

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-020

FINAL DECISION

██████████ Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was commenced on November 4, 1998, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated April 22, 1999, 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, a xxxxxxxxxxx in the Coast Guard, asked the Board to correct his record by removing an officer evaluation report (OER) that contains comments referring to his knee surgery and convalescence. The disputed OER covered the period December 1, 199x, to May 31, 199x. He also asked the Board to expunge his failure of selection to the rank of lieutenant commander.

APPLICANT'S ALLEGATIONS

The applicant stated that the disputed OER, which he received while serving as an ██████████ at the Xxxxxxxxx, contains the following comments by his supervisor and reporting officer:

Underwent knee reconstructive surgery during this marking period which resulted in 5 months in a ██████████. Despite extensive outpatient therapy, he was still able to adequately administrate the ██████████ program. . . .

Concur. Despite a prolonged medical [REDACTED] and convalescence, [the applicant] kept the unit's [REDACTED] Program on track through regularly scheduled training and informal sessions with junior [REDACTED] . . .

The applicant alleged that these comments are prohibited because they refer to a medical condition and to how that condition affected his performance. The applicant alleged that references to medical conditions are impermissible under Article 10.A.4.g. of the Personnel Manual in effect at the time the disputed OER was completed and under 10.A.4.f.(5) of the current Personnel Manual.

Furthermore, the applicant alleged, his supervisor erred by disparaging his performance with the word "adequately" when his performance was hampered by his medical condition and treatment. He alleged that Article 10.A.2.b.2.i.(1) "provides for restructuring or reassignment of duties and directs that 'commanding officers shall ensure that these individuals do not receive below standards evaluations strictly as a consequence of these circumstances.'"

The applicant alleged that the disputed OER constituted a significant part of his record before the selection board because it was completed within the previous six years and because his evaluations from his service in the xxxxxx from 1981 to 1987 could not be considered by the selection board, which sees only a summary Statement of Creditable Service for service in other military departments. Therefore, the applicant alleged, the disputed OER caused him to be passed over for promotion by the selection board in 1998:

The patent adverse impact of an evaluation of "adequately" cannot be gainsaid when applied to the principal duty being performed by an [REDACTED] in a [REDACTED] . . . While overall the report does not disparage [the applicant], it is a patently mediocre evaluation unlikely to assist promotion in a highly competitive selection field.

On December 16, 1998, the applicant submitted a statement signed by the captain who was the applicant's commanding officer at Xxxxxxxxxxxx and who served as the reviewer for the disputed OER. The captain stated that he arrived at the [REDACTED] only 14 days prior to the end of the reporting period in question. At the time he reviewed the disputed OER, he was unaware of the restriction on mentioning medical conditions. Since that time, the captain stated, he has had ample opportunity to observe the applicant's performance as an [REDACTED] safety instructor, and he is "strongly of the opinion that the overall evaluation in the report in question is inconsistent with the knowledge, technical capability and execution of duties [the applicant] has displayed as an xxxxxxxxxxxxxx with wide ranging authority over Coast Guard [REDACTED] . . . reflective of much more than just an 'adequate administration of [REDACTED]' [Ellipses in original.]

VIEWS OF THE COAST GUARD

On March 30, 1999, the Chief Counsel of the Coast Guard recommended denial of the applicant's request for relief.

The Chief Counsel alleged that, at the time the OER was completed, regulations allowed rating chain members to mention a medical condition in an OER. The Personnel Manual at the time only prohibited medical or psychological speculation or mention of a medical diagnosis. This policy was not changed until three years later, in October 1997, when the language was broadened to prohibit any mention of medical or psychological conditions. The Chief Counsel argued that the comments complained of by the applicant do not constitute medical speculation or diagnosis according to the definitions in the American Heritage Dictionary. Therefore, the comments were permissible. He stated that under the old rule, "once a member's diagnosis was confirmed or settled, the rating chain was permitted to mention the medical condition as a method of clarifying and further explaining the member's performance."

The Chief Counsel stated that the provision of the Personnel Manual that directs commanding officers to ensure that members do not receive below standard evaluations as a consequence of medical conditions did not become effective until March 199x, after the disputed OER was completed. Therefore, it cannot be considered a basis for relief. Furthermore, the Chief Counsel argued, the disputed OER is "not an adverse evaluation." It contains no mark below a 4, and the reporting officer recommended him for promotion with his peers. The Chief Counsel also noted that the applicant failed to submit a reply to the OER, which was his "opportunity to raise his issue in an immediate and proactive manner to his OER rating chain."

Finally, the Chief Counsel stated that, if the Board decides that the references to the applicant's medical condition were in error, only the comments should be removed, rather than the entire OER. The applicant "has presented no evidence in support of his contention that the entire OER is somehow infected by these comments." "In the interests of administrative efficiency," the Chief Counsel did not discuss whether the alleged error could have caused the applicant to fail of selection, but he requested the chance to do so if the Board decides to remove the disputed OER or comments.

The Chief Counsel attached to his advisory opinion a memorandum on the applicant's case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that the disputed comments referred to a medical condition, rather than a diagnosis, according to the definitions in the Random House College Dic-

tionary. CGPC also noted that the applicant had not asked the Board to remove the OER which immediately preceded the disputed OER and which also contains a reference to his knee surgery: "[REDACTED] on a wide range of missions prior to being [REDACTED] knee surgery." However, the marks in that OER are somewhat higher than those in the disputed OER.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The Chairman sent the applicant a copy of the Coast Guard's views, and on April 13, 1999, he responded. The applicant alleged that "a medical condition is subsumed in a medical diagnosis." He argued that the words "diagnosis" and "condition" are synonymous according to the various definitions in several dictionaries, including those used by the Coast Guard. He concluded that "the distinction which the Advisory Opinion seeks to draw is too nebulous to be accorded weight."

The applicant asked that the Board focus on the purpose of Article 10.A.4.g., rather than on dictionary definitions. He alleged that the purpose was "to preclude inappropriate factors from providing undue and unfair emphasis and support for an evaluator's rating." Pursuant to that purpose, "it was plain error to mention the medical diagnosis and use it as the predicate for the evaluation of his performance of duty."

The applicant further argued that, although Article 10.A.2.b.2.i.(1) was not effective until after the disputed OER was issued, the Personnel Manual still required Coast Guard officers to ensure that members received fair evaluations. The disputed OER was not fair because it "was driven by his medical infirmity which prevented him from performing his [REDACTED]." The "infected reference" "permeates the entire evaluation and is incapable of severance."

The applicant also argued that the lack of a mark below 4 in the disputed OER does not mean that it was not so adverse as to prevent his promotion. In fact, he "was stymied in his quest for promotion through an OER expressing faint praise while postulating a period of medical inability to fully perform as a Coast Guard [REDACTED]. He stated that his case was ready for decision by the Board and should not be delayed to allow the Coast Guard additional time to submit a nexus analysis.

Finally, the applicant explained why he had not asked the Board to remove the OER immediately preceding the disputed OER even though it also contains reference to his knee surgery. He stated that the earlier OER did not fall within the six years of previous service that are supposed to be considered most significant by the selection board. In addition, he was able [REDACTED] the majority of

that reporting period, and the OER reflects his excellent performance. He also explained that he did not submit a reply to the disputed OER because he did not then know that the references to his medical condition were prohibited.

RELEVANT REGULATIONS

Article 10.A.1.b. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) in effect in 199x states that “[c]ommanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.”

Article 10.A.4.g.(3)(c) states that members of a rating chain shall not “engage in medical or psychological speculation, or mention any medical diagnosis.”

After the completion of the disputed OER, the Personnel Manual was revised to provide that for “officers who are unable to fully perform due to illness, injury, pregnancy, etc. . . . commanding officers shall ensure that these individuals do not receive below standard evaluations strictly as a consequence of these circumstances.” Article 10.A.2.b.2.i.(1). The new provisions also state that rating chain members shall not “[m]ention any medical or psychological conditions, whether factual or speculative.” Article 10.A.4.f.5.

Section 10.A.4.h. allows the Reported-on Officer to reply to any OER and have the reply filed with the OER. The provision for reply is intended to “provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official.”

SUMMARY OF THE RECORD

The applicant served in the xxxxxx from August 14, 1981, to June 15, 1987. He was trained as a [REDACTED] and achieved the rank of xxx. On April 23, 19xx, he accepted a commission as a xxxxxxxxxx in the Coast Guard and began serving as a [REDACTED] at Xxxxxxxx. In March 199x, he began serving as a [REDACTED] as well, and later became the department head responsible for all [REDACTED] safety training. On April 27, 199x, he was promoted to xxxx. The applicant received eight OERs during his time at the [REDACTED]. The last six of them are numbers 1 through 6 in the chart on page 6, below. The disputed OER is number 6, the last the applicant received for his service at the [REDACTED]. Aside from the references to his knee surgery, the disputed OER also includes the following comments:

Thoroughly prepared for safety stand-downs Utilized professional resource of local xxx police Rewrite of safety incentive program has

revived interest and participation in safety suggestions. . . . Effective cooperation with department heads . . . channeled several ideas into a detailed working plan of action. . . . Shared lessons learned from last year's fatal xxxxx accident at Xxxxxx. . . . Assisted all [REDACTED] via oral quizzes & tutoring Routinely gave training classes to [REDACTED] mech[anics] Obvious flare for public speaking. . . . Excellent guidance provided to members of [REDACTED] . . . Used discretion and sound judgment while investigating allegations of improper maintenance Following extensive physical therapy program, promptly regained proficiency and requalified as [REDACTED]. [Emphasis added.]

Forthright and sincere, [the applicant] has made his mark on [REDACTED] Xxxxxx's [REDACTED] Program. Through his engaging speaking skills and personable demeanor, he instilled an attitude of safety and professionalism His staff potential was clearly evident in his leadership of the [REDACTED] [REDACTED] . . . He is qualified & recommended for promotion with his peers.

On June 1, 199x, the applicant began working at headquarters in the [REDACTED] [REDACTED] branch, first as a program officer and then as an xxxxxxx. The seven OERs he received for this service prior to his failure of selection in 199x are numbers 9 through 16 in the chart below.

APPLICANT'S MARKS IN 13 OERs FROM 7/1/9x THROUGH 5/31/9x

| CATEGORY ^a | 1 | 2 | 3 | 4 | 5 | 6 ^b | 7 | 8 | 9 | 10 | 11 | 12 | 13 | AVE ^c |
|---------------------------------------|---|---|---|---|---|----------------|---|---|---|----|----|----|----|------------------|
| Being prepared | | | | | | | | | | | | | | |
| Using resources | | | | | | | | | | | | | | |
| Getting results | | | | | | | | | | | | | | |
| Adaptability ^d | | | | | | | | | | | | | | |
| Responsiveness ^d | | | | | | | | | | | | | | |
| Work-life sensitivity ^d | | | | | | | | | | | | | | |
| Specialty expertise | | | | | | | | | | | | | | |
| Collateral duty ^d | | | | | | | | | | | | | | |
| Working with others | | | | | | | | | | | | | | |
| Human relations/ Workplace climate | | | | | | | | | | | | | | |
| Looking out for others | | | | | | | | | | | | | | |
| Developing subordinates | | | | | | | | | | | | | | |
| Directing others | | | | | | | | | | | | | | |
| Evaluations | | | | | | | | | | | | | | |
| Speaking & Listening | | | | | | | | | | | | | | |
| Writing | | | | | | | | | | | | | | |
| Initiative | | | | | | | | | | | | | | |
| Judgment | | | | | | | | | | | | | | |
| Responsibility | | | | | | | | | | | | | | |
| Stamina ^d | | | | | | | | | | | | | | |
| Health & Well-being | | | | | | | | | | | | | | |
| Military bearing ^d | | | | | | | | | | | | | | |
| Professionalism | | | | | | | | | | | | | | |
| Dealing with public ^d | | | | | | | | | | | | | | |
| Comparison scale ^e | | | | | | | | | | | | | | |
| Total | | | | | | | | | | | | | | |
| Average for OER | | | | | | | | | | | | | | |

^a Some categories' names have changed slightly over the years.

^b Disputed OER.

^c Average score of all OERs except disputed one, which is shaded. Averages have been rounded.

^d Category nonexistent until later years, or category discontinued.

^e The Comparison Scale is not actually numbered. In this row, "5" means the applicant was rated to be a "distinguished performer; give tough, challenging, visible leadership assignments." A "4" means the applicant was rated to be an "exceptional performer; very competent, highly respected professional."

^f The reviewer of this OER attached a separate page on which he assigned a separate comparison mark of 4.

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 requested an oral hearing before the Board. The Chairman denied the request under 33 C.F.R. § 52.31, and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The following comments appear in the applicant's OER for the period December 1, 199x, to May 31, 199x:

Underwent knee reconstructive surgery during this marking period which resulted in 5 months in a [REDACTED]. Despite extensive outpatient therapy, he was still able to adequately administrate the [REDACTED] program. . . .

Despite a prolonged medical g [REDACTED] and convalescence, [the applicant] kept the unit's [REDACTED] Program on track through regularly scheduled training and informal sessions with junior [REDACTED].

The Board notes that the applicant did not protest the presence of two other references to his knee surgery and convalescence in his OERs. However, the two other references are not so different from those disputed by the applicant as to affect the Board's decision in any way.

4. The Board finds that the comments in the disputed OER were permissible according to both the spirit and the letter of the law in Article 10.A.4.g. The words do not constitute medical "speculation" or "diagnosis" within their usual meaning. Furthermore, the rule was clearly intended to prevent selection boards from being prejudiced by officers' medical conditions. The Board does not believe that references to knee surgery and an extended period of convalescence per se would prejudice a selection board against an officer. Therefore, even if the comments did constitute "diagnosis," the references to the knee surgery did not by themselves make the applicant's record appear worse than it would have been without them and would not justify removal of the OER or of applicant's failure of selection. The fact that the regulation was later broadened to prohibit references to any medical "condition" does not alter this conclusion. Therefore, the Coast Guard did not commit error by including the contested comments in the applicant's OER.

5. Article 10.A.2.b.2.i.(1) of the current Personnel Manual provides that for “officers who are unable to fully perform due to illness, injury, pregnancy, etc. . . . commanding officers shall ensure that these individuals do not receive below standard evaluations strictly as a consequence of these circumstances.” Although Article 10.A.2.b.2.i.(1) was not in effect when the disputed OER was completed, the Board’s inquiry does not end there. Article 10.A.1.b. of the Personnel Manual, which was in effect at that time, states that “[c]ommanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Therefore, the Board must consider whether the applicant has proven by a preponderance of the evidence that the disputed OER was inaccurate or unfair as a result of his medical [REDACTED]

6. The applicant’s major duty during his [REDACTED] was safety training and management of the [REDACTED] safety program. Prior to the reporting period in question, the applicant had already been involved in the safety program for over two years. The fact that his supervisor chose to describe his performance of this duty as “adequate” rather than “excellent” or “superb” in the same sentence that he mentioned the applicant’s [REDACTED] does not prove that he was prejudiced against the applicant because of his [REDACTED]. Nor does it prove that the applicant’s medical condition prevented him from performing his duty better than “adequately” or that his limited opportunity to perform was not properly taken into account by his rating chain when it completed the OER. Furthermore, the disputed OER is not surprisingly worse than the OER for the immediately preceding reporting period, during most of which the applicant was not [REDACTED]. Therefore, the applicant has not proven by a preponderance of the evidence that he was unfairly downgraded because of his medical [REDACTED].

7. The applicant has not proved that the Coast Guard erred or committed injustice by including the disputed comments and OER in his record.

8. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

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

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