

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-023

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

 **Deputy Chair:**

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 docketed on December 23, 2002, upon receipt of the applicant's application.

This final decision, dated September 25, 2003, is 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 remove an officer evaluation report (OER) for the period February 1, 1999, to June 4, 1999, from his record. The disputed OER contains many good evaluation marks and comments. However, the applicant received marks of 3 (on a scale of 1 to 7, with 7 being best) in the performance categories of "Judgment" and "Responsibility." These low marks were supported by the following narrative comments in blocks 8 and 10 on the OER:

... Displayed significant lapses in judgment and responsibility this period; allowed perception of inappropriate relationship with junior enlisted to continue despite counseling and unprofessional conduct with female peer precipitated sexual harassment grievance.
...

Highly intelligent and capable officer ... performance and potential well above average. Recent behavior, however, raises doubts with regard to maturity; on more than one occasion, despite personal counseling, member continued to engage in seriously questionable behavior; result is my loss of confidence in his credibility and all that entails. ... Upon documentation of sustained successful performance during second tour, and commensurate maturation, would recommend for promotion to O-3 w/his peers.

The applicant alleged that the marks and comments were unjust and inconsistent with the Officer Evaluation System (OES). He stated that he does not contest the fact that he displayed a lapse in judgment, engaged in an inappropriate relationship, and was counseled about the matter. However, he stated, Article 10.A.4.f. of the Personnel Manual prohibits a rating chain official from including a comment in an OER that emphasizes a third party's gender. He also alleged that his conduct was the subject of an investigation and that the Personnel Manual prohibits OER comments concerning conduct that is the subject of an investigation.

The applicant alleged that his command's investigation concluded that "inappropriate behavior was displayed by all parties involved" but that no further action was taken against the parties. He argued that his rating chain should not have referred to a third party's gender in his OER and should not have mentioned conduct that was the subject of "an administrative investigation that was eventually dismissed as inappropriate behavior precipitated by myself and the other party."

The applicant further alleged that the low marks in the OER were inconsistent with his overall performance, as shown by the higher marks in the other OERs he has received. He alleged that the disputed OER caused his failures of selection for promotion to lieutenant and consequent separation from the Coast Guard. He alleged that this outcome was inconsistent with this selection by the Coast Guard for a graduate school program. He stated that he fears that the OER will continue to negatively affect his career beyond the Coast Guard.

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy in May 199x, was commissioned an ensign, and assigned to a cutter as a deck watch officer. In his three semi-annual OERs as an ensign on the cutter, the applicant received some marks of 4 and many high marks of 5 and 6 in the various performance categories and marks of 5 on the Comparison Scales.¹

On November 21, 199x, the applicant was promoted to lieutenant junior grade (LTJG). In his first OER as an LTJG on the cutter, he received eight marks of 4, eight marks of 5, two marks of 6 and a mark of 5 on the Comparison Scale.

The second OER that the applicant received as an LTJG is the disputed OER in this case, covering his service on the cutter from February 1 to June 4, 199x. In it, he received the two low marks of 3 for "Judgment" and "Responsibility" with the negative

¹ The Comparison Scale is not actually numbered, but there are seven possible marks from which the reporting officer (RO) may select. In selecting a mark on the Comparison Scale, the RO compares the reported-on officer to all other officers of the same rank whom the RO has known. A mark in the third, fourth, or fifth positions on the scale indicates that the RO considers the reported-on officer to be "one of the many competent professionals who form the majority of this grade."

comments quoted above; eleven marks of 4, four marks of 5, and one mark of 6 with corresponding positive comments; a mark of 4 on the Comparison Scale; and his reporting officer's recommendation for promotion to lieutenant with his peers.

In June 199x, the applicant left the cutter and became the officer in charge (OIC) of a law enforcement detachment. In this position, he supervised a nine-member team assigned to Navy vessels and coordinated the team's law enforcement missions, including boardings for drug and immigrant interdiction. In the four semi-annual OERs he received for this service from June 199x through June 200x, the applicant's marks rose from mostly 4s and a Comparison Scale mark of 4 in his first OER as an OIC to mostly 6s and a mark of 6 on the Comparison Scale in his fourth OER as an OIC. In these OERs, the applicant also received his reporting officer's "strongest" recommendations for promotion. However, he was not selected for promotion to lieutenant by the selection board that met in 200x.

In June 200x, the applicant became a liaison officer to the commander of a Naval destroyer squadron. On the two OERs covering his service in this position through July 31, 200x, he received primarily marks of 6 and 7 in the performance categories and a mark of 6 on the Comparison Scale. He also received his reporting officer's "highest recommendation for accelerated promotion," and a recommendation to promote him "ahead of his peers!" These two OERs also show that he received a Coast Guard Achievement Medal on June 21, 200x, for his prior service as an OIC, and a Navy Achievement Medal on June 14, 200x.

The applicant failed of selection for promotion to lieutenant again in 200x. Therefore, having twice been passed over for promotion by lieutenant selection boards, he was separated from the Service on June 30, 200x.

VIEWS OF THE COAST GUARD

On June 16, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant only the partial relief of removing the word "female" from the disputed OER.

The Chief Counsel first argued that the application should be dismissed for untimeliness since it was submitted approximately three years and six months after the disputed OER was prepared. He argued that the Board should not waive the three-year statute of limitations.

Regarding the merits of the case, the Chief Counsel argued that, "[t]o establish that an OER is erroneous or unjust, an applicant must prove that the challenged OER was adversely affected by a clear, material error of objective fact, factors 'which had no business being in the rating process,' or a clear and prejudicial violation of a statute or regulation." *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*,

618 F.2d 11, 17 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96. He also argued that an applicant must overcome a “strong presumption that his rating officials acted correctly, lawfully, and in good faith in making their evaluations under the Coast Guard’s Officer Evaluation System.” *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

The Chief Counsel pointed out that the applicant has admitted “to the underlying conduct on which the contested OER is based.” He also pointed out that the applicant failed to exercise his right to prepare a formal reply to rebut the low marks and negative comments in the disputed OER in accordance with Article 10.A.4.g. of the Personnel Manual. He argued that under *Grieg v. United States*, 640 F.2d 1261, 1269 (Ct. Cl. 1981), the fact that the applicant’s OERs previous and subsequent to the disputed OER were much better is irrelevant to the question of whether the disputed OER is accurate and fair.

The Chief Counsel argued that the comment in the disputed OER concerning the sexual harassment grievance was permissible under Article 10.A.4.f.1. because no mention of the investigation was made in the OER. He alleged that the fact that the applicant’s commanding officer chose to document his lapses in judgment in an OER rather than by preparing a Letter of Censure or by charging him under the Uniform Code of Military Justice does not mean that the investigation absolved the applicant of wrongdoing. He alleged that the evidence of record “supports the conclusion that the challenged OER represents the honest professional judgment of those responsible for evaluating Applicant under the Coast Guard Officer Evaluation System.”

The Chief Counsel further argued that although the inclusion of the word “female” in one comment in the OER was technically incorrect, it did not cause any injustice to the applicant. He argued that the inclusion of the word “female” may actually “have prevented harm by precluding speculation regarding same-sex prohibited conduct. However, since it is unclear whether the word was used for this purpose, and since Applicant challenges the word’s inclusion in his official records, the Coast Guard is willing to recommend the administrative removal of the word female as requested.” However, the Chief Counsel argued, removal of the word “female” would “not change the content, context, or quality of the OER” and “[t]here is no demonstrable connection between the presence or absence of the word female and Applicant’s non-selection for promotion.” Therefore, he argued, the applicant’s failures of selection for promotion to lieutenant should not be removed from this record.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 16, 2003, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

Article 10.A. of the Personnel Manual governs the preparation of OERs. Article 10.A.1.b.1. provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." Each OER is prepared by the reported-on officer's "rating chain" of senior officers: the supervisor, the reporting officer, and the reviewer.

Article 10.A.4.c.4. instructs supervisors to assign marks and write comments for the first 16 performance categories on an OER as follows (virtually identical instructions are provided in Article 10.A.4.c.7. for reporting officers, who complete the rest of the OER):

(b) For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance and qualities against the standards--not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

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(d) In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her own observations, from those of any secondary supervisors, and from other information accumulated during the reporting period.

(e) Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

Article 10.A.4.c.8.a. instructs the reporting officer to complete the Comparison Scale on an OER by "fill[ing] 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."

Article 10.A.4.f., which covers OER restrictions, states that members of a rating chain may not

1. Mention [that] the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, PRRB, CGBCMR, or any other investigation (including discrimination investigations) except as provided in --> Article 10.A.3.c. Referring to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding that

proceeding first raised by an officer in a reply under --> Article 10.A.4.g. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.

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8. Place emphasis upon a third party by name, gender, religion, color, race, or ethnic background (e.g., Catholic lay minister, wrote award recommendation for African-American civilian, praised by RADM Smith, was a female role model).

Article 10.A.4.g. states an officer may submit a reply to any OER within 14 days of receiving it and have this reply filed with the OER. The purpose of the reply is to “provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official.”

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. The Chief Counsel argued that the application should be dismissed for untimeliness since it was filed more than three years after the disputed OER was prepared. However, in *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994), the court held that section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 “tolls the BCMR's limitations period during a servicemember's period of active duty.” Since the applicant in this case was not separated from active duty until June 30, 2003, his application was clearly filed before the BCMR's three-year statute of limitations began tolling.

3. Absent evidence to the contrary, rating officials are presumed to have acted correctly, lawfully, and in good faith in preparing officers' OERs. 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The applicant did not allege or submit any evidence to indicate that any comment in the disputed OER is untrue.

4. The applicant alleged that it was erroneous and unfair for his command to mention a matter that was the subject of an investigation that did not result in any punitive action being taken (other than the documentation of his actions in the disputed OER). However, Article 10.A.4.f.1. of the Personnel Manual expressly allows rating officials to comment on an officer's conduct that is the subject of an investigation. The only restriction is that the investigation itself may not be mentioned. The disputed OER does not mention any investigation of the applicant's actions.

5. Furthermore, the comments that refer to his inappropriate behavior are sufficiently specific to support the two low marks of 3 in the categories "Judgment" and "Responsibility," as required under Article 10.A.4.c.7. of the Personnel Manual. In addition, the Board is not persuaded that the decision of the applicant's commanding officer to document his inappropriate conduct in an OER rather than charging him under the Uniform Code of Military Justice or preparing a Letter of Censure constitutes an injustice. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the low marks and comments concerning in the disputed OER are erroneous or unjust.

6. The applicant alleged, and the Chief Counsel admitted, that the use of the word "female" in the disputed OER violated Article 10.A.4.f.8. of the Personnel Manual by emphasizing the gender of a third party. The applicant argued that because of this error the entire OER should be removed from his record. However, in BCMR Docket No. 151-87, it was held that "an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material." In this case, the Board finds that the redaction of the word "female" from the disputed OER is a very simple correction. The Board finds no basis for removing the entire OER.

7. The applicant alleged that the errors in the disputed OER caused his failures of selection for promotion to lieutenant and, therefore, his separation from the Coast Guard. Because the Board finds that the inclusion of the word "female" in the OER was a technical violation of Article 10.A.4.f.8. of the Personnel Manual, it must consider whether the applicant's failures of selection should be removed because the applicant's record contained the error when it was reviewed by the lieutenant selection boards in 200x and 200x.

8. In *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982), the Court of Claims held that the BCMR should decide whether an officer's failures of selection for promotion should be removed by answering two questions: "First, 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? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?" The Board finds that the inclusion of the word "female" in the disputed OER was a harmless error. As the Chief Counsel argued, if the prohibited word had any effect at all on the selection board members, it is likely to have been positive rather than negative since the use of the word "female" might have prevented speculation about same-sex sexual harassment. Therefore, the Board finds that the applicant's record was not prejudiced by the erroneous inclusion of the word "female" in the disputed OER, and the removal of the applicant's failures of selection is not justified.

9. Apart from the negative comments and two low marks in the disputed OER, the applicant's military record is excellent. It is clear from the reporting officer's comments in block 10 of the OER that he did not intend the matter to be career-ending and hoped that further excellent performance by the applicant would repair his career. Moreover, it is clear from the applicant's subsequent OERs that he made every effort to meet and exceed his next commands' high expectations. However, in choosing officers for promotion, selection boards must select from among many highly qualified officers, and there is no evidence in the record that the applicant was more qualified than the officers who were selected for promotion. Moreover, under 14 U.S.C. § 261, Congress has made the deliberations of selection boards entirely confidential and not subject to scrutiny by this Board.

10. Accordingly, apart from the redaction of the word "female" from the disputed OER, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall redact the word "female" from block 8 of the OER covering his performance from February 1, 199x, to June 4, 199x.

No other relief is granted.

