

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 147-97

FINAL DECISION

██████████ Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on July 1, 1997, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated May 28, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request for Relief

The applicant is a former ██████████ ██████████ ██████████ in the Coast Guard. He asked the Board to raise 5 marks that appeared on his Officer Evaluation Report (OER) for the evaluation period ending March 13, 1993. He also asked to be promoted to the rank of Commander after the upgrade.

The applicant stated that he "believe[s] all [his] OERs at ██████████ ██████████ were lower than [his] actual performance and they were compared to prior OERs which is a violation of the Personnel Manual." He stated that he believed that these factors prevented his promotion to Commander.

SUMMARY OF RECORD AND SUBMISSIONS

Applicant's Submissions

The applicant submitted a copy of the OER for the period ending March 13, 1993 (disputed OER) and his draft of the disputed OER with notes on it. The disputed OER shows that, out of 22 evaluation categories, he received two marks of 4, nine marks of 5, and eleven marks of 6, in addition to a mark of 5 in block 12 of the OER.¹ The narrative

¹ Block 12 (Comparison Scale and Distribution) is where the reporting officer compares the evaluated officer with others of the same grade.

in the comments blocks of the OER praised every aspect of the applicant's performance and addressed significant achievements he had made during the marking period.

The applicant also submitted a copy of his draft of the disputed OER, which he had submitted to his command for that marking period. The applicant alleged that the draft was returned to him because the marks he had given were too high. The draft has notes on it by an unidentified individual which state "too high 14 points tone it down see me." The applicant had also written "reduced 5 points per your note" and signed his initials.

The draft OER gives the applicant one mark of 4, nine marks of 5, and eight marks of 6, including a mark of 5 in block 12. The draft OER is not certified to be a true copy, nor has the applicant explained the significance of the notes on the draft.

The applicant submitted a letter to the Commander of the FY93 Commander Selection Board dated July 6, 1993. He explained that, pursuant to the provisions of Article 5-A-4.e of the Coast Guard Personnel Manual,² he was submitting the letter "to provide [the selection board] some amplifying information on [his] record and [his] goals."

In the letter, the applicant described his goals of personal and professional development. He also discussed his achievements and his contributions to the operations at his command post and to the Coast Guard in general.

The applicant's letter was forwarded to the selection board with an endorsement by his commanding officer. The commanding officer commented on the applicant's "excellent performance" and other accomplishments at his duty station.

Applicant's Average OER Marks

The applicant's average scores on his marks for his OERs during his period of service in each marking period as an LCDR (O-4) are as follows:

| <u>Marking Period</u> | <u>Average of Marks</u> | <u>Mark in Block 12</u> |
|-------------------------------|-------------------------|-------------------------|
| July 9, 1988 - April 30, 1989 | 4.6 (23 total) | 5 |
| May 1, 1989 - Sept. 7, 1989 | 4.4 (23 total) | 5 |

² Article 5-A-4.e (Communication with the Selection Boards) of the Personnel Manual states that "(1) Each officer eligible for consideration by a selection board may send a communication through official channels to the board . . . inviting attention to any matter of record in the Armed Forces concerning him/herself"

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| | | |
|------------------------------------------------|----------------|---|
| Sept. 8, 1989 - April 30, 1990 | 4.9 (23 total) | 5 |
| May 1, 1990 - April 30, 1991 | 4.8 (22 total) | 5 |
| May 1, 1991 - March 13, 1992 (disputed OER) | 5.4 (22 total) | 5 |
| March 14, 1992 - Jan. 28, 1993 | 5.5 (23 total) | 5 |
| Jan. 29, 1993 - April 30, 1993 | 5.5 (23 total) | 5 |
| May 1, 1993 - June 30, 1994 | 5.3 (23 total) | 5 |

The applicant's mark averages show a steady increase as the years progressed. The marking period of July 9, 1988 to April 30, 1989, was the applicant's first evaluation as an LCDR. The applicant's rating chain in the first and second evaluation periods was changed in the third evaluation period. The applicant was assigned a new supervisor in the fourth evaluation period, and that rating chain remained through the fifth evaluation period. The composition of the applicant's rating chain changed in the sixth, seventh and eighth evaluation periods.

The disputed OER was completed in the fifth evaluation period. It was the second time that the applicant was evaluated by that rating chain.

Views of the Coast Guard

On November 10, 1997, the Coast Guard recommended that the applicant's request for correction be denied.

The Chief Counsel of the Coast Guard stated that the applicant failed to meet the burden of proof of error or injustice established in Germano v. United States, 26 Cl. Ct. 1446, 1460 (1992), or in Arens v. United States, 969 F.2d 1034, 1037 (1992).³ He stated that the applicant's "evidence of error consists entirely of two scrawled notes on an OER form . . . with unexplained mathematical symbols and arrows elsewhere on the form." The Chief Counsel asserted that there was no evidence offered to show the origin of that document or its authenticity, or any evidence "explaining the meaning of [the] notes or

³ Germano stated that in order to establish that an OER is in error or unjust, the applicant requesting correction must provide prima facie proof of a misstatement of a significant hard fact or a clear violation of a statute or regulation.

Arens reaffirmed the principle established in Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979), which said that an applicant seeking correction of his record must overcome the presumption that government officials have carried out their duties correctly, lawfully, and in good faith.

their effect on the OER." The Chief Counsel stated that "[b]ecause such cryptic, unauthenticated and incomplete matter does not establish a prima facie case of error or injustice, the application must be denied."

The Chief Counsel also stated that the applicant has failed to show a "causal nexus between a proven error on injustice [in the OER] and the claimed injury." He argued that even if the applicant successfully proved that improper procedures were followed in the creation of the disputed OER, he has not shown that absent the improper procedures, the marks he challenges would have been higher. The Chief Counsel stated that an "OER is not complete until signed by the Reporting Officer and reviewer, and administratively reviewed by Coast Guard Personnel Command." The corrections the applicant asks to be made to his OER would be made without of the applicant's reviewer and reporting officer, and therefore would be improper. The appropriate procedures in the event of a disagreement between a supervisor's and reporting officer's evaluation would have been that the supervisor would have corrected the OER accordingly, or the reporting officer would have "noted his disagreement and his reasons therefor in Section 8 of the OER." The Chief Counsel stated therefore, that "even if there was a prejudicial error, Applicant would [only] be entitled to replacement of the challenged OER with a continuity OER, not an OER which falsely reflects the concurrence of the rating chain officials."

Applicant's Response to the Views of the Coast Guard

On November 17, 1997, the BCMR sent the applicant a copy of the Coast Guard's recommendation and encouraged him to respond. On January 21, 1998, the applicant submitted his response.

The applicant asserted that the executive officer (XO) at his duty station (his former supervisor) informed him that his reporting officer completed the disputed OER by referring to previous OERs, contrary to Personnel Manual provisions. He stated that if the Coast Guard contacted the former XO, he would confirm that allegation.

The applicant stated that he believed that the Coast Guard made it a practice to give a "lower evaluation . . . based on the standard that four was a good mark and would not hurt you." He stated that based on this belief, he never submitted a written disagreement to an OER and never returned an OER.

The applicant also asserted that he believes the marks on the disputed OER were lowered because of an investigation in which he had to participate at [REDACTED]. He stated that he believes that his commanding officer unfairly pressured him to change his OER marks.

The applicant again asserted that he believes the comments of the disputed OER reflect his performance, but that the marks do not correspond with the comments. He

believes that he and his supervisors "were led to believe [his OERs] were very solid and [he] would have no trouble with promotion to O-5. . . ."

The applicant asked the Board for the addresses of some of his former co-workers and supervisors. The Board sent the applicant the address and phone number of the Coast Guard Personnel Command Center, through which he might obtain the information he sought.

Additional Submission from Coast Guard

On February 24, 1998, the Chief Counsel of the Coast Guard submitted additional comments regarding the applicant's response.

The Chief Counsel stated that, with regard to the applicant's request for addresses, "the Applicant is responsible for providing all evidence to support his case." 33 CFR 52.24. The Chief Counsel asserted that the "Applicant claims to have discovered the alleged error in June of 1994" and that he could have utilized the Coast Guard's Worldwide Locator Service to contact his witnesses between 1994 and the present, but he failed to do so. He stated that the applicant's "petition was, and remains, insufficient to support his case."

The Chief Counsel also stated that the applicant's response "provides no evidence that [his] marks were lowered for improper purposes."

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, United States Code. The application was timely.
2. The applicant asked the Board to increase five marks on his OER for the period ending March 13, 1992, on the basis that they were improperly lowered.
3. The applicant has failed to provide any evidence to the Board, or any plausible justification, for raising the marks on the disputed OER. The averages of his OERs for his period of service as an O-4 show that the marks on the disputed OER were, in fact, .6 higher than the previous OER. His marks and comments made an obvious improvement from the fourth marking period. Moreover, that .6 increase is the largest increase of all the applicant's OERs.

In general, the disputed OER is very good. Of the 22 total marks, the applicant received only two marks of 4; a significant difference from the previous OER where he received seven marks of 5. Additionally, a review of the averages of all his OERs shows that the applicant's performance as an O-4 was steadily improving.

4. The applicant claimed that his reporting officer completed the disputed OER by referring to previous OERs, contrary to Personnel Manual provisions. Article 10-A-4.g(3)(g) of the Personnel Manual states that members of the rating chain may not consider the reported-on officer's conduct or performance that occurred outside the reporting period.

There is no evidence in the record or in the applicant's submissions that the applicant's reporting officer improperly considered the applicant's previous performance. The applicant has based this claim solely on the comments allegedly made to him by his XO at [REDACTED] but he has submitted no statements, evidence, or other information to support this allegation. A review of the applicant's OER scores, which show a steady increase, is contrary to the applicant's allegation that his marks on the disputed evaluation were unreasonably low.

5. The applicant has failed to provide "prima facie proof" of an error or injustice. Germano, supra. He has failed to show that the OER was derogatory or that the marks he received on the disputed OER were in error or did not reflect his actual performance.

While the applicant submitted several documents, he failed to explain the significance of any of them, or how they prove that his OER marks were in error. The notes on the draft OER are not explained, and the applicant has not said who wrote the notes, if the draft OER is an authentic copy, and what specific marks were lowered or raised. Additionally, the applicant's later allegation that his marks were lowered because of his participation in an investigation is completely unsupported by evidence submitted by the applicant or contained in his record.



6. Even if the applicant had proved there is an error in his military record, he has not shown a nexus between the alleged error and his failure of selection. See Engels v. United States, 678 F. 2d 173, 176 (Ct. Cl. 1982). Establishing a nexus requires meeting two standards: (1) was the applicant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors; and (2) even if there was prejudice, is it unlikely that the applicant would have been promoted in any event? Engels, supra. He has not satisfied that test.

7. The applicant has not shown that the Coast Guard committed an error or that he suffered an injustice. Accordingly, the application should be denied.

Final Decision: BCMR No. 147-97

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ORDER

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

