are from the lowest to the highest as follows: "Strong performer; very competent and respected professional," "Excellent performer; highly recommended for positions of increased responsibility," and "Exceptional performer; give toughest and most visible leadership assignments." The other portion of block 9 is the promotion scale and the ratings are either accelerated promotion/in zone reordering, definitely promote, or do not promote. The applicant was marked as definitely promote, which is not in dispute.

Of the 18 performance dimensions on the disputed OER, the applicant received 14 marks of 6 and 4 marks of 7, on a scale of 1 to 7, with 7 being the highest. In block 10 where the reporting officer described the applicant's potential to assume greater leadership roles and responsibilities, the reporting officer wrote the following:

An exemplary officer. [The applicant] is excelling in command, meeting all challenges with vigor & creativeness. Consistently achieves outstanding results implementing new & complex initiatives (WPB biometric prototype, WPB multi-crewing; HAWKEYE implementation) enabling operational innovation & success. He has proven his ability to successfully lead in the high pressure cauldron of D7 operations, and is unquestionably ready for positions of greater responsibility. Recommended for promotion to CAPT with the highest performing of his peers. Desires, extremely well-prepared for, & has my strongest recommendation for senior service schools or equivalent programs.

The applicant argued that the reporting officer committed an error when he marked the applicant in the lowest of the three middle categories on the comparison scale, which constituted a violation of Article 10.A.1.b. of the Personnel Manual. This provision states the following:

The commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command. To that end, performance evaluation forms have been made as objective as possible, within the scope of jobs and tasks performed by officers. In using the Officer Evaluation Form, CG-5310 (series), strict and conscientious adherence to specific wording of the standards is essential for realizing the purpose of the evaluation system.

The applicant argued that based upon his evaluation of performance on the disputed OER he should have been marked in the highest category as an exceptional performer. He argued that the reporting officer's evaluation of his performance on the disputed OER proves that the mark describing him as merely a "strong performer," rather than an "Exceptional performer" is erroneous and violated Article 10.A.1.b. of the Personnel Manual. He provided the following five examples that support his contention that the mark he received on the comparison scale was in error.

1. In Block 10, the reporting officer's very first sentence crisply describes [the applicant] as "[a]n exemplary officer." If anything, "exemplary" suggest that the highest of the three middle-range options—covering "[e]xceptional performer[s]"—should have been selected, rather than the lowest.
2. The next sentence described [the applicant] as "excelling in command, meeting all challenges with vigor and creativeness." "Excelling" suggest selection of the middle option: "Excellent performer," although it would not be out of the question for an officer receiving such a comment to be described as an "Exceptional performer" in the Comparison Scale.

3. The sentence after that refers to his consistent achievement of outstanding results. This language is consistent with either excellent or “exceptional” performance.
4. The comments in block 10 go on to describe [the applicant] as “unquestionably ready for positions of greater responsibility,” a phrase that is clearly reminiscent of the second clause of the description of ‘Excellent performer[s],’ “highly recommended for positions of increased responsibility.”
5. The penultimate sentence in Block 10 is critical. It squarely recommends [the applicant] “for promotion to CAPT with the highest performing of his peers.” Taking as a given that the overall category in which [the applicant] belonged, in the Reporting Officer’s own view, was the middle range that accounts for the “majority of high performing commanders, this comment plainly points to a mark in the highest of the three middle categories, not the lowest and not the “Excellent performer” middle. Because this particular comment speaks to promotion, it is entitled to special weight from the stand point of its implications for the Comparison Scale mark.

The applicant argued that the first, second, third, and fifth points mentioned above point to a mark in the highest of the three middle categories, with the fourth comment pointing to mark in the second highest of the middle categories. The applicant argued that the reporting officer’s mark on the disputed OER cannot be reconciled with the Personnel Manual’s direction for strict and conscientious adherence to the descriptors on the form.

In addition to the above, the Board should consider the internal inconsistency between the applicant marks in the performance categories, which is nothing lower than a 6, and the mark in the lowest of the three middle categories. The applicant argued that his marks in the performance dimensions would suggest that he was an exceptional officer or at worst an excellent officer.

The applicant also argued that his mark of definitely promote on the promotion scale is more consistent with a comparison scale mark of excellent performer because the second phrase of the description for that category (‘highly recommended for positions of increased responsibility’) implies promotion, whereas the lower category to which the reporting officer relegated the applicant is silent with respect to promotion. The applicant argued that OERs are supposed to be internally consistent. See Personnel Manual Articles 10.A.4.c.11.g (Reviewer Authentication), 10.A.4.j.2 (Review of OERS at Coast Guard Personnel Command). According to the applicant, the disputed OER is not internally consistent.

The applicant noted that the comparison scale mark on the disputed OER is the lowest mark in that section that he has received in his present rank, and that he has never received a mark below “Exceptional performer” in the grade of commander.

The applicant stated that based upon the foregoing, the disputed OER should have had a higher mark in the Comparison Scale. This requires the Board to decide whether the applicant’s

failure of selection for promotion should be removed using the analysis in *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1983). The higher mark in Block 9, especially on a recent OER, would have made the applicant's record stronger when he met the PY 09 Captains Board. He also argued that there is no basis for the Coast Guard to contend, much less prove, that he would have failed of selection in any event.

VIEWS OF THE COAST GUARD

On March 19, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief to the applicant. The JAG identified the issue as "whether there existed a "clear and prejudicial violation of a statute or regulation, or alternatively, a misstatement of a significant had fact," found in or around the applicant's OER; i.e. legal error. See *Germano* 26 Cl. Ct. at 1460." The JAG stated that the applicant failed to prove that the disputed OER was adversely affected by a clear and prejudicial violation of a statute, regulation, or alternatively, a misstatement of a significant hard fact.

The JAG stated that the applicant's argument that the reporting officer violated his duty under the Personnel Manual by marking the applicant as a strong performer on the comparison scale is without merit. The JAG stated that block 9 comparison scale mark is not dependent on the applicant's marks in the performance dimensions, but rather the comparison scale mark is for the reporting officer to compare the applicant alongside all commanders that the reporting officer has known. According to Article 10.A.4.c.8.a of the Personnel Manual, the comparison scale represents the relative ranking of the reported-on officer, not necessarily a trend of performance.

The JAG argued that the policy guidance with respect to completing the comparison scale clearly refutes and renders applicant's argument meritless. According to a declaration from the reporting officer, he rated the applicant in accordance with the standard as set forth on the applicant's OER and in conjunction with the policy guidance of the Personnel Manual. The evidence submitted by the applicant is insufficient to rebut the presumption that his rating chain carried out their duties correctly, lawfully, and in good faith.

The Coast Guard argued that an analysis of a causal connection between the alleged error and the applicant failure of selection for promotion is unnecessary because he has failed to make a prima facie showing of an error.

The JAG submitted a memorandum from the Commander, Coast Guard Personnel Command (CGPC) as a part of the advisory opinion. CGPC recommended that the application be denied.

CGPC obtained a declaration from the reporting officer and noted that he did not agree that the applicant's block 9 comparison scale mark should be revised upward. CGPC noted that the reporting officer's evaluation of the applicant's performance was based on his direct observation of the applicant along with input from the applicant's supervisor. CGPC noted that the reviewer who also submitted a statement agreed with the reporting officer that the disputed OER is accurate.

CGPC stated that the Personnel Manual does not require the reporting officer to comment on his reason for marking the applicant as a “strong performer rather than as an exceptional performer. CGPC stated that the applicant only provided his own statement as support for his allegations, which is insufficient to overcome the presumption of regularity with respect to the construction or submission of the disputed OER.

CGPC attached the declaration from the reporting officer to the advisory opinion. The reporting officer stated the following, in pertinent part:

As I recall the OER in question was completed on a newly revised form and the wording was changed specifically for block 9, to task the reporting officer to “Compare this Commander alongside all Commanders you have known through your career” . . . [T]his was the first OER I had ever prepared on [the applicant] . . . therefore there is no issue of consistency in my evaluation of [the applicant]. I considered [the applicant] to be completely promotable. If I were asked to rank order the commanding officers of the six Electronic Support Units at the time of the report, I would have place [the applicant] at the bottom. All were fine performers. That is not to say that ANY were the best, or even above median, of ALL THE COMMANDERS I knew in 29 years of commissioned service.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 10, 2009, the Board received the applicant’s reply to the views of the Coast Guard. He disagreed with them.

The applicant stated that the reporting officer’s declaration that none of the six commanding officers assigned to work for him performed above the medial of all commanders he has known is remarkable given the great care that the Coast Guard takes in selecting its commanding officers. He noted that of the 770 commanders on active duty at any given time only about 11% of the most talented have the opportunity to serve in command, which defies the odds that all six of those who worked for the reporting officer of the disputed OER performed below the median.

The applicant disagreed with the reporting officer’s statement that there was no inconsistency within the OER because it was the first OER he prepared on the applicant. In this regard the applicant stated the following:

In his declaration, [the reporting officer] paints the applicant as an officer who is performing below the median. However, every performance mark on the OER except for [the disputed] block 9 was a six or seven, and in block 10 of the OER he gives [the applicant] his strongest recommendation for senior service school. Assignment to such a school is a sign that the officer is potentially on track for promotion to flag rank. The precept for the latest senior service school panel . . . directs the panel . . . to “select only those highly qualified officers and civilians, who, in the Panel’s opinion, offer the greatest potential for executive level service in the Coast Guard.” It is impossible to reconcile [the reporting officer’s]

declaration or the block 9 comparison scale marking with the other performance marks on the OER, his “strongest recommendation” for senior service school and the “definitely promote” mark contained in the OER. Whatever was actually going on in the preparation of this OER, it simply does not hang together.

[T]he approach reflected in [the reporting officer’s] declaration and the advisory opinion would basically drive a wedge between block 9 (which is one of, if not the, most important parts of the OER) and the rest of the OER. It seems illogical that the Commandant could really have intended that these two parts of the evaluation—block 9 vs. everything else—would function in isolation from one another. We are aware of no guidance, in the Personnel Manual or elsewhere, to personnel boards and panels that they should view different parts of the OER through different lenses when making important personnel decisions. The lack of any authoritative guidance to interpret different parts of the OER in isolation from one another seriously undermines the advisory opinion’s position that the other parts of the OER have no bearing on block 9.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The Board begins its analysis by presuming that the disputed OER in the applicant’s military record is correct and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust. 33 C.F.R. § 52.24(b). For the reasons discussed below, the applicant has failed to prove by a preponderance of the evidence that the disputed OER is in error or unjust.

3. The issue is whether the block 9 comparison scale mark is in error. There are seven rating choices on the comparison scale in block 9: they are range from highest to lowest, as follows: “Best Officer of this grade”; “One of the few Distinguished performers”; “Exceptional performer; give toughest and most visible leadership assignments”; “Excellent performer; highly recommended for positions of increased responsibility”; “Strong performer; very competent and respected professional”; “Steady performer; limited potential for increased responsibility”; and “Unsatisfactory performance/conduct; no potential for increased responsibility.” The applicant was rated as a “strong performer.”

4. With respect to evaluating an officer on the comparison scale of an OER, Articles 10.A.4.c.8.a. & d. of the Personnel Manual state as follows:

The 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.4.c.8.a.]

No specific comments are required to support the Reporting Officer's judgment in this section. However, a mark other than in the center three circles is strengthened considerably if there are comments in the report from which one could reasonable draw a conclusion why this particular officer has been indentified as different from the majority of this grade. [Article 10.A.4.c.8.d.]

5. The applicant argued that the evaluation of his performance on the disputed OER supports a comparison scale mark higher than "Strong performer" which is the lowest block of the three middle categories. He argued that the evaluation of his performance supports a mark in the highest block of the middle categories, which is "Exceptional performer . . ." or at least a mark in the second highest block in the middle category as an "excellent performer . . ." The Board agrees with the applicant that having no marks lower than 6, with several 7s, in the performance dimensions and being described in block 10 (potential) as an exemplary officer, who excelled in command and is ready for positions of greater responsibility, who consistently achieved outstanding results, and who is recommended for promotion to captain with the highest performing of his peers seem inconsistent with a comparison scale mark in the lowest block of the middle categories. However, as stated in Article 10.A.4.c.8.a. of the Personnel Manual, the reporting officer fills 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. The provision further states that the comparison section scale mark 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. In light of the guidance from the Personnel Manual, a comparison mark seemingly inconsistent with the remainder of the OER is not necessarily erroneous. The comparison scale mark represents the reporting officer's judgment of where the applicant ranked when compared to others of the same grade that the reporting officer has known. Therefore, while the applicant performed his duties well for the period under review, in the judgment of the reporting officer he was a "Strong performer; . . ." when compared to other commanders that the reporting officer has known. The reporting officer stood by his evaluation of the applicant's rating scale mark in a statement attached to the advisory opinion.¹

6. The applicant also argued that his mark of definitely promote on the promotion scale is more consistent with a comparison scale mark of "Excellent performer; highly recommended for positions of increased responsibility," which implies promotion, whereas the lower category of strong performer where the applicant was placed, is silent as to any recommendation for increased responsibility. Article 10.A.4.c.8.b.of the Personnel Manual states that the reporting officer, in addition to the comparison scale mark, is to also assign one promotion scale mark.

¹ In BCMR No. 1996-084, the Secretary's Delegate wrote that she was reluctant to second-guess expressions of opinion or judgments in OERs by supervisors and reporting officers, who are entitled to a presumption of correctness, where there is no legal error. The Delegate further noted that OER comments represent the opinions or discretionary judgments of different supervisors and reporting officers over a period of time.

This provision requires the reporting officer to provide the reviewer with a copy of his most recent rating scale history. The reviewer for the disputed OER stated that he found the disputed OER to be consistent, correct, and he recommended no changes. There is nothing in the Personnel Manual that requires correlation between the marks assigned on the comparison scale and those assigned on the promotion scale. With the reporting officer and the reviewer standing by the disputed OER, the weight of the evidence favors the accuracy of the OER.

7. Further evidence favoring the accuracy of the OER, is the lack of a finding by CGPC of a substantive error upon its review of the disputed OER. Article 10.A.4.j.2. of the Personnel Manual states that during the review of an OER, CGPC should pay particular attention to inconsistencies between the numerical evaluations and written comments to ensure that the OER has been prepared in accordance with the officer evaluation system guidelines. There is no indication that CGPC found any irregularity with the disputed OER. Although, the applicant suggested that CGPC failed in its responsibility by not noting an inconsistency between the comparison scale mark and the other marks and comments on the disputed OER, other than the applicant's opinion in this regard, there is no proof that CGPC acceptance of the disputed OER was erroneous. The applicant has not proven by a preponderance of the evidence that the disputed OER is in error or unjust.

8. Since the applicant has failed to establish an error or injustice with respect to the disputed OER, there is no basis for the Board to consider removing the applicant's failure of selection for promotion to captain.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is denied

Bruce D. Burkley

Robert F. Parker

Richard Walter