

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-099

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on February 23, 2007, upon receipt of the completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 15, 2007, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct the reporting officer's section of his officer evaluation report (OER) for the period June 1, 2003, to July 23, 2004. During the first three months of this reporting period, the applicant was serving on active duty under Title 10 orders. A Reserve officer, he was released to inactive duty on September 30, 2003. He asked the Board to correct the disputed OER by raising the numerical marks he received for "Judgment" and "Responsibility" from 3s to 4s (7 is best); by raising his mark on the comparison scale from the third spot, which denotes a "fair performer," to the fourth spot, which denotes a "good performer"; and by replacing the following negative comments by the reporting officer with more suitable comments prepared by the applicant's supervisor, his current command, or the Board:

... His overall adaptability was challenged, however, by his recall under Title 10 orders & initial lack of understanding/support for the MSO's Port Security roles/authorities/mission.

... Demonstrated commitment to service success after initial period of not understanding/supporting CG role as Federal Maritime Security Coordinator & COTP authority for Homeland Security: engaged in written exchange w/peer that actively disparaged CG PS mission, but following education period came to understand the importance of the service's role in the maritime environment, including shoreside port facilities. Self assured to a fault ...

A decent performer who may, with guidance and example, continue to grow into a good leader. Needs to recognize that due to military nature of CG, missions and assignments are often contrary to personal desires yet must still be performed & performed well. Similarly, needs to fully understand that CG policies must be supported, even when unpopular or difficult. Recommend consid-

eration for promotion only with peers, under best-qualified review process. Continued assignments should utilize civilian LE skills & knowledge. Recommend continuation at this unit until end of tour, then assignment to a similar unit to facilitate professional/personal growth as an officer.

APPLICANT'S ALLEGATIONS

The applicant stated that upon his request, the Personnel Records Review Board (PRRB) has already corrected several significant factual errors in the supervisor's portion of the disputed OER. He stated that the errors were inserted after his supervisor prepared and forwarded the OER to the reporting officer, LCDR [M], who was the Executive Officer of his unit. As an example, he noted that whereas the supervisor reported his primary duty to be "Assistant Chief, Port Security Department," and the PRRB confirmed his title, the OER that was ultimately forwarded to the Coast Guard Personnel Command (CGPC) by the commanding officer of his unit, who served as the reviewer of the OER, stated that his primary duty was "Assistant Section Chief, Weekend Duty Team." In support of his allegation, the applicant submitted a copy of the decision of the PRRB, which found the following:

There are inconsistencies between the version of the OER submitted by the supervisor and the final validated version of the OER in the applicant's official record. The supervisor documented that her comments and numerical marks were changed without her concurrence from those she submitted to the reporting officer. Coast Guard policy prohibits the reporting officer from directing an evaluation mark or comment be changed on the OER. Additionally, the supervisor indicates that she was directed by the reporting officer to sign an incomplete version of the final OER, which is inconsistent with Coast Guard policy. ... OES policy was not followed in this case.

The PRRB ordered the Coast Guard to replace the supervisor's section of the OER with the marks and comments originally prepared by the supervisor but did not order any changes to the reporting officer's section of the OER.¹ The decision of the PRRB includes a sworn statement from the applicant's supervisor, who wrote that the applicant served as the Assistant Chief of the Port Security Department and that, although the department tripled in size during the first few months of the reporting period, the applicant "met that challenge head on." The supervisor also wrote the following:

In April of 2004, I submitted an Officer Evaluation Report for [the applicant]. The numbers I assigned for marks ranged from a couple of "4s," mostly "5s" and a couple of "6s". I did not assign [him] a mark of "3" in any category. When the final OER was printed, the Executive Officer, LCDR [x], brought me page two to sign and there were no marks assigned. LCDR [x] did not give me the opportunity to review the OER prior to signing. In fact, he did not relinquish the document while I signed it. Given the command climate at the time, I don't believe that I would have been permitted to review the OER even if I had asked. Several weeks later, I received [the applicant's] copy of the submitted OER and discovered that he had been given numerous "3s" without my knowledge or concurrence. Edits were also made to the comments that I had provided for blocks 3, 4, and 5. A copy of my original input is attached to this statement for your review and comparison. ... [The applicant] did an outstanding job as the Assistant Chief of Port Security and as an officer assigned to MSO He did not deserve the OER that was given him.

¹ However, the PRRB's recommendation, which was approved by the Acting Deputy Director of Personnel on June 19, 2006, has apparently not yet been implemented since the official Personal Data Record received by the Board from the Coast Guard contains the version of the OER that describes the applicant's title as an "Assistant Section Chief, Weekend Duty Team," rather than "Assistant Chief, Port Security Department."

The applicant argued that the reporting officer's section of the disputed OER should be corrected, as well as the supervisor's section, because it contains low marks and negative comments, whereas the PRRB found he had been a "consistently good performer." He alleged that the actions of the reporting officer in making unauthorized and inaccurate negative changes to the supervisor's part of the OER indicate that the OER section prepared by the reporting officer was "tainted with negative bias." Therefore, he asked the Board to raise the low marks and remove the negative comments from the reporting officer's section of the OER and replace the comments with more appropriate comments about his performance.

The applicant submitted a copy of his supervisor's original input for the OER, which contains significantly better marks and comments than the OER that CGPC received and validated on August 6, 2004, and a copy of a Commandant's Letter of Commendation, which authorizes him to wear the ribbon bar for his outstanding service on active duty from March through September 2003.

VIEWS OF THE COAST GUARD

On June 25, 2007, the Judge Advocate General of the Coast Guard forwarded to the Board a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC) and asked the Board to accept it as the Coast Guard's advisory opinion.

CGPC stated that under Article 10.A.2.g.2.b. of the Personnel Manual, an officer is disqualified from serving on another officer's rating chain in any "situation where personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation." CGPC stated that "[b]ased upon the inconsistencies noted in the PRRB application and final decision, it can be concluded that the OER rating chain beyond the supervisor should be disqualified. The procedural irregularities on the part of the OER chain raise a 'substantial question as to whether the reported-on officer [received] a fair, accurate evaluation.'"

CGPC noted that the comments in the reporting officer's section of the OER "are not in alignment with the observations presented by the supervisor and are inconsistent with the applicant's overall performance as documented in his record and may represent a bias." In addition, CGPC noted that in prior and subsequent OERs, the applicant has received above-standard marks and supporting comments and that his record contains no documentation of any performance or disciplinary problems.

CGPC stated that there is no alternate reporting officer or reviewer who directly observed the applicant's performance and could prepare a substitute OER, and there is no policy provision for any other entity to prepare new written comments. Therefore, CGPC recommended, "given the nature of irregularities in the rating chain and procedural errors, and lack of suitable alternate rating chain, the Coast Guard recommends that the OER for the period June 1, 2003, through July 23, 2004, be replaced with a report for continuity purposes, pursuant to [Article 10.A.3.a.5. of the Personnel Manual]."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 24, 2007, the applicant responded to the Coast Guard's advisory opinion by concurring with CGPC's recommendation that the disputed OER be removed and replaced by one prepared for continuity purposes only. He also noted that he had received a Commandant's Letter of Commendation, which should be noted as an attachment to the continuity OER as well.

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 10 U.S.C. § 1552. The application was timely.

2. Article 10.A.1.b.1. of the Personnel Manual provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." The applicant alleged that the negative marks and comments in the disputed OER are the result of bias on the part of members of his rating chain. To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by a "misstatement of significant hard fact," factors that "had no business being in the rating process," or a "clear and prejudicial violation of a statute or regulation."² The Board must begin its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that the OER was prepared "correctly, lawfully, and in good faith."⁴

3. Under Article 10.A.2.d.2.h. of the Personnel Manual, supervisors are supposed to complete their section of an OER before forwarding it to the reporting officer. Under Article 10.A.2.e.2.c., a reporting officer "shall return a report for correction or reconsideration, if the Supervisor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer may not direct that an evaluation mark or comment be changed (unless the comment is prohibited under Article 10.A.4.f.)." In light of the supervisor's sworn statement and the decision of the PRRB, the Board finds that the applicant has proved by a preponderance of the evidence that his rating chain violated these regulations in two significant respects: First, the reporting officer required the supervisor to sign an incomplete version of the OER in which the marks and comments she prepared had been removed and/or altered; second, either the reporting officer or the reviewer changed the marks and comments in the supervisor's section of the OER for the worse without her knowledge or concurrence.

4. The applicant argued that his reporting officer's improper conduct in making unauthorized and inaccurate negative changes to the supervisor's section of the OER proves that

² *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 F.2d 704 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96.

³ 33 C.F.R. § 52.24(b).

⁴ *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 reporting officer's own section of the OER was "tainted with negative bias." The Coast Guard has admitted that the "procedural irregularities on the part of the OER chain raise a 'substantial question as to whether the reported-on officer [received] a fair, accurate evaluation,'" and so the reporting officer and reviewer of the OER should be disqualified as members of his rating chain pursuant to Article 10.A.2.g.2.b. of the Personnel Manual. The Board agrees with the Coast Guard that the strange and obviously improper violations of the OER regulations by the applicant's reporting officer and/or reviewer—who were the Executive Officer and Commanding Officer of his unit—raise a "substantial question as to whether the reported-on officer [received] a fair, accurate evaluation." Therefore, in accordance with Article 10.A.2.g.2.b., the reporting officer and reviewer of the OER should be disqualified as members of his rating chain.

5. The conduct of the applicant's reporting officer and/or reviewer in preparing his OER violated several sections of the Personnel Manual and casts significant doubt on the propriety of their motivations in skirting proper OES procedures. The Board finds that the preponderance of the evidence shows not only that the OER as a whole was prepared in violation of regulations to the prejudice of the applicant but also that it was negatively affected by factors that "had no business being in the rating process."⁵

6. The applicant originally asked the Board to remove the negative marks from the OER and to replace the negative comments with more positive comments. The Coast Guard recommended removing the entire OER and replacing it with one prepared for continuity, and the applicant has concurred in that recommendation. 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 prejudicial effect of the OES violations is not clearly delineated but is likely pervasive and that it is "impossible or impractical to sever the incorrect/unjust material from the appropriate material." Therefore, the disputed OER should be removed from the applicant's records and replaced with one prepared for continuity purposes only.

7. Under Article 10.A.3.a.5. of the Personnel Manual, continuity OERs are prepared when "an OER is required by these instructions, but full documentation is impractical, impossible to obtain, or does not meet officer evaluation system goals." Article 10.A.3.a.5.d. states that on a continuity OER, there are no performance comments and, instead of numerical marks, the performance dimensions are marked as "not observed." However, Article 10.A.3.a.5.d. requires that section 2 of the OER form, which is for the "Description of Duties" and the notation of any attachments to the OER, be properly completed in accordance with Articles 10.A.4.c.2. and 10.A.4.c.3. The latter article states that in preparing an OER, any award listed under Chapter 1.A.17. of the Medals and Awards Manual that is received during a reporting period should be listed as an attachment in section 2 of the OER form. The Commandant's Letter of Commendation ribbon bar was awarded to the applicant on September 30, 2003, during the reporting period for the disputed OER, and that award is listed in Chapter 1.A.17. of the Medals and Awards Manual. Therefore, the award would normally be listed in section 2 of his continuity OER, along with the description of his duties for the period.

⁵ *Germano*, at 1460.

8. Accordingly, relief should be granted by removing the disputed OER from the applicant's record and replacing it with one prepared for continuity purposes only in accordance with Articles 10.A.3.a.5., 10.A.4.c.2., and 10.A.4.c.3. of the Personnel Manual, including the Description of Duties originally provided by the supervisor as amended by the PRRB in section 2 on the OER form with a notation of the applicant's receipt of the Commandant's Letter of Commendation ribbon bar on September 30, 2003.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted as follows:

- His officer evaluation report for the period June 1, 2003, to July 23, 2004, shall be removed from his record and replaced with one prepared “for continuity purposes only” in accordance with Article 10.A.3.a.5.d. of the Personnel Manual.
- Section 2 of this new continuity OER shall include the Description of Duties received from his supervisor (which indicates that his primary duty was “Assistant Chief, Port Security Department”) and amended by adding the phrase “Title 10: 120 days,” in accordance with the relief granted by the Personnel Records Review Board, as well as a notation of his receipt of the Commandant’s Letter of Commendation ribbon bar on September 30, 2003, in accordance with Articles 10.A.4.c.2. and 10.A.4.c.3. of the Personnel Manual.

