

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 106-96

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on April 17, 1996, by the filing of an application for relief with the Board.

This final decision, dated May 9, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**Request for Relief**

The applicant, a lieutenant commander (LCDR), asked the Board to correct an officer performance evaluation (OER) for the period May 1, 1993 to March 7, 1994 by deleting the reviewer's comments. The applicant also asked to be promoted to commander (CDR). If promoted, he asked to be reinstated on the active duty promotion list to the position he held prior to his failure of selection.

On March 21, 1997, the Coast Guard recommended that the applicant's request be denied.

On April 15, 1997, the applicant disagreed with the views of the Coast Guard.

**EXCERPTS FROM RECORD AND SUBMISSIONS**

**Applicant's Record and Allegations**

The supervisor and reporting officer assigned high marks to the applicant on the OER. The supervisor assigned the applicant seven 7s (on a scale of 1 to 7, with seven being the highest), seven 6's, and one 4. The reporting officer gave the applicant two 7's and six 6's. The applicant was evaluated as a 5 on the comparison scale in block 12.

The applicant disputed the reviewer's comments on the OER. The reviewer wrote, in part:

I find the marks assigned in this evaluation report are too high in some areas and do not accurately reflect the level of performance I have observed. I discussed my concerns over these marks with the "Supervisor," "Reporting Officer" and "Reported on Officer" and recommended the evaluation be resubmitted with lower marks which would more accurately reflect [the applicant's] performance. The report was reviewed and resubmitted, however, the marks assigned remained the same.

The report is tainted due to the fact the "Reporting Officer," who was retiring at the time of the first submission, simply signed a report in which his comments and marks were prepared in advance without his input. The "Reporting Officer" admitted to me the report was inflated, however, he signed it as he was rushed to close out pending work and leave the service. . . . I find this report does not provide the level of review and input as envisioned by the personnel system. . . .

I found [the applicant] to be a dedicated officer who willingly put in extra hours into the job. I have, however, been very concerned over the protracted delays and in some cases substandard work produced by him and his staff in processing marine investigations. I've had to return several reports for being incomplete and for not identifying obvious violations. One of his cases was not completed for over 12 months. Accordingly "Being Prepared," "Using Resources," "Getting Results," "Developing Subordinates," and "Directing Others" should be 5's.

I also did not find [the applicant] to be a very effective speaker. He was often too verbose and not straightforward. My impressions were validated when a maritime lawyer conveyed to me his frustrations in dealing with [the applicant] stating that he would take 45 minutes to answer a question that should have taken 5 minutes to respond to. I accordingly find the marks of "7" assigned in "Working with Others," "Speaking and Listening" and "Dealing with the Public" should be "5's."

[The applicant] exhibited many favorable attributes in carrying out his work. I . . . find [the applicant's] section 12 mark should fall into the category of "Excellent Performer" [this would be a mark of 3].

The applicant alleged that the comments were inaccurate and unfairly diminished the level of his performance appraisal. He stated that the reviewer made these comments based on a seven week observation period. The applicant stated that the supervisor and reporting officer have reviewed the OER several times and attested to its accuracy. The applicant stated that the numerical marks on the OER were not inflated.

In particular, the applicant challenged the reviewer's negative comments, as follows:

- \* The reviewer had served in that capacity for only seven weeks when the report became due. The applicant claimed that as a new commanding officer (CO), with over 100 assigned personnel, the reviewer could not have spent very much time observing his performance as an assistant department chief.

- \* The reviewer discussed the report with the applicant for approximately 10 minutes on June 17, 1994, upon the applicant's departure from that command. The applicant claimed that this was the first time that he became aware that his performance did not live up to the reviewer's expectations. The reviewer was the applicant's third line supervisor.

- \* The reporting officer's statement (discussed herein) contradicted the reviewer's statement that the OER was "tainted." The reporting officer stated that he reviewed a draft of the OER prior to submitting the final one.

- \* The substandard work that the reviewer referred to dealt with a report submitted in a database format rather than the letter report format that the reviewer expected. The applicant stated that the letter report was no longer required by regulation and the reviewer was not familiar with the database report format. The applicant stated that the reviewer did not communicate his desire to have the report prepared in letter format, nor did he state that he needed the report for an upcoming presentation.

- \* The applicant stated that the incomplete report which the reviewer referenced was actually an ongoing investigation. Pursuant to the Marine Safety Manual (MSM) no report should have been issued in this case until the investigation was complete. The applicant stated that these were marine casualty reports that focused solely on the causative elements of the casualty and not the culpability of those involved.

- \* The applicant stated that the reviewer approved a delay in the case that the reviewer stated was not completed for approximately 12 months. The applicant stated that he took over the case in August 1993 from another officer who had worked on the case since April 1993. The applicant stated that additional investigative work was necessary before he could submit the letter report.

- \* The applicant stated that the reviewer returned two reports to him for additional information that was not required to be included in the report. The applicant stated that the reviewer wanted this information so that he could use it in a presentation to a local committee.

- \* The applicant complained that the reviewer did not present any facts, except for a hearsay comment from a maritime lawyer, to support his conclusion that the applicant was not an effective speaker.

### Statements Submitted by the Applicant

The applicant submitted three statements: one each, from the supervisor, reporting officer, and previous commanding officer (CO) who was also a past reviewer on the applicant's previous OER. Each statement is summarized below.

1. The supervisor was the Chief, Investigations Department of the Marine Safety Office (MSO). He stated that he was physically present at his duty station for only 40% of the reporting period. The supervisor stated that the command permitted him to be away from the unit for this amount of time because the CO was satisfied with the applicant's performance as acting head of the department. He stated that he kept abreast of what was happening in the department through the mail and telephone conversations with the applicant. He stated that he discussed the applicant's performance expectations with him at the beginning of the marking period.

The supervisor stated that a change of command occurred within the last two months of the reporting period. It resulted in the appointment of a new reviewer.

The supervisor stated that the OER was processed in accordance with established policies. Input for the OER was received from the applicant prior to the drafting of the final OER. The OER was completed and signed by the supervisor and reporting officer and then submitted to the reviewer.

The supervisor stated that the reviewer questioned the accuracy of the OER and asked the supervisor to review the report. The supervisor stated that his re-review of the OER did not cause a change in his evaluation of the applicant's performance as originally written. The reporting officer who had retired also re-reviewed the OER and stood by the evaluation as initially written.

2. The reporting officer stated that during the initial preparation of the OER, he had requested that the supervisor modify the report to more accurately reflect the applicant's level of performance. The supervisor modified the OER, and it was signed and submitted to the reviewer.

The reporting officer wrote that after he retired, he received a call from the reviewer expressing the opinion that the marks on the OER were too high. The reporting officer stated that the reviewer's opinion was based a very limited opportunity to observe the applicant's performance.

The reporting officer stated that he received the OER package from the supervisor for his re-review. This time the supervisor submitted the OER to the reporting officer with the narrative sections completed but the marks were left blank. The reporting officer stated that he reviewed the OER and supporting documentation,

agreed with the narratives, and assigned the numerical marks. The OER was returned to the reviewer.

The reporting officer stated that approximately one year later he received a call from the applicant seeking a statement to rebut the reviewer's comments. The reporting officer stated that he did not believe the original OER was inflated. He stated that the numerical marks were more than justified and accurately reflected his observation of the applicant's performance as the first line supervisor for seven months of the reporting period and the reporting officer for the entire reporting period.

3. The applicant's previous CO/reviewer for eight months of the reporting period stated that a number of high-visibility and precedent-setting projects were initiated and accomplished during the reporting period. He stated that during this reporting period, under the applicant's leadership, his department completed 351 cases --an increase of approximately 170 over the past two years.

The former CO/reviewer stated that he had reviewed the OER and supporting documentation. He wrote the following:

I find the numerical marks are fully supported by the narratives and that the narratives are fully supported by voluminous documentation. Based on my personal knowledge of events and record material, I concluded that the subject OER accurately reflects [the applicant's] performance under my cognizance as [r]eviewing [o]fficial for the aforementioned eight and one half month period. . . .

#### Views of the Coast Guard

The Coast Guard recommended that the applicant's request be denied. The Service stated that the Personnel Manual permits a properly prepared OER to reflect the views of several rating chain members--a supervisor, reporting officer, and reviewer. The Coast Guard stated that nothing in the regulation required the rating chain officials to reach a monolithic agreement on their evaluation of the applicant's performance.

The Coast Guard stated that the Personnel Manual does not require the reviewer to observe a reported-on officer, prior to performing the duties of a reviewer. The Service stated that unlike other rating chain officials, the reviewer fills a position rather than being designated as an individual. The Coast Guard stated that when the reviewer assumed command he also assumed the duty as reviewer for the OER.

The Service stated that the applicant has failed to demonstrate an error in this regard. The Coast Guard argued that the applicant has failed to show that the reviewer's comments were in error or unjust. The Service also stated that the reviewer's comments were supported by specific examples of the applicant's performance. The Coast Guard argued that the reviewer had sufficient time to form an impression of the applicant's performance that was based on specific instances of that performance. The

Service argued that "[w]hile the difference in the views of [the] applicant's performance is apparent, that is not sufficient to establish that the [reviewer's] comments are erroneous or unjust, so as to require removal from [the] applicant's record."

The Coast Guard also argued that there is no evidence in the record to support the reviewer's conclusion that the report was "tainted." In this regard, the Service stated that the reporting officer's statement does not refute the reviewer's comment referring to the "[reporting officer's] admission to the [r]eviewing [o]fficer that the marks were inflated, and that they were signed in the rush of events prior to [the reporting officer's] retirement."

The Coast Guard argued that the applicant's contention that the "[r]eviewer is prohibited from commenting on, or providing a comparison scale mark is wrong. There are no restrictions limiting the [r]eviewer from commenting on the mark in section 12. In fact, in cases where the [r]eporting [o]fficer is not a Coast Guard officer the [r]eviewer must include another comparison scale mark. Further, position responsibilities specify that the [r]eviewer is allowed to discuss the [r]eported-on [o]fficer's leadership and potential when deemed necessary. Considering inconsistencies observed in the report's content and completion, the [r]eviewer believed it necessary to comment on [the] [a]pplicant's performance and potential, including a discussion of the [s]ection 12 comparison scale mark."

Regarding the applicant's claim that the reviewer did not provide him with performance expectations or feedback, the Coast Guard noted that it was the applicant's responsibility for managing his performance, including ensuring that performance feedback was thorough and received in a timely manner. The Coast Guard also argued that the applicant's failure to submit a reply to the OER was a tacit indication that he agreed with the reviewer's characterization of his performance at the time.

The Service further stated that if the BCMR finds that the applicant has proven his case in its entirety, then the failure of selection should be removed. Specifically, the Service stated:

Applicant's OERs consistently reflect marks that are above the expected high standard of performance and contain recommendations for promotion to the grade of commander. The record does not appear worse with the contested comments. While the [selection] board's deliberations are confidential and no one outside the board members may know the reason an individual was or was not selected, it is reasonable to conclude that the contested comments influenced the board's decision, especially in light of the highly competitive opportunity of selection for this board; 71 percent. Thus, if the [BCMR] finds, contrary to the Coast Guard's analysis, that all of the contested comments were the result of error or injustice, it should also find that [the] applicant has established the required nexus between the alleged errors or injustices and his non-selection. A finding

that some, but not all, of the alleged error has been proved would require a nexus analysis tailored to those findings.

### **Applicant's Response to the Views of the Coast Guard**

The applicant submitted a rebuttal to the advisory opinion and restated many of the arguments he made earlier.

The applicant disagreed with the reviewer's comments criticizing his performance. He argued that he refuted each specific performance shortcoming mentioned by the reviewer. He stated that the Coast Guard failed to offer any evidence that rebutted his explanation as to the alleged inaccuracies.

The applicant stated that while the reporting officer may have signed one version of the OER "in a rush," it was not the first time that officer had seen that report. The first version of the OER was not the one that was entered into his record. Rather, the later version of the OER was reviewed and signed by the reporting officer after he had retired. The reporting officer, therefore, had plenty of time to review it.

The Coast Guard's conclusion that the period of observation by the reviewer was immaterial was incorrect. An OER is intended to capture the entire reporting period. The applicant argued, for example, he processed 350 cases during the 44-week reporting period. Of this number, the reviewer had problems with only two of the 350 cases. The applicant asserted that he has shown the reviewer's comments with regard to his performance to be inaccurate.

The applicant disagreed with the Coast Guard that marks of 7 are reserved for "superlative performance which only a few officers in each grade can achieve." The applicant alleged that his marks of 7 were deserved and supported by direct observation and record material. The applicant stated that he was nominated, as mentioned in block 8 and 11 of the OER, for the [REDACTED]

The applicant argued that comments by the reviewer that pertain to block 12 are only permitted if the reporting officer is not a Coast Guard officer. [See, however, Article 10-A-4d.(11)(f), Personnel Manual.]

The applicant agreed that an officer is "ultimately responsible for managing his own performance," but argued that there is nothing in the Personnel Manual that states performance feedback should be solicited from the reviewer. The applicant stated that the Personnel Manual dictates that feedback be sought from the supervisor.

The applicant argued that the absence of an OER reply to an OER is not a tacit agreement by the reported-on officer with the contents of an OER. The applicant stated

that filing a reply would not cause the reviewers comments to be removed from the OER.

The applicant stated that, prior to attaching comments, the reviewer failed to consult with the previous CO/reviewer regarding the perceived discrepancies on the OER. If the reviewer had any doubts regarding the regularity of the process involving the reporting officer or even the supervisor, the reviewer should have contacted the previous commanding officer who was present 83% of the time during the reporting period.

The applicant concluded his rebuttal by arguing that the reviewer's comments, the question of accuracy aside, unjustly implied applicability to the entire 44-week reporting period. He claimed that the reviewer's comments prejudiced him before the selection board.

### APPLICABLE REGULATIONS

Article 10-A-2f.(2) of the Personnel Manual details the responsibilities of the reviewer. It states, in part, that the reviewer shall perform the following tasks with respect to an OER:

(a) Ensures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential.

(b) Checks for obvious errors, omissions, or inconsistencies between numerical evaluations and written comments and any failures to comply with instructions. . . .

(c) If necessary, adds comments on a separate sheet of paper further addressing the performance and/or potential of the Reported-on Officer. For any officer whose Reporting Officer is not a Coast Guard commissioned officer, the Reviewer shall describe on a separate sheet of paper the officer's "Leadership and Potential" and include an additional "Comparison Scale" mark. . . .

(d) Ensures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. The Reviewer may not, however, direct in what manner an evaluation mark or comments to be changed. . . .

Article 10-A-4d.(11)(f) of the Personnel Manual states the following:

On a separate page, the Reviewer may comment on the Reported-on Officer's performance, qualities, potential, or value to the Coast Guard if



these areas need to be expanded or explained further. (Comments are required if the Reporting Officer is not a Coast Guard Officer. See article 10-A-2f.(2)(c).) The Reviewer also may explain or reconcile discrepancies or conflicts reflected in the completed report, if such inconsistencies cannot be resolved by return of the report to concerned members of the rating chain or by personal discussion.

### 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 of the case pursuant section 1552 of title 10, United States Code. It is timely.

2. It was not an error for the reviewer to attach comments to the OER, if in his judgment, there was a need to further address the applicant's performance and/or potential. Article 10-A-2(2)(c), Personnel Manual. The Personnel Manual does not require that a reviewer discuss his evaluation of the applicant's performance with the previous reviewer, nor does the Personnel Manual prohibit the reviewer from commenting on a block 12 mark. Thus, if an error exists, it would be with respect to the accuracy of the reviewer's comments.

3. The Board finds that the applicant has not established by a preponderance of the evidence that the reviewer's comments are inaccurate. The reviewer stated that the applicant did not deserve marks of 7 in certain areas because he was late in completing some assignments and produced substandard work in others. The applicant explained that (a) a report was late because it required additional work after he took over the project from another officer; (b) a report that the reviewer said was incomplete, was, according to the applicant, complete because the MSM ( Marine Safety Manual) did not require findings of violations as part of the investigation; and (c) the substandard work the reviewer referred to involved a report that was correctly submitted by the applicant in dataform format, rather than the letter format expected by the reviewer. Except for the late report, the applicant argued that the other reports were completed in accordance with the MSM. The applicant failed to submit with his application pertinent provisions from the MSM.

4. The applicant offered statements from the supervisor, reporting officer, and former CO with respect to the accuracy of the OER. The supervisor and reporting officer attested to the accuracy of their particular portions of the OER. However, neither the supervisor nor the reporting officer rebutted the specific deficiencies noted by the reviewer in the applicant's performance. Neither officer corroborated the applicant's statement that the reports the reviewer found to be insufficient were, in fact, submitted in accordance with regulation, nor did these officers state that the applicant was timely in the submission of an investigation. Neither officer offered an explanation

as to why the reviewer would expect reports to be prepared in a manner inconsistent with regulation. The Board notes that the applicant did not immediately register his disagreement with the OER by filing a reply. If the applicant believed the OER to be in error, he could have submitted a reply to it. He did not do this. The Board finds the evidence offered by the applicant inter alia, his statement and the general statements of the supervisor and reporting officer does not prove that the reviewer's comments are inaccurate.

5. The reviewer's comments were made based on an observation period of approximately two months. Evaluation of performance within a limited period of time does not render that evaluation inaccurate. Moreover, the Personnel Manual does not require that the reviewer serve in that capacity for a minimum period before performing OER duties. One of the duties of the CO/reviewer is to ensure that the applicant's performance is accurately reported. As stated above, the applicant has not shown to the Board's satisfaction that the reviewer's comments are inaccurate. In the reviewer's judgment, the applicant's performance needed some improvement and the OER as originally presented to him did not note any shortcomings. In accordance with the Personnel Manual, he returned the OER to the rating chain for reconsideration prior to attaching reviewer comments. The other members of the rating chain remained convinced that the performance as described was accurate. The only option left to the reviewer, pursuant to the Personnel Manual, was to attach comments to the OER.

6. Additionally, Article 10-A-4b.(3) of the Personnel Manual states that the OER "serves as a vehicle for multiple assessments by members of the rating chain." Each member of the rating chain evaluates the applicant's performance in his best judgment.

7. The applicant alleged that the reviewer failed to notify the reported-on officer and other members of the rating chain when the reported-on officer's performance did not meet expectations. The applicant argued that this failure to counsel him on his performance denied him the opportunity to correct his performance during the period of the reviewer's observation. The Board notes that the applicant also failed in his responsibility to seek the necessary feedback on his performance from the reviewer. The applicant has not presented any evidence that he sought feedback from the reviewer after some of his work was returned to him because it was either incomplete or poorly done. The applicant should have been on notice after one report was returned to him that he was not performing in a satisfactory manner to the reviewer. The applicant argued that the Personnel Manual requires that the reported-on officer seek feedback from the supervisor and not from the reviewer. This may be true, but there is no evidence that the applicant went to the supervisor for assistance, which he could have done, in handling any deficiencies noted by the reviewer. The applicant seems to think that because the supervisor and reporting officer were satisfied with his performance that the reviewer should have been equally satisfied. This is not necessarily the case.

8. The applicant complained that the reviewer's comments, which covered an approximate two month period, do not accurately reflect the level of his performance

for the entire 44-week period covered by the OER. The reviewer's comments show that he took note of the applicant's strengths as well as his weaknesses. The reviewer noted in his comments that the applicant was a "dedicated officer who was willing to put in extra hours to get the job done." He also stated that the applicant "exhibited many favorable attributes in carrying out his assignments." It appears from the comments that the reviewer tried to present a balanced evaluation of the applicant's performance.

9. The Board finds that the reviewer's comment regarding the applicant's speaking ability was not based solely on hearsay. Rather, the reviewer's comment was also based on his own observation. The reviewer stated the following in evaluating the applicant's speaking skills: "I . . . did not find [the applicant] to be a very effective speaker. He was often too verbose and not straightforward." The reviewer also indicated that another person had recognized the same problem with the applicant's communication. While this information from the other individual could be considered hearsay, the reviewer could consider the statement to assist in formulating this evaluation. Accordingly, the applicant has failed to demonstrate that the comment with regard to his speaking skills is inaccurate.

10. The applicant has not established that the reviewer's comments are inaccurate. The reporting officer denied that the OER was tainted and stated that marks and comments on the OER were well deserved. However, the reporting officer did not deny the allegation by the reviewer that the reporting officer admitted to the reviewer that the grades were inflated and that the reporting officer signed the OER in an effort to complete his work assignments prior to retirement. Weighing all the evidence of record, the Board finds that the evidence is insufficient to establish that the reviewer's comments are inaccurate.

11. The applicant has failed to prove an error or injustice on the part of the Coast Guard. Accordingly, no basis exists to promote the applicant to CDR or, in the alternative to remove his failure of selection for promotion to CDR.

12. This application should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

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

