

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2009-210**

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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application July 30, 2009, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 22, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT’S REQUEST AND ALLEGATIONS**

The applicant, a Reserve commander, asked the Board to correct his record by removing certain remarks from his officer evaluation report (OER) for the period May 1, 2007, to June 30, 2008.<sup>1</sup> The applicant argued that the remarks should be removed because they are “factually incorrect and without foundation.” The disputed remarks are as follows:

- From block 7: “[The applicant’s] performance and drill status turned around during the second half of the reporting period following expectation management consultations with supervisor and District SRO [Senior Reserve Officer].
- From block 8: “Held self accountable during performance counseling given by supervisor and unit SRO regarding lack of ADT for FY08; no excuses made.”

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<sup>1</sup> On an OER form (CG-5310B), Coast Guard officers are rated in eighteen different performance categories, such as teamwork and judgment on a scale of 1 (worst) to 7 (best), and written comments are added to support the assigned marks. Each OER is prepared by a “rating chain” of officers, which includes a supervisor, who is normally the person to whom the reported-on officer reports on a daily basis and who completes the first thirteen numerical marks on an OER and the supporting comments for those marks; a reporting officer, who is normally the supervisor’s supervisor and who completes the remaining marks and comments on an OER; and the reviewer, who reviews the OER for consistency and may add a page of comments but need not have personal knowledge of the reported-on officer’s performance. PERSMAN, Arts. 10.A.2.a., 10.A.2.d.1.a., 10.A.2.e.1.a., and 10.A.2.f.1.a.

The applicant explained that in the spring of 2006, he returned to his regular Selected Reserve unit from Kuwait, where he had been serving on Title 10 orders. He was assigned to drill with the Field Intelligence Support Team (FIST) located in Seattle. In the summer and fall of 2006, he drilled mostly on weekends, doing cruise ship liaison work on the waterfront. In late fall 2006, he arrived to find that the FIST office had been moved to a new building on the pier. He had not been notified of the move and had no way of entering the building. He emailed the lieutenant in charge of the FIST (LT S) about the problem and received no reply. Therefore, he called the lieutenant and left a voicemail message about needing access to the office but again received no reply. "Over the next few months, I both called and emailed [LT S's] supervisor, [LCDR A] at the D13 Intelligence Branch. I cannot honestly recall what he told me he would do about the situation, but in any event I never received access to the new building.

The applicant alleged that by early 2007, he was quite frustrated because he wanted to fulfill his drill obligations, so he decided on his own to move his drill location to the D13 Intelligence office at D13 Headquarters, for which he still had an access card although it had been deactivated. LCDR H, who had replaced LCDR A, "seemed sympathetic to my situation and said she did not have any issues with me using D13 spaces to do my drills." Therefore, he asked to have his access card reactivated, but several months passed and, by the spring of 2008, his card was still not reactivated. He asked LCDR H for access a second time but still did not receive access. Therefore, in order to drill, he had to depend on someone else being in the office to let him in the door. Since only two or three other people worked in that office, he could not get in when they were out of the office or off duty, and once he was in, he could not leave to use the restroom and count on getting back in. Thus, he could not drill on weekends.

The applicant further alleged that when he needed to fill his annual training obligation in 2008, he asked LCDR H for suggestions, but she had none. He "was not going to submit for ADT when [he] had no real access to Coast Guard working spaces." However, he kept busy with some correspondence courses and small projects. When a new SRO arrived, the applicant expressed his frustrations with his lack of access to the office, but there was no improvement.

The applicant alleged that the two disputed remarks are therefore unwarranted. They "do not reflect the true nature of the reasons behind [his] inability to complete drills or ADT. [His] performance 'turnaround' had nothing to do with counseling and everything to do with [his] own initiative to do the right thing. The remarks completely ignore the real issue, [his] supervisors' inability or inexplicable unwillingness to provide [him] a place to do [his] work, or even to provide [him] with work to do. The remarks unfairly place the blame for this situation entirely on me. It was simply not the case. I am not sure what more I could have done."

With regard to the many mediocre marks of 4 he received on the disputed OER, the applicant stated, "Clearly these [disputed] remarks contributed to my low OER scores. I understand the difficulty in changing scores; I just ask that the remarks be removed."

The applicant submitted a copy of the disputed OER but did not submit any evidence to support his allegations.

## SUMMARY OF THE RECORD

On October 22, 1975, the applicant enlisted in the Reserve. He then served four years on active duty in the regular Coast Guard from March 29, 1976, to March 28, 1980. Following his release into the Reserve in 1980, the applicant drilled regularly for 25 consecutive years, earning satisfactory years of service for retirement purposes each year. He was commissioned as an ensign in 1992.

On July 1, 2001, as a lieutenant, the applicant began drilling at the FIST in Seattle. He served as a law enforcement liaison and intelligence analyst. His first OER at the FIST, covering his service from July 1, 2001, through April 30, 2002, shows that he performed 48 of 48 scheduled drills and 12 days of annual training. He received all marks of 5 or 6 in the various performance categories, laudatory supporting comments, and a mark in the fifth spot on the comparison scale.<sup>2</sup> He was highly recommended for promotion to lieutenant commander (LCDR).

The applicant's second OER at the FIST, covering his service from May 1, 2002, through April 30, 2003, shows that he again performed 48 of 48 drills and 12 days of annual training and that he received all marks of 5 and 6 in the performance categories, laudatory comments, and a mark in the fifth spot on the comparison scale. He was promoted to LCDR on July 1, 2003.

On the applicant's third OER at the FIST, covering his service from July 1, 2003, through April 30, 2004, he again received marks of 5 and 6 in the various performance categories, laudatory comments, and a mark in the fifth spot on the comparison scale. The reporting officer noted that the applicant

is a dedicated & highly effective officer who demonstrated consistently high performance during a challenging evaluation period during which he played a key role in the very successful overhaul of the D13 Reserve Intelligence program and the stand-up of the Seattle FIST. [His] efforts were critical in attaining the District Thirteen goals of developing our people & meeting the greatly-expanded requirements for MDA intelligence. [He] has shown himself to be very adept at managing complex projects with competing demands. Highly recommended for any position of greater responsibility commensurate with rank.

On the applicant's fourth OER at the FIST, covering his service from May 1, 2004, through February 26, 2005, he received marks of 5, 6, and 7 in the various performance categories, highly laudatory comments, and a mark in the fifth spot on the comparison scale. he was highly recommended for promotion to commander (CDR).

From February 27, 2005, though March 28, 2006, the applicant served with a Naval Coastal Warfare Squadron in Kuwait<sup>3</sup> under Title 10 orders. On his OER for this period of

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<sup>2</sup> The comparison scale on an OER form is not actually numbered, but as with the performance categories, there are seven possible marks on the scale from the first ("performance unsatisfactory for grade or billet") to the seventh ("BEST OFFICER of this grade"). For LCDRs, a mark of 5—i.e., a mark in the fifth spot—on the scale denotes an "Excellent performer; give toughest, most challenging leadership assignments." The Reporting Officer assigns the Reported-on Officer a mark on the comparison scale by comparing him with all other officers of the same rank whom the Reporting Officer has known throughout his career.

<sup>3</sup> The Board notes that the applicant's DD 214 for this period of active duty does not reflect any foreign or sea service during these 13 months with the Naval Coastal Warfare Squadron in Kuwait.

active duty, he received marks of 5 and 6 in the various performance categories and a mark in the fifth spot on the comparison scale. In addition, he was recommended for promotion.

Upon his release from active duty, the applicant was reassigned to the FIST. His OER for the period March 28, 2006, through April 30, 2007—his fifth and last from the FIST—shows that he attended 56 of 56 scheduled drills during this period and performed no active duty.<sup>4</sup> The Chief of the Intelligence Branch, LCDR A, served as both the supervisor and reporting officer on the rating chain for this OER and assigned him marks of 5 and 6 in the various performance categories, laudatory comments, and a mark in the fifth spot on the comparison scale. The applicant was highly recommended for promotion.

The disputed OER covers the applicant's performance from May 1, 2007, through June 30, 2008, and shows that he was assigned as an Intelligence Staff Member and Critical Incident Response Team Member at District Thirteen Headquarters. The OER shows that he attended 56 of 56 scheduled drills during the year but performed no days of active duty for the annual training requirement. LCDR H, the new Chief of the Intelligence Branch, served as both the supervisor and reporting officer for the disputed OER and thus assigned all of the marks and comments therein. She assigned him fifteen marks of 4 and three marks of 5 in the various performance categories and a mark in the fourth spot on the comparison scale.<sup>5</sup> LCDR H included some positive comments in the OER but also the two critical comments disputed by the applicant, which appear on page 1 of this decision. In addition, in block 10 of the OER, which is for the reporting officer's comments on the evaluated officer's potential for leadership, LCDR H described him as merely a "qualified officer." She noted that the applicant's "[s]election for promotion to O-5 [CDR] demonstrates exceptional past performance and future potential. Recommended for future billets in intel and port security." She also noted that he was being transferred to a new assignment at USTRANSCOM, a joint command managing the deployment of military members.

The disputed OER was also signed by a reviewer, CAPT D, the Chief of the District Response Division."

### **VIEWS OF THE COAST GUARD**

On December 10, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. In so doing, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The PSC noted that the applicant never submitted a reply to the OER and did not submit "any supporting documentation to substantiate any claim expressly stated or implied." The PSC stated that the applicant's rating chain members presumptively carried out their duties correctly in preparing the OER and "were in the best position to observe the applicant's performance and

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<sup>4</sup> With permission, members may satisfy their annual training requirement by transferring 12 days of active duty from the year before or the year after the anniversary year in question.

<sup>5</sup> For LCDRs, a mark of 4—i.e., a mark in the fourth, or middle, spot—on the comparison scale denotes a "Good performer, give tough, challenging assignments."

provide a fair, accurate, and objective OER.” The PSC argued that because the applicant has “failed to substantiate any error or injustice with regards to the record,” the Board should deny his request.

## **APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS**

On December 14, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

### **APPLICABLE REGULATIONS**

Article 10.A. of the Personnel Manual governs the preparation of officers’ OERs. Article 10.A.1.b.1. states that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officer under their command.”

Article 10.A.2.d.2.a. states that it is the responsibility of the supervisor to evaluate the reported-on officer in the execution of her duties and to prepare the supervisor’s portion of the OER form. Article 10.A.2.e.2.a. states that it is the responsibility of the reporting officer to evaluate the reported-on officer based on direct observation, reports of the supervisor, and other reliable reports and to prepare the reporting officer’s portion of the OER form. Article 10.A.2.f.2.c. states that the reviewer “[e]nsures the supervisor and the reporting officer have adequately executed their responsibilities under the OES.”

Article 10.A.4.c.4. instructs supervisors to assign marks and write comments for the first thirteen performance categories on an OER as follows (nearly identical instructions appear in Article 10.A.4.c.7. for reporting officers, who complete the rest of the OER):

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

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

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

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

Article 10.A.4.c.6.a. states that block 7 of an OER

provides an opportunity for the Reporting Officer to comment on the Supervisor's evaluation. Although this section is not mandatory, Reporting Officers are encouraged to cite other information and observations they may have which would confirm or provide another perspective of the Reported-on Officer's performance and qualities demonstrated during the reporting period. By doing so, the Reporting Officer gives a more complete picture of the Reported-on Officer's capabilities.

Article 10.A.4.c.8.a. instructs the reporting officer to complete the comparison scale on an OER by filling in the circle that most accurately reflects his or her ranking of the reported-on officer in comparison to all other officers of the same grade whom the reporting officer has known. Article 10.A.4.c.9. states that in the comment block titled "Potential," the reporting officer "shall comment on the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard."

Article 10.A.4.g. states that an officer may submit a written reply to an OER within 21 days of receipt of the official copy. The reply and any responses to the reply prepared by the rating chain will be included in the officer's record with the OER.

## FINDINGS AND CONCLUSIONS

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

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

2. The applicant alleged that certain comments in the disputed OER are erroneous and unfair. The Board begins its analysis by presuming that the disputed OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.<sup>6</sup> Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.<sup>7</sup> To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of

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<sup>6</sup> 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

<sup>7</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>8</sup>

3. The applicant alleged that the disputed comment in block 7 is erroneous and unjust because he was prevented from drilling regularly on weekends during the evaluation period when the District command repeatedly failed to provide him with access to a Coast Guard office where he could work. Because the applicant has drilled regularly and accumulated more than 25 consecutive years of satisfactory service, the Board finds his allegations that inadequate access to Coast Guard office space sometimes interfered with his drilling to be credible even though he submitted no evidence to support his claim. However, the applicant did not elaborate on what efforts he made to gain a key card to the office, and the OER shows that he completed 56 of 56 scheduled drills during the evaluation period. His supervisor, the Chief of the Intelligence Branch, apparently believed that the disputed comment in block 7 was justified. The Board does not have enough information or evidence to conclude that the disputed comment in block 7 is erroneous or unjust.

4. The applicant alleged that when he inquired about performing annual training during his 2008 anniversary year, his supervisor did not offer him an opportunity to fulfill the requirement. Therefore, he alleged that the disputed comment in block 8 is erroneous and unjust. The applicant did not elaborate on what efforts he made at what point during his anniversary year to fulfill the annual training requirement, and his supervisor apparently believed that the disputed comment in block 8 was justified. The Board does not have enough information or evidence to conclude that the disputed comment in block 8 is erroneous or unjust.

5. Accordingly, the applicant’s requests should be denied because he has not proved by a preponderance of the evidence that the disputed comments or anything else in the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>9</sup>

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

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<sup>8</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), *cited in Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

<sup>9</sup> *Id.*

**ORDER**

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

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Evan R. Franke

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James E. McLeod

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Adrian Sevier