





poise and confidence during numerous xxx briefings to senior officers, impeccable uniform appearance. Maintains healthy lifestyle with regular exercise.

The applicant stated that he should have been assigned a mark of 5 (“excellent performer; give toughest, most challenging leadership assignments”) when compared with other officers of the same grade that the reporting officer has known throughout his career (block 9). The applicant was assigned a mark of 4 (“Good performer; give tough, challenging assignments”). The applicant also argued that the mark on the comparison scale in block 9 should be a 5, rather than a 4, because the average of all the other marks on the OER is 4.722, rounded up is a 5. Moreover, he stated that the block 9 comments describing his potential support a mark of 5. The comments describing the applicant’s potential were as follows:

Extremely valuable and talented member of MSO SFB Planning Team. Exceeded expectations in all assignments. Provided key port readiness training contributions. xxxxxxxxxxxxxxxxxxxxxx, recognized nationwide as the most effective, thorough & comprehensive manual for local PRC members. Always worked to improve operations & helped coordinate reserve/regular integration for port planning unit functions. Excels in critical thinking skills. Can be depended to respond and react well in any circumstances. Provided key information while serving on Reserve Officer Selection Board. Strongly recommended for promotion to CDR.

In support of his allegations, the applicant submitted a copy of his service record, with a report from the ROA officer who reviewed it. The applicant also alleged that neither his supervisor nor his reporting officer counseled him on the disputed OER.

### **Views of the Coast Guard**

On October 29, 2001, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief to the applicant.

With respect to the gaps in the applicant’s record, the Chief Counsel stated that it was the applicant’s responsibility to ensure the accuracy of his record. He stated that Article 10.A.2.c.2.i. of the Personnel Manual states that the reported-on officer has the responsibility of ensuring “that all days of commissioned service are covered by OERs. If an OER is missing or a gap in coverage exists, [the Reported-on Officer] informs the appropriate rating chain. The rating chain shall take necessary action to correct the discrepancy.” The Chief Counsel stated that steps would be taken to correct these gaps in the applicant’s record.

The Chief Counsel stated that even with the gaps in his record, the applicant was selected for promotion to lieutenant (LT) and LCDR. He stated that there were no OER gaps in the applicant’s record in close proximity to the applicant’s consideration for commander (CDR) by either the 1999 or 2000 CDR selection boards.

The Chief Counsel disagreed with the applicant that the comments on the disputed OER were inconsistent with the assigned marks. The Chief Counsel stated that the disputed numerical marks compare reasonably with the narrative comments contained in the associated blocks. Except for his interpretation of the comments, the applicant did not submit any evidence corroborating his contention that he should have received higher marks. The Chief Counsel stated that the applicant had failed to overcome the strong presumption that his rating officials acted correctly, lawfully, and in good faith in making their evaluation under the Coast Guard's Officer Evaluation System. Arens v. United States, 969 F.2d 1034, 1037 (1992).

The Chief Counsel noted that the applicant did not file a reply to the OER. The applicant's failure to submit a reply to the OER was an indication that he accepted the rating officials' characterization of his performance at that time. The Chief Counsel also noted that the applicant took advantage of the opportunity to communicate by letter with the 1999 CDR selection board. (The applicant also communicated by letter with the 2000 CDR selection board.)

The Chief Counsel stated that the applicant's supervisor gave him a copy of the disputed OER. The supervisor wrote the following in a signed statement attached to the advisory opinion:

My standard procedure is to provide a copy of their OER to the officer, give them time to read it and then make myself available for counseling. I distinctly remember giving [the applicant] a copy of his OER because of a comment he made about the number of 7s that should be on it due to his upcoming Commander selection board. [The applicant] is a steady performer who's very favorable OER reflects his performance. When he did not request a counseling session, I was not alarmed as I felt it unnecessary to counsel him on his performance, as it was satisfactory.

The Chief Counsel did not provide a nexus analysis, stating that since the application lacked merit any such analysis was considered unnecessary.

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

On January 14, 2002, the Board received the applicant's response to the views of the Coast Guard.

The applicant stated that gaps in a military OER record play a potential role during the selection board process. He argued that it is possible that the CDR selection board could have compared his record, which included periods not covered by OERs, against another officer with similar time in grade. He stated that no one knows how the CDR selection board treated the gaps in his record because selection board proceedings are secret. The applicant stated that the Coast Guard should not be allowed to argue that the gaps in his OER record were too remote to have impacted the CDR selection board.

In support of his claim that the gaps in his OER record were a factor in his failure to be selected for promotion to CDR, the applicant stated the Article 14.A.5.b. of the Personnel Manual states "In recommending each officer it considers, the [selection] board should compare him or her to the present grade and those in the next higher grade to determine how well the individual measures up to such officers according to the overall criteria the board established. If the [selection] board believes the officer has demonstrated by past performance, fitness, and potential to perform creditably those duties to which he or she reasonably might be assigned, the board should recommend him or her [for promotion]." He stated that Article 14.A.6.b. of the Personnel Manual requires that the selection board compare officers among themselves in accomplishing past assignments and potential for greater responsibility according to the criteria adopted by the selection board.

The applicant stated that he did not receive counseling on or a copy of his marks from the supervisor. In fact, the applicant stated that he was asked by the supervisor to write the comments for the OER and to leave the marks sections blank. He stated that the supervisor did not give him a copy of the OER or discuss it with him before sending it for review and signature by the reporting officer and reviewer. The applicant stated that the supervisor's action in this regard was wrong. He stated that Article 10-A-2.d(2)(e) of the Personnel Manual provides for "performance feedback to the Reported-on Officer upon that officer's request during the period or at such other times as the supervisor deems appropriate."

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10, United States Code, and the application was timely.

2. The short gaps in the applicant's military OER record existed prior to the convening of the 1999 and 2000 CDR selection boards. They were present in his record at that time. The applicant had a responsibility to review his record, and therefore, he either knew or should have known about this discrepancy. The applicant has failed to explain to this Board why he did not notice these gaps in his military record prior to the first CDR selection board. The applicant also failed in his responsibility to ensure that all periods in his military record were covered by OERs, as required by 10.A.2.c.2d. of the Personnel Manual. Notwithstanding the applicant's failure to ensure that he had a complete OER record, the Deputy General Counsel ruled in BCMR Docket No. 101-91 that "[Article 10.A.2h of] the Personnel Manual clearly places the primary onus of responsibility on the Commandant's administrative reviewers, rather than on the reported-on officer, to manage the officer evaluation system, maintain the records, and ensure completeness." The Chief Counsel has stated that the Coast Guard will correct these gaps in the applicant's OER record.

3. The applicant has not submitted sufficient evidence to show that the challenged marks on the disputed OER are inconsistent with the written comments and should be raised higher. The 4 in adaptability appears to be consistent with comments such as: “Strategically developed objectives to ID shortfalls & problems to address in future” and “worked within stringent budgetary and time lines to accomplish all goals projected.”

4. The 4 in speaking and writing appears to the Board to be consistent with such comments as: “Briefed officers of all grades . . . Fostered clear communication resulting in clarification of roles/missions of the xxx. . . . Accurately revised xxxxxx, which was praised as best in the nation.” While the applicant believes these comments describe accomplishments of a caliber that require a 5, it is the opinion of the rating chain that must be respected, unless the applicant produces sufficient evidence that the marks are erroneous, which he has not done.

5. Similarly, the Board finds that the comments with respect to developing others and health and well-being are not inconsistent with the 4s assigned to those categories. Again, unless the applicant submits persuasive evidence that the marks assigned in these categories should have been higher, the Board will not act to modify them. The Board finds that the applicant’s evidence, consisting mainly of his opinion, that the comments deserve higher marks is not sufficient to prove error or injustice with respect to the challenged marks.

6. The mark on the comparison scale, contrary to the applicant’s belief, is not based on an average of all the marks on an OER, but rather it is the reporting officer’s opinion of the applicant’s performance in comparison to all other LCDRs the reporting officer has known throughout his career. See Article 10.A.4.c.8 of the Personnel Manual. Therefore, unless the applicant can show that this reporting officer’s opinion of his performance, as compared with other LCDRs the reporting officer has known, is inaccurate, the result of bias or the result of some other consideration that should not have been included in the evaluation process, the Board will respect the judgment of the reporting officer.

7. Disagreement exists between the applicant and the supervisor whether the applicant requested a counseling session about the marks on the disputed OER. The applicant has the burden of establishing by a preponderance of the evidence that he requested a counseling session from the supervisor, which was refused. He has not met that burden. Even if he had met the burden, he has not offered any evidence that such a counseling session would have caused a change in the marks assigned. The applicant had a responsibility to seek counseling earlier in the reporting period to ensure that he was meeting his supervisor’s expectations. The ability to request counseling from the rating chain is available throughout the reporting period at the request of the reported-on officer or at the discretion of the supervisor. See Articles 10.A.2.d.(2)(e) and 10.A.2.(2)(f) of the Personnel Manual.

8. To obtain the removal of his failures of selection for promotion to CDR, the applicant must establish a causal connection between any errors found in his military record and his failures of selection for promotion to CDR before the 1999 and 2000 CDR selection boards. In determining whether a nexus exists, the Board applies the standards set forth in Engels v. United States, 230 Ct. Cl. 465 (1982). The standards are as follows: "First, was the claimant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that he would have been promoted in any event?" Engels at 470.

9. The Board finds that the applicant's record does not appear worse than it would in the absence of the errors. The Board found neither error nor injustice with respect to the challenged marks on the disputed OER. Therefore, the disputed OER was an accurate assessment of the applicant's performance and was properly considered by the 2000 CDR selection board.

10. It is unlikely that the applicant would have been selected for promotion in any event. Although there were three short periods for which there were no OERs in the applicant's record, the Board finds that his failures of selection for promotion to CDR should not be removed. In this regard, the applicant has failed to persuade the Board that the short periods of time for which there were no OERs in his record make it likely that he would have been selected for promotion had these periods been covered by OERs. These periods were early in the applicant's Coast Guard career, with the latest two-month period ending on July 31, 1991. The first CDR selection board to consider the applicant's record met over eight years later, in October 1999. In addition, as the Chief Counsel stated the applicant was selected for promotion to LT and LCDR with these gaps in his OER record. He has provided no evidence that the evaluation of his performance for these short periods would have been of a higher caliber than that which existed in his record when it was considered by the 1999 and 2000 CDR selection boards.

11. Accordingly, the applicant's request for relief should be denied.

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

**ORDER**

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

