

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-114

**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 application upon receipt of the applicant's completed application on April 7, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated February 1, 2013, 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 record by raising his comparison scale mark from the third block to the fifth block on the rating scale in section 9¹ on his officer evaluation report (OER) for the period July 1, 2009 to May 11, 2010 (disputed OER). In the alternative, he asked that the entire OER be removed from his record. He also asked that his non-selection for promotion to chief warrant officer-W3 (CWO3) be removed from his record and that he be reconsidered for promotion to that grade.

The applicant received the disputed OER while serving as the Support Department Head (SUPPO) on a Coast Guard cutter. The applicant received a mark in the third block from the left on the comparison scale. The mark rates the applicant between that of a "qualified officer" and that of "one of the many competent professional who form the majority of this grade." The applicant described his mark on the comparison scale as a "3". The applicant argued that the

¹ The section 9 comparison scale of an OER is where the reporting officer rates the reported-on officer by comparing him with other officers of the same grade that the reporting officer has known during his or her career. For CWOs, the comparison scale is composed of seven blocks: the first block describes the officer as "unsatisfactory," the second block describes the officer as "qualified," the third block has no description, the fourth block describes the officer as "one of the many competent professional who form the majority of this grade," the fifth block has no description, the sixth block describes the officer as "exceptional," and the seventh block describes the officer as "distinguished."

comparison scale mark is inconsistent with other marks received on the OER and nothing in the evaluation of his performance on the disputed OER supports the comparison scale mark. He argued that the reporting officer's marks are not consistent with the higher marks and very complimentary comments in the supervisor's portion of the OER. He argued there should not be such a stark contrast between the supervisor's and reporting officer's evaluations on the OER. He also argued that the comparison scale mark is inconsistent with the comments in the Commandant's Letter of Commendation that he received for his outstanding performance of duty from July 2008 to July 2010. The applicant argued that he should have received a mark in the fifth block to the right. He also contended that the rating chain committed an error by having him sign the disputed OER before the reviewer had signed it.

The applicant alleged that the environment on the cutter was very stressful due to a fear of reprisal. He stated that it is his belief that the negative command climate due to previous command incidents resulted in OER supervisors and reporting officer receiving direction to assign low comparison scale ratings and performance marks in preparing OERs. He stated that several officers have been granted relief by the BCMR because of "evaluation inconsistencies that took place under the reporting officer's command during similar time frames."

The applicant stated that he has never received a below average mark on any OER until he received the one under review. He argued that without the low mark on the comparison scale it is likely that he would have been promoted to CWO3 because his other OERs contains high marks.

The Disputed OER

An OER is composed of three parts: the supervisor's portion, the reporting officer's portion, and the reviewer's portion.

In the supervisor's portion of the OER the applicant received marks of 5s and 6s, with one mark of 4 in "writing." The comments supporting the supervisor's marks were very complimentary.

In the reporting officer's portion of the OER, section 7 entitled "Reporting Officer Comments," contained the following amplification of the supervisor's evaluation of the applicant's performance:

The applicant did well in a challenging Dept Hd position as . . . SUPPO. Excelled at management of finance procurement & supply issues, while also expanding knowledge of medical & food service operations. Developed spreadsheet tracking tools that improved tracking of cost and supplies. Carried out significant KO oversight of overhaul of messdeck & galley, rack curtain and mattress purchases; ensuring improvements to habitability & sanitation. Well versed in CG financial web applications. Facilitated [the cutter's] meeting operational commitments.

In the performance categories (section 8) of the reporting officer's section of the OER, the applicant received marks of 4 in "initiative," "judgment," "responsibility," and "professional presence." He received a 5 in "health and well-being." The comments supporting these marks read as follows:

Innovative approaches to quality of life issues; developed plan for and helped with physical install of internal morale network. Liaisoned with BSU Portsmouth to carry out 2010 Census for all members living in barracks or on ship; ensured 100% completion of Census. Dedicated to achieving the desired result for cutter and crew; worked closely with husbanding agent, JLATF-S, and Defense Energy Support Center to coordinate receipt of fuel in Cartagena, CO-id'd significant issues with 2 day delay in delivery and marginal quality of fuel that resulted in formal review of Sea Card fueling contract with vendor. Expanded accountability for all Dept'l personnel; utilized performance probation and counseling to address issues with at risk SK2 and 2 FS3s, set clear expectations and provided avenues for improvement. Expertly id'd errors with recurrent files resultant from req'ts for HAZMAT, safety, and property verifications – directed overhaul of all files and instituted a single page template to minimize future occurrences. Maintained excellent uniform appearance and grooming; projected good CG image to foreign officials and vendors at OCONUS port calls. High stamina; regularly exercised and encouraged others to do the same; followed and promoted healthy eating.

As stated above on the comparison scale in section 9, the applicant was marked in the third block. (The comparison scale is composed of seven blocks with the first block describing an officer as "unsatisfactory," the second block describing an officer as "qualified," the fourth block describing an officer as "one of the many competent professional who form the majority of this grade," the sixth block describing an officer as "exceptional," and the seventh block describing an officer as "distinguished.")

In block 10 of the OER, the reporting officer described the applicant's ability to assume greater leadership roles and responsibilities as follows:

Recommended for promotion to CWO3. A very capable officer. Demonstrated strong technical expertise in management of significant AFC-30 budget and procurement responsibilities for execution of the same. Exercised leadership and mentored 2 newly promoted CPOs over the course of marking period; effective at delegating and monitoring diverse work outside of storekeeper specialty. Recommended for future assignments where subject matter knowledge will be of best benefit - comptroller, procurement or contracting positions as SFLC, FINCEN, or DCMS sub-units would be ideal.

Evidence Submitted by applicant

1. A Commandant's Letter of Commendation dated July 23, 2010 and signed on behalf of the Commandant by the applicant's new CO of the cutter, commended the applicant for "outstanding performance of duty" for the period from July 2008 to July 2010.

2. The applicant's immediate prior OER from the same reporting officer on the disputed OER has no marks lower than 5 in the performance categories of the reporting officer's section of the OER. He was marked in the fourth block on the comparison scale, and he was highly recommended for promotion in block 10. His leadership as support department head was described as solid. His mentoring of junior officers was described as outstanding.

3. LTJG Q was a student engineer who served with the applicant on board the cutter for the period under review. He wrote that although he did not work directly with the applicant, he noted his commitment to the unit and his technical expertise in budgetary and property management matters. He also stated the following:

We were under the command of some seemingly impersonal and micromanaging personnel, making the environment so tense sometimes that lines of communication were not open between subordinate and senior. Even when the Command Chief – one of the most knowledgeable and respected people amongst the crew – spoke up about the difficulties of the environment, he subsequently received extremely low marks, despite his tireless efforts and outstanding performance. I personally was never given mid-period counseling, so my departing marks (which I was given on my departure date) came as a surprise, especially since they contained a “3”. This is all to say [the applicant] was not alone; I believe that he, among several others, received marks that he did not deserve.

4. LTJG K served with the applicant and described him as a “truly . . . outstanding officer and [could] always be counted on to perform his duties to the absolute best of his ability, and he is a great leader to those that serve under his direction. It was an honor to sail with him . . . “

5. LTJG M served with the applicant during the period under review. He stated that the applicant was a positive force for the junior officers despite the environment of distrust, low morale, and frustration that existed at the unit created by the micromanagement style of the CO. LTJG M described the applicant as a good mentor, good leader, capable, and confident.

VIEWS OF THE COAST GUARD

On August 28, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief.

The JAG argued that the applicant has failed to provide cogent and clearly convincing evidence that the rating chain erred in submitting the applicant's OER for the period under review. The JAG stated that the evidence from members of the rating chain suggests that they evaluated the applicant's performance properly in accordance with the Personnel Manual. (Statements from the rating chain are summarized further down in this section.)

The JAG stated that the comparison scale, in which the applicant was placed in the third block, is a relative ranking of CWO2s the reporting officer has known and worked with

throughout her career and requires no supporting comments. The JAG stated that the mark on the comparison scale, as supported by the reporting officer's declaration, was appropriate and accurate based on her twenty year career.

The JAG stated that while the applicant signed the report before the reviewer signed it, there is no indication or evidence presented that this error had any impact on the content of the OER. According to the JAG, there was no change in the OER between the time the applicant signed it and the time the reviewer signed it.

The JAG argued that since the applicant has failed to show that the Coast Guard committed a legal error, it is logically impossible for him to make a prima facie showing of a substantial connection, or nexus, between the alleged errors and the Coast Guard's decision not to select him for promotion to CWO3 before the selection board that convened in October 2011.

Statements from the Rating Chain

1. The supervisor wrote that the applicant was a subject matter professional, a solid department head, and a reliable shipmate. He stated that the applicant encountered some challenges in his department during the period. For instance, some of his subordinates were charged with violations of the Uniformed Code of Military Justice (UCMJ) and two other subordinates were on performance probation. There was also an ongoing investigation in the applicant's department because of missing property. The supervisor stated that although he did not view the problems as leadership or performance related on the applicant's part, he believed that the problems may have been the basis for the lower marks assigned by the reporting officer. The supervisor did not offer a comment as to the comparison scale mark because it was subjective and based upon the reporting officer's experience.

2. The reporting officer stated that she marked the applicant in sections 7-10 of the disputed OER based on her own observations, information from the supervisor, and other information accumulated during the reporting period. She stated that she marked the circle on the comparison scale that "most closely reflected my ranking of [the applicant] relative to all other of the same grade that I have known in my 20 year career."

The reporting officer stated that the applicant's performance was acceptable as evidenced by the laudatory comments. She stated that the marks and comments are accurate and reflective of the applicant's performance. The reporting officer stated that the applicant's performance did not meet the standard for higher marks and that one incident during the period caused her to question his judgment. She stated that the applicant submitted a financial report to the Finance Center without executive officer (XO) or commanding officer (CO) review. According to the reporting officer, the financial report was returned by the Finance Center because it was incomplete, unprofessional, and contained numerous inaccuracies. She stated that the applicant's supervisor conducted a supply department stand down and reviewed all compliance checklists for inconsistencies. The reporting officer also stated the following:

Although [the applicant's] statement and the statements of other officers qualify my leadership in a negative light, they were at times in direct opposition to my

efforts to provide a positive shipboard experience. Wardroom members, including those [who submitted statements] maintained a quote book aboard [the cutter]. The quote book contained references to perverted, disgusting, and unprofessional behavior [of a sexual nature] in direct opposition to Coast Guard Core Values. . . . [The applicant] was in a position to stop this behavior and has admitted that junior officers approached him to discuss what to do with the book. [The applicant] took no action and failed junior officers by not stopping the unacceptable practice.

The reporting officer asserted that the applicant received counseling and feedback on his performance throughout the marking period.

The reporting officer stated that the provision of the Personnel Manual that called for the reported-on officer to sign the OER after the reviewer had signed was not in effect when the disputed OER was completed. COMDTINST 1000.3 was not promulgated until September 29, 2011. The reporting officer stated that the disputed OER has all required signatures. She stated that the applicant's signature on the OER is not evidence of his agreement or disagreement with the OER but an acknowledgement that he had reviewed the OER.

3. The reviewer for the disputed OER stated that he followed proper procedures as outlined in the Coast Guard Personnel Manual.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 13, 2012, the Board received the applicant's response to the views of the Coast Guard. He stated that although, the Personnel Manual states that "commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command," he maintained that he did not receive an accurate, fair, or objective OER. He denied that he was counseled throughout the reporting period. He stated that on one occasion he sat down with the CO and XO to discuss the incident in which he sent a report to the Finance Center without obtaining the XO's review. He stated that one incident does not establish a consistent pattern and no other incidents are mentioned to justify the non-competitive OER, except for a quote book that was found on the bridge. With regard to the quote book, the applicant stated the following:

This quote book was only accessible to bridge watch standers. I did not stand deck watches and couldn't possibly hold that qualification due to documented red green color blindness. This quote book was brought to my attention by two junior officers for advice. I and the other CWO onboard both told them to seek additional guidance from the operations officer, which they did. They also removed the book from the bridge. [BCMR] Dockets 2011-035 and 2011-082 both center largely on this same quote book. Both of these Dockets also clearly establish that the time frame of the quote book is outside of the OER marking period that I'm being held accountable for. On page 3 of Docket 2011-035, it states that in April 2009 this quote book arrived back on the bridge. The rating period for the OER that I'm questioning is 7-1-2009 to 5-11-2010. Docket 2011-082 also states on page 3 that in April 2009 the quote book was somehow placed

back up on the bridge. Regardless of the date the book showed back upon the bridge, all the quotes involved were previous to the OER in question. Again, I state for the record, I was not a deck watch officer. I do not understand why I'm being held accountable, punished for something that I did not have access to. After reading [the reporting officer's] statement, it is clear that she is continuing to hold me accountable along with others for this quote book. This at least sheds some light as to why she felt a 3 for a comparison scale may have been warranted. However, my part in this was to advise the officers. I never made entries in this book. Both of the dockets I have referenced indicate that measures were taken to remove this quote book however [the reporting officer] appears to continue to hold many of the officers on board at the time accountable for it.

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There have been 6 BCMRs submitted covering the [reporting officer's] time onboard as CO. Of these, five have been granted relief either in full or in part. . . . I bring these . . . BCMR's to light to establish that there is, most certainly, a problem with the OER process during the two years that [the reporting officer] was the CO. With so many OERs adversely affected by her leadership there should be no doubt that accurate, fair, and objective evaluations were not provided.

The applicant disagreed with the comparison scale mark and stated that it is neither appropriate nor accurate. He stated that some of the marks of 4 in block 8 are inaccurate. He stated that he received a 6 on the comparison scale on all of his subsequent OERs.

The applicant submitted a statement with his response to the advisory opinion from a chief boatswain's mate (BMC), who stated that he was surprised to receive 3s in responsibility and loyalty and a recommendation against advancement on his efficiency evaluation review (EER) for period ending September 2009. The BMC stated that he was distraught by the EER and submitted an appeal and the reporting officer, who was the CO, granted him relief.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 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. 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 in effect at the time stated 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 identified as different from the majority of this grade. [Article 10.A.4.c.8.d.]

4. The applicant alleged that his comparison scale mark in the third block from the left in section 9 of the disputed OER is erroneous because it is not supported by any other marks or comments on the OER. He also alleged that the mark is inconsistent with the marks and comments assigned to him by the supervisor. However, the Personnel Manual does not require any correlation between performance marks and the comparison scale mark. Article 10.A.4.c.8.a. of the Personnel Manual, directs the reporting officer to 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. 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 scale mark seemingly inconsistent with the performance marks and comments on 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 during his or her career. Therefore, while the applicant performed his duties well for the period under review, as noted in a July 23, 2010 Letter of Commendation, in the judgment of the reporting officer when compared to other warrant officers she has known, he rated a mark on the comparison scale in the circle between a qualified officer and one of the many competent professionals who form the majority of this grade. The reporting officer stood by her evaluation of the applicant's rating scale mark in a statement attached to the advisory opinion.²

5. The applicant alleged that the OER process during the reporting officer's tenure is suspect because 6 different officers have filed applications with the BCMR and that 5 of them

² 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.

have received relief. He cited BCMRs No. 2011-035 and 2011-082 and listed the names of two others but did not have their docket numbers. (Docket Nos. 2011-035 and 2011-082 are available on the BCMR's electronic reading room and are the only ones discussed in this decision.) The applicants in Docket Nos. 2011-035 and 2011-082 alleged among other things that the quote book incident occurred in a previous reporting period and should not have been mentioned in their disputed OERs.³ The Board on the recommendation of the Coast Guard agreed that the CO had violated the Personnel Manual by commenting on the quote book incident in the disputed OERs because the incident occurred in an earlier reporting period. In the applicant's case, the OER does not mention the quote book or make any references to it. While the CO mentioned the quote book in her statement to PSC and stated that the applicant knew of the quote book and did nothing to stop it, she never states that the marks assigned to the applicant on the disputed OER were based on that incident. Moreover, the CO gave the applicant higher marks on the OER he received soon after she discovered the quote book. The applicant has offered insufficient evidence to prove that the marks on the disputed OER were based on the quote book incident.

6. The applicant submitted statements from three officers who served with him onboard the cutter. Two of them corroborated the applicant's contention that the environment on the cutter was strained due to the CO's micromanagement style, which created distrust between the leadership and the crew. All three officers wrote that the applicant exercised good judgment in his duties, was a good leader and mentor, and that he was a responsible officer. However, the supervisor for the disputed OER noted in his PCS statement that the applicant encountered some problems during the reporting period under review. In addition, in the comments to section 8 of the OER, the reporting officer wrote that she "id'd significant issues with 2 day delay in delivery and marginal quality of fuel that resulted in formal review of Sea Card fueling contract with vendor." This observation by the CO may have had an impact on the marks assigned to the applicant, since the event was significant enough to make it into the applicant's OER comments. The statements from non-rating chain members are insufficient to prove that the marks and comments in the reporting officer's portion of the OER are inaccurate.

7. Further evidence favoring the accuracy of the OER, is the lack of a finding by CGPSC 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 CGPSC found any irregularity with the disputed OER.

8. ALCGOFF 024/09 issued on February 27, 2009, required the reported-on officer to sign the OER before it is sent to CGPSC. The ALCGOFF does not state that the reviewer must sign the OER before the reported-on officer signs. The reported-on officer's signature meant only that the applicant had reviewed the OER and not that he agreed or disagreed with it. As the reporting officer stated the manual (COMDTINST 1000.3) that calls for the reported-on officer

³ The applicants in Docket Nos. 2011-035 and 2011-082 also alleged that the CO directed the members of the rating chain to assign lower marks than they otherwise would have because the CO believed the two officers were involved with a quote book incident that contained some vulgar sexual statements. The Board on the recommendation of the Coast Guard agreed that the CO had violated the Personnel Manual by directing the rating chain to assign certain marks.

to sign the OER after the reviewer signed it was not promulgated until September 29, 2011. Therefore, no error occurred because the applicant signed the OER before the reviewer did.

9. 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 CWO3.

10. Accordingly, the application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Troy D. Byers

Lillian Cheng

Frank E. Howard