

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-124

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

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 April 13, 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 January 24, 2008, is approved and 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 raise his performance mark for “Professional Competence” on his officer evaluation report (OER) for the period June 1, 2003, to June 7, 2004, from a mark of 3 to a mark of 4 or 5.¹ The applicant alleged that his test scores and flight evaluations show that he met the written standard for a mark of 4 or higher on the OER form. Block 3.e. of the disputed OER appears as follows:

<p><u>Professional Competence</u></p> <p>Ability to acquire, apply, and share technical and administrative knowledge and skills associated with description of duties. (Includes operational aspects such as marine safety, seamanship, airmanship, SAR, etc., as appropriate.)</p>	1	<p>Questionable competence and credibility. Operational or specialty expertise inadequate or lacking in key areas. Made little effort to grow professionally. Used knowledge as power against others or bluffed rather than acknowledging ignorance. Effectiveness reduced due to limited knowledge of own organizational role and customer needs.</p> <p style="text-align: center;">○ ○</p>	3	<p>Competent and credible authority on specialty or operational issues. Acquired and applied excellent operational or specialty expertise for assigned duties. Showed professional growth through education, training and professional reading. Shared knowledge and information with others clearly and simply. Understood own organizational role and customer needs.</p> <p style="text-align: center;">● ○</p>	5	<p>Superior expertise; advice and actions showed great breadth and depth of knowledge. Remarkable grasp of complex issues, concepts, and situations. Rapidly developed professional growth beyond expectations. Vigorously conveyed knowledge, directly resulting in increased workplace productivity. Insightful knowledge of own role, customer needs, and value of work.</p> <p style="text-align: center;">○ ○</p>	7
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¹ Coast Guard officers are rated in numerous categories of performance on a scale of 1 to 7, with 7 being best. A middle mark of 4 is the “expected standard of performance.” Personnel Manual, Art. 10.A.4.c.4.g.

The following written comment in the OER supports the mark of 3: “Displayed lack of motivation & leadership to upgrade to Aircraft Cdr, well beyond the normally expected timeline of peers; aviation status terminated, reassigned to duties not involving flight ops.”

The applicant stated that he was designated as an HH-60 First Pilot on December 4, 2002, and that the “normal progression from HH-60 First Pilot to Aircraft Commander is 18 months.” By May 20, 2003, he alleged, less than six months after he became a First Pilot, he had submitted a request form to be upgraded to Aircraft Commander and had “started working to complete other prerequisites.” He argued that because he submitted the request form and started working to complete the prerequisites less than six months after becoming a First Pilot, the comment in the OER that he “[d]isplayed lack of motivation & leadership to upgrade to Aircraft Cdr, well beyond the normally expected timeline of peers” is clearly erroneous and unfair. The applicant further alleged his motivation during the reporting period is proved by the fact that in July 2003, he completed the Aircraft Commander Upgrade Syllabus Open Book Exam; in September 2003, he completed the air station’s Closed Book Exam; and in November 2003—less than a year after becoming a First Pilot—he completed the National Search and Rescue Fundamental Course. In support of his allegations, the applicant submitted the following documents:

- An undated copy of his Aircraft Commander Upgrade Syllabus Open Book Exam, which indicates that he scored 92% correct.
- An “Annual NVG Check” dated August 13, 2003, in which the instructor wrote, “Excellent flight by [the applicant]. Good knowledge of identifying simulated emergencies and providing the correct bold-faced response. Very comfortable with the NVG environment. Great job, flew all maneuvers and handled simulated emergencies at the AC level.”
- A critique of the applicant’s flying dated August 24, 2003, in which the instructor wrote that during a flight to pick up and deliver a law enforcement team to a hijacked Cuban vessel, the applicant “did a great job of VFR navigating across the state and used his ‘Army’ training to point out all towers and hazards en route. ... We discussed different options with the crew as to our mission and [the applicant] provided good input and recommendations.”
- A second critique dated August 24, 2003, in which the instructor wrote that during a night flight to Cortez with calm winds and calm seas, the applicant “[f]lew all maneuvers to standard on first attempt except the MATCH. ... Recommended for the AC syllabus DN!”
- A third critique dated August 24, 2003, in which the instructor stated that during a night flight to practice rescuing a swimmer, the applicant used “[g]ood visual cues for hoisting. Well-prepped for brief, knew procedures well, and nice aircraft control during swimmer evolutions. All hoists completed the first time to the level of an AC. Throughout flight, nice acft control.”
- A fourth critique dated August 24, 2003, in which the instructor wrote that in a heavy landing exercise, the applicant performed “[a]ll maneuvers ... to the S level first time and

with excellent aircraft control. Discussed limits, EP and techniques for flying in heavy gross weight conditions.”

- A copy of an “A/S Xxxxxxxx Closed Book Exam” dated September 16, 2003, shows that he scored 98% correct.
- A critique of the applicant’s performance dated September 24, 2003, in which the instructor stated that the applicant showed “above average knowledge of the Tactical Navigation system! Easily worked through the search and DF exercise. Nice Job.”
- A second critique dated September 24, 2003, in which the instructor wrote about an “external load” carrying exercise, “Excellent flight. Used good judgment to go around when he realized the approach was too steep and we risked getting into power settling.”
- A third critique dated September 24, 2003, in which the instructor wrote about a “rough area/stops” exercise, “Nice job. Almost as if you have been in down these tactically before.”
- A fourth critique dated September 24, 2003, in which the instructor wrote about a “day land” exercise, “An excellent pattern flight for [the applicant]. Great systems knowledge. Excellent aircraft control and maneuver knowledge. Needs a little more practice on Autos. AFCS off flight was above average.”
- A critique of the applicant’s performance dated October 2, 2003, in which the instructor wrote that it was an “[e]xcellent flight overall. Most of maneuvers were to the “S” level. [The applicant] has trouble with station keeping in calm winds in both DIW hoist and RS ops. He tends to select reference points too far away from the aircraft. Try using foam about 50 feet at the 2 o’clock.”
- An evaluation of the applicant’s performance during his HH-60J Proficiency Course, dated October 27, 2003, in which the instructor wrote that the applicant

arrived for his Pcourse motivated and ready to learn. All maneuvers were completed to the appropriate level, though with some difficulty. It was evidence that [he] spent some time preparing for his Pcourse because he was well versed in all procedures. I was also impressed with how open and receptive he was to input from both his instructor and stick buddy, and his effective use of CRM. We had the opportunity to discuss and dissect many systems and how each EP affects its associated components. As far as stick and rudder skills, I noticed [he] had some difficulty with his autos and matches. I realize these are very difficult to do in the simulator, but these were not the normal problems we see with those maneuvers. After watching him extensively, I noticed he was not using an effective instrument scan (i.e. – he wasn’t looking at the right instrument at the right time). [He] was making corrections when he was off parameters, but was not catching the error in a timely manner and over correcting. Knowing this, I gave [him] some scanning techniques and we tried to nail these two maneuvers down on the last day. I am happy to say that he greased almost all of his autos and shot some of the best matches that I have seen in the sim[ulator] to date – nicely done! Before we started this week, I noticed [he] is still qualified as an FP [First Pilot] at Airsta Xxxxxxxx. I kept this in mind over the entire week to use as a benchmark for consideration to AC [Aircraft Commander]. All things considered, only after [he] gets a little more practice

doing some night matches and work developing a good instrument scan would I consider him for the AC syllabus. I do, however, believe it can be done with some work. Great effort this week!

- A critique of the applicant's performance dated November 3, 2003, in which the instructor wrote about a "night land" exercise, "Great Flight – Solid acft control with smooth control inputs. Quizzed [the applicant] on EP's, systems and limits throughout flight. His knowledge level was up to par. No deficiencies noted in maneuvers execution or Dash-1 knowledge. All maneuvers flown to the S level first attempt except the min speed approach."
- A letter dated November 4, 2003, congratulating the applicant for having successfully a correspondence course called Search and Rescue Fundamentals.
- A critique dated November 6, 2003, in which the instructor wrote that during an "airways trainer" flight, the applicant

completed many items that were incomplete on previous IFR trainer with [LCDR M]. Preflight briefing asserted that [the applicant] was "acting AC" and I would be "acting CP" to offer opportunity to demonstrate decision making capabilities. I only interjected when safety or deviation from requirements was necessary. Most items completed to required level. However some lapses occurred. Initial flight planning was completed to required levels with minor discrepancies (see specific tasks). Enroute portion of flight was mostly uneventful (see comment on clearance). Never completed ILS due to aircraft equipment malfunction (see specific comment on CRM). Completed NDB at Zepherhills Airport (see specific comments on NDB). VFR return was completed to required levels.

- A critique of the applicant's performance dated November 14, 2003, in which the instructor wrote about a "NVG EP Review" that the

[f]light began with an explicit brief that [the applicant] would act as the AC to demonstrate ability to maintain situational awareness, provide leadership, and make sound decisions. During entry into MacDill RWY 04 traffic pattern, tower required us to enter a mid-field downwind (stated twice). [The applicant] elected to enter downwind at the base leg point. Tower requested "ident" to confirm our position and advised of two aircraft on final. With T-38 traffic on short final and second T-38 traffic on 8 nm final, [the applicant] began to turn base at approx 5-6 nm final. [I] stated "turn right now" to return to downwind heading. Rest of approach was uneventful. [The applicant] failed to comprehend the reason for tower's request to enter at mid-field. He then failed to communicate to the aircrew his intent or level of understanding of the current situation. The situation was resolved safely and with adequate safety margins but required [my] intervention. Extensive post flight debrief discussed this and other less glaring CRM breakdowns. Bottom line: AC must never lose SA [situational awareness] or immediately take steps to regain it. ... Stick and rudder skills were at required levels. CRM was not at AC levels (see specific task comments). EP/systems/procedural knowledge generally good with some exceptions.

- A letter dated November 25, 2003, indicating that the applicant had completed the requirements in the Air Operations Manual for the HH-60J Proficiency Course on October 31, 2003; for Rotary Wing Instrument Check on October 29, 2003; and for CRM Refresher on October 29, 2003.

SUMMARY OF THE APPLICANT'S RECORD

On August 12, 1999, the applicant was appointed a lieutenant junior grade in the Coast Guard Reserve. He had previously served on active duty in the Army for almost ten years, during which he trained as a helicopter pilot, accumulated more than 1000 flight hours, advanced to the Army equivalent of an Aircraft Commander, and was promoted to the rank of captain (O-3). Based on his experience, the applicant was assigned to a Coast Guard air station as a helicopter (HH-60J) copilot and began serving on an extended active duty.

On the applicant's first OER as a helicopter copilot, for the period August 12, 1999, through July 31, 2000, he received all marks of 4 in the performance categories, including "Professional Competence," and the comparison scale, except for one mark of 5 for "Speaking and Listening" and one low mark of 3 for "Responsibility," due to "not arriving at the appointed place of duty on time." The written comments about his performance include the following:

- "Notable aviation/[public affairs officer] skills & knowledge. Flew 163.2 H60 mishap-free flight hours, 53 sorties, 7 SAR cases."
- "Supervisor's marks reflect the best performance of the period, not the overall performance."
- "Showed progress as copilot: aggressively pursued, obtained NVG Level II qualification; qualified as ODO."
- "[The applicant] has the potential and the skills to be a successful officer and aviator. Minimum performance standards were not met during the first few months assigned at this unit. Had a slow start meeting expectations even after numerous counseling sessions. Possesses good flight skills and operational awareness, performance while on deployment lauded by deployed H-60 Aircraft Commander. Coming on speed as a Coast Guard Officer, presently performing at the LTJG level. I expect that based on observed performance towards the end of this reporting period [he] will become a fully productive and reliable member of Team Coast Guard."

On the applicant's second OER as a helicopter copilot, for the period August 1, 2000, to January 31, 2001, which was prepared by a new Supervisor and Reporting Officer, he received mostly marks of 4 in the performance categories, including "Professional Competence," five marks of 5, and a mark in the fourth spot on the comparison scale. The supporting comments include the following:

- "Solid aviation skills. Flew 180+ hours including 21 SAR cases resulting in 2 lives saved. ... played integral role in fugitive hunt after smugglers abandoned vsl ..."
- "[C]ontinued to solidify and expand reputation as a trusted and operationally effective pilot."
- "Sound judgment in cockpit decision making; while engaged in International SAR/LE; evaluated risks associated with rough area landings, reduced exposure, completed mission and maintained safety of aircraft & crew. Deployed Aircraft Commanders praised thoroughness and initiative shown coordinating missions with OPBAT controllers geographically remove from deployed site. Astute attention to detail on preflight inspection identified incorrect installation of engine cowling; prevented potential aircraft damage/inflight emergency."

- “Progressing steadily as an aviator; showed strong interest/ability in growing pilot role beyond already considerable stick and rudder skills to broader mission mgmt issues; will be ready for First Pilot upgrade soon. I saw purposeful improvement in approach & attentiveness to duties throughout the period; began by waiting to be told what to do & tending to let deadlines slip, ended with more diligent responsiveness & several notable examples of leadership initiative. ... I expect continued aviation/admin challenges will be easily met; clear potential to succeed as O3 [lieutenant].”

On the applicant’s third OER as a helicopter copilot, for the period February 1 through June 30, 2001, he received five marks of 4 and thirteen marks of 5 in the performance categories, as well as a mark of 5 for “Professional Competence” and a mark in the fifth spot on the comparison scale. The supporting comments include the following:

- “Notable aviation skills. Flew 62 sorties totaling over 180 mishap-free flight hours. Efforts crucial to successful completion of 12 SAR cases resulting in 2 lives saved ... Completed NVG upgrade flight syllabus; raised own qualifications to highest level for night aided operations.”
- “Steadily progressing aviator abilities demo’d on several notable SAR/LE cases.”
- “[The applicant] showed strong determination to exceed expectations & actively expand knowledge/quals in prep for increased responsibility. Balanced approach to aviation & collateral duties ensured robust professional growth in both arenas. Info Tech continues as an area of high personal interest/ability offering opportunity for specialization. ... Progressing nicely as an aviator with obvious motivation and talent. I strongly recommend promotion to O3.”

On the applicant’s fourth OER as a helicopter copilot, for the period July 1, 2001, through January 31, 2002, he received ten marks of 4 in the performance categories, including “Professional Competence,” eight marks of 5, and a mark in the fourth spot on the comparison scale. The supporting comments include the following:

- “Flew over 140 flight hrs on a wide variety of missions including 6 SAR cases resulting in 2 lives saved. ... Played integral role in complex pursuit of smuggling suspect engaged by multiple government agencies. Provided vital backup to Acft Cmdr; rapidly located safe landing site when suspects grounded vessel ... Vigilant situational awareness during night boat hoist trng averted likely mishap; observed Acft Cmdr’s unintentional descent, assertively took control of acft to prevent collision with vessel.”
- “Airmanship & positive interaction with aircrews contributed to ops success. Comfortable and earned my full trust in copilot role but evidence of efforts to show skill/knowledge for FP [first pilot] upgrade was limited.”
- “Notable initiative in operational aspects of duties; stepped up readily for missions & deployments. Evaluated risks intuitively as ODO and copilot, applied ‘assertiveness with respect’ in recommending courses of action, keeping superiors informed, and even coming on flight controls autonomously when needed to ensure safety when acft cmdr experienced vertigo during night hoist.”
- “[The applicant] is a capable pilot and officer with clear potential. Solid performance in operational flying & OPCEN watches ... Effort in expanding horizons in aviation & collat-

eral duty knowledge/professionalism appeared to plateau and retrograde toward minimum required this period. Has intellect/skills to upgrade to FP and shoulder more responsibility if matched in kind w/ more robust motivation displayed previously. ... Fully capable to succeed as O3

On the applicant's fifth OER as a helicopter copilot, for the period February 1 through July 31, 2002, which was prepared by a new Supervisor and Reporting Officer, he received twelve marks of 4 in the performance categories, including "Professional Competence," six marks of 5, and a mark in the fourth spot on the comparison scale. The supporting comments included the following:

- "Solid performing aviator & officer. Flew 130 hours, including 16 on SAR & 45 on LE resulting in 4 lives saved. Excellent performance on Stan check & exam: check pilot praised that 'airwork far exceeded copilot level,' scored 96% on written exam; selected for entry into First Pilot syllabus. Superbly planned night medevac 250 nm offshore ..."
- "Steady, concerned team member readily deployed on short notice to allow fellow pilot to attend to medical emer at home ... Obtained CG mentoring training to expand leadership skills; put knowledge to immediate use."
- "[The applicant] is progressing as a copilot. Performed well on recent standardization check/exam & now in First Pilot syllabus."
- "Possesses capable aviation and leadership skill, and ability to accomplish assigned tasks. ... Clearly has the potential to provide bigger and better results as a pilot and carrying out collateral duties yet motivation is lacking to employ considerable intellect and interpersonal skills. When directly tasked and challenged shows the sparkle and organizational skills needed to get things done. I believe is fully capable of succeeding as an O-3 but high performance without close supervision must be forthcoming. Recommended for promotion with peers."

The applicant was integrated into the regular Coast Guard on May 25, 2002, and promoted to lieutenant on August 14, 2002. On his first OER as a helicopter First Pilot, for the period August 1, 2002, through May 31, 2003, the applicant received ten marks of 4 in the performance categories, including "Professional Competence," eight marks of 5, and a mark in the fourth spot on the comparison scale. The supporting comments include the following:

- "Employed resource maturely, prosecuted SAR/LE cases as pilot & ODO w/ admirable results ... Flew 270+ hrs, deployed 49 days, 10 SAR cases & 45 LE missions- saved 5 ... professional aviation skills growing steadily, first pilot upgrade was well deserved, mature expertise in medevac of child from a ship's confined hoist area w/ inop acft stabilization equip."
- "Displayed leadership skills & concern for others; readily accepted duties on holidays & weekends; filled short notice flights. ... Sought add'l OCONUS deployments. ... Positively controlled H-60 operational/training flights; directed crews through all evolutions – openly accepted feedback & adjusted mission profile as appropriate. ... Led by example—arrived in maintenance control one hour prior to flights to review aircraft & logs & brief crews for flts/missions."

- “[The applicant] completed a number of important tasks this rating period, including upgrading to First Pilot. ... Showed improvement in the ability to accomplish assigned tasks without supervision.”
- “Clearly has the skills and judgment to assume greater leadership roles, assume larger responsibilities and upgrade to Aircraft Commander as demonstrated with the improvements made ... the successful upgrade to First Pilot qualification. Possesses the intellect and military bearing to be excellent example for fellow officers and enlisted as professional self-discipline, motivation and dedication to Coast Guard increase with maturity. ... Recommended for promotion with peers.”
- “Supervisor’s marks reflect the best performance of the period, not the overall performance.”

On August 28, 2003, the applicant’s commanding officer (CO) sent him a letter stating the following:

1. On 24 July 2003, the unit Flight Examining Board has determined that your motivation is not at the level to support a recommendation for entry into the aircraft commander syllabus. Although you submitted a Request for Pilot Upgrade memorandum on 20 May 2003, you have not completed the closed book exam and emergency procedures review, both [of which] are required prior to entering the syllabus flight phase. In addition, you have not completed the SAR fundamentals course, which is required for an aircraft commander designation.
2. As required in [the Personnel Manual], when an aviator’s performance is considered substandard, you are hereby directed to complete a training program to improve performance. That training program developed to improve your skills will consist of completing the
 - a. HH-60 Aircraft Commander Closed Book Exam
 - b. HH-60 Emergency Procedures Review
 - c. National Search and Rescue Fundamental Course
 - d. Preparatory training syllabus enclosed
3. The syllabus is to begin immediately and must be completed by 01 November 2003. This syllabus contains all preparatory requirements of [the Air Operations Manual] as well as a syllabus of 13 flights designed to offer you the opportunity to develop skill necessary to succeed as an H60 aircraft commander. Each flight in the syllabus will be flown with a flight examiner. Upon timely completion of all items contained in the syllabus, the Flight Examining Board will review your package for aircraft commander and make a recommendation to me regarding your potential to upgrade.
4. In the event you are not successful in upgrading to aircraft commander prior to 31 January 2004, I will request that a Coast Guard Aviation Evaluation Board be convened to determine continued aviation suitability.

On December 11, 2003, the applicant’s CO informed him that his flight status would be reviewed by an Aviator Evaluation Board (AEB) “due to a demonstrated lack of motivation to progress to Aircraft Commander, recurrent loss of situational awareness during flight operations and demonstrated poor leadership practices relating to flight situations.” The applicant acknowledged the notice, acknowledged having reviewed the AEB regulations, and indicated that he did not want to consult legal counsel.

On February 24, 2004, the Coast Guard Personnel Command (CGPC) convened the AEB, which recommended termination of the applicant's flight status. CGPC approved the recommendation and terminated his flight status. Therefore, his collateral duty of Assistant IRM Department Head became his primary duty until he was transferred in June 2004.

The applicant's second OER as a First Pilot, for the period June 1, 2003, through June 7, 2004, is the disputed OER in this case. It was prepared by a new rating chain at the Air Station. Aside from the mark of 3 he received for "Professional Competence," the applicant received ten marks of 4, six marks of 5, and one mark of 6 in the performance categories and a mark in the fourth spot on the comparison scale. The comments concerning his aviation skills in the disputed OER are the following:

Capably flew as [First Pilot] during training exercise with FBI; vertical delivery (VDEL) evolution simulated response to major maritime incident in Greater Tampa Bay area; improve inter-operability with counter terrorism agencies. Amassed 140 flt hrs including 12 maintenance test flights; contributed to successful execution of 8 [search and rescue] cases; assisted 5 & saved 2 lives. Displayed lack of motivation & leadership to upgrade to Aircraft Cdr, well beyond the normally expected timeline of peers; aviation status terminated, reassigned to duties not involving flight ops.

The applicant's Reporting Officer made no direct comments about the termination of the applicant's flight status and stated the following regarding his potential as an officer:

[The applicant] has the operational knowledge, experience & intellect to succeed in the Coast Guard. Rendered solid performance as Asst. IRM Officer; capably stood in as Department Head during Supervisor's absences and retirement. [He] facilitated the transition of the IRM Dept to a streamlined division. I have high expectations that the change in venue to the Lant Area/D5 Acc branch will offer ample opportunities for [him] to demonstrate leadership capacity for increased responsibilities outside the aviation environment. [The applicant] would be a good candidate for IT or HLS postgraduate opportunities with marked improvements in leadership and initiative.

VIEWS OF THE COAST GUARD

On August 28, 2007, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case.

The JAG stated that the applicant's submissions "may indicate comprehension of the given subject matter, [but] they do not encapsulate the totality of circumstances surrounding those test scores; nor do they show the existence of a clear and prejudicial violation of statute, regulation, or misstatements of significant facts" in the disputed OER regarding his professional competence. The JAG argued that the applicant's evidence was insufficient to overcome the presumption of regularity with respect to his rating chain's preparation of the OER, and noted that some statements in his evidence supports the comments made in the rating officials' declarations (see below). The JAG alleged that the disputed OER, including the mark of 3, "was properly prepared in accordance with the Personnel Manual; that it represents the honest professional judgment of his command; and that it accurately reflects [his] actual professional competence during the period of the report."

The JAG adopted the findings and analysis of the case provided in a memorandum prepared by CGPC, which the JAG forwarded as the Coast Guard's advisory opinion. CGPC stated

that the applicant's allegation about the mark of 3 for "Professional Competence" being erroneous and unjust "is without merit." CGPC stated that the copilot critiques and task proficiency reports submitted by the applicant are refuted by the declarations of his Supervisor and Reporting Officer, which are summarized below. CGPC alleged that the written comment adequately supports the mark of 3, as required by the Personnel Manual, and the applicant has "not provided evidence that overcomes the presumption of regularity" afforded the disputed OER.

Declaration of the Applicant's Supervisor

The commander who supervised the applicant as head of the IRM Department, stated that since three years have passed and he has retired from the Coast Guard, he has only general recollections of the issues involved in the application. The Supervisor stated that he did not personally fly with the applicant but was informed

by the Operations Department that [the applicant] was faltering in his progression to Aircraft Commander. To furnish impetus for [him], the Operations Officer provided a reasonable timeline with syllabus benchmarks to attain that would put him back on track to upgrade to Aircraft Commander. It was my understanding that special dispensations were made to accommodate the "eleventh hour" completion of this syllabus. This individually tailored program to kick-start [his] progression is atypical and speaks both to the Command's willingness to go the extra mile and unfortunately, [the applicant's] paucity of initiative. These difficulties culminated in the convening of an Aviator's Evaluation Board (December 2003, I believe) to determine [his] suitability for continuance as a Coast Guard pilot. I was not privy to the results; however, the mere fact that the Board was assembled bespeaks to substandard performance as an aviator.

I do not agree with [the applicant's] premise that his progression through the upgrade syllabus was chronologically normal. According to the Air Operations Manual, among the criterion for the helicopter Aircraft Commander Designation is to have not less than 700 hours of total pilot time in military aircraft, of which at least 150 hours is in rotary wing. [The applicant] joined the Coast Guard in the fall of 1999 with well over 1,000 hours of total pilot time in the U.S. Army, most of which was flying a helicopter which is very similar, if not identical, to the Coast Guard Jayhawk. He alludes to an 18 month time period to upgrade from First Pilot to Aircraft Commander. I'm unsure where he obtained this figure because it's not in the Air Ops Manual. The Coast Guard's expectation is that even the lowest common denominator, a fledgling aviator with no previous military experience (i.e., nugget), should be able to ascend to the Aircraft Commander designation well within the completion of his or her first tour of duty. As a rule, the majority of Direct Commission Aviators upgrade in considerably less time because of their flight hours accumulated and expertise gained in another military service. [The applicant] benefiting from previous H-60 experience and unconstrained by the need to build flight hours prior to entering the upgrade syllabi, was unable or disinclined to successfully achieve Aircraft Commander despite being at Air Station XXXXXXXX for over 4 years.

Declaration of the Applicant's Reporting Officer

The Deputy Executive Officer of the air station, who served as the applicant's Reporting Officer, stated that the applicant earned the mark of 3 for "Professional Competence" because his competence to become a safe and effective Aircraft Commander was in question and he "did not take full advantage of training opportunities afforded to him during the period." The Reporting Officer further stated that the command asked CGPC to convene an Aviator Evaluation Board (AEB) for the applicant on December 11, 2003, to assess his performance, potential, and motivation for aviation service. He explained that the applicant

was designated a Copilot in the HH-60J aircraft on 29 October 1999 and First Pilot on 4 December 2002. The command disapproved [his] 20 May 2003 request to upgrade to Aircraft Commander based on the Air Station XXXXXXXX Flight Examining Board's (FEB) recommendation. [He] did not have the prerequisites completed, such as the National Search and Rescue Fundamentals Course required by the CG Air Operations Manual and the Emergency Procedure Review and Closed Book Exam required by Air Station XXXXXXXX Organizational Manual. The FEB members also advised the command that they lacked confidence in [his] ability to provide the necessary leadership required as an Aircraft Commander.

On 28 August 03, in an effort to provide [the applicant] an opportunity to gain the FEB's confidence, the command directed that [he] be entered in an Aircraft Commander preparatory training syllabus. The syllabus and all remaining prerequisites required by the CG Personnel Manual and the Air Operations Manual were to be completed prior to 1 November 2003. However, [he] did not take the National Search and Rescue Fundamentals Course exam until 1 November 2003 and did not receive positive results from the exam until 4 November 2003. More importantly, five of thirteen flights in the training syllabus remained incomplete as of the 1 November 2003 deadline. [The applicant] did complete the syllabus on 14 November 2003, two weeks beyond the deadline.

The preparatory training plan afforded [the applicant] the opportunity to demonstrate his willingness and desire to assume the role as an Aircraft Commander. Areas during the preparatory training identified as points of concern were situational awareness, motivation, and leadership. There were several occurrences when situational awareness and communication breakdowns occurred that required safety pilot intervention to maintain compliance with Air Traffic Control instructions and to ensure the safety of the crew. During these situations, [the applicant] did not exercise the authority and leadership he was given during preflight briefs to manage the flight as if he was the Aircraft Commander.

[The applicant's] behavior was inconsistent with that of an aspiring Aircraft Commander, especially when considering that he had over 1,250 flight hours of experience in the HH-60J helicopter and a total of over 2,250 military flight hours. [He] demonstrated a lack of motivation to develop as an aviator and a lack of desire to accept additional responsibility and leadership in the aircraft during the reporting period.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On October 12, 2007, the Chair received the applicant's response to the views of the Coast Guard. Regarding his Supervisor's claim that he was given a reasonable amount of time to complete the syllabus, the applicant alleged that he had only "two months to complete flights that normally take six months," and that during those two months he had a two-week deployment in the Bahamas, one week of annual training at an Aviation Training Center, and one week assigned to Maintenance Test Pilot duties. Therefore, he had to complete the fifteen flights required by the syllabus in just the remaining month of time, and he worked very hard to do so. For example, on November 4, 2003, he "performed 3 hours' worth of aircraft maintenance ground runs and a short test flight in order to get a flyable aircraft for syllabus training. After the maintenance flight I quickly completed an Instrument flight plan and flew the syllabus RT-6 Airways training flight Due to a high maintenance spike there was a shortage of aircraft available for training during this period. Because of this the flying portion of the syllabus was not completed until 14 November 2003."

The applicant also challenged the Supervisor's claim that the syllabus was specially tailored for him. He stated that it comprised the same eleven recurrent training flights that all aviators must complete every six months and nothing special was added to enhance his training.

His instructors “were told to get the flights done as soon as possible.” The applicant further alleged that two other helicopter pilots at the station who received Aircraft Commander training plans “were given five tailored scenario flights to determine their readiness level.”

The applicant claimed that he completed all of the written prerequisites on time since he passed the HH-60 Aircraft Commander Closed Book Exam on September 16, 2003; the HH-60 Emergency Procedure Review on October 31, 2003, as part of his annual training; and the National Search and Rescue Fundamentals Course on November 1, 2003, although the grade was posted on November 3, 2003. He submitted copies of his pilot flight log for November 2003; his instructors’ critiques; his examination results; the letter dated November 25, 2003, about his completion of three courses;

The applicant challenged his “command’s concern that I have an uncorrectable situational awareness and communications problem.” He alleged that such a problem would have manifested itself during all of his flights and would have been addressed in all of the training records. He further alleged that “[a]ll aviators make mistakes while flying training and real world missions. The small mistakes I made on my training flights were typical and reviewed after each flight. My mistakes were not an indication of an uncorrectable trend.”

The applicant argued that because his Supervisor cannot remember all the marks and comments he included in the OER, it is possible that he assigned the applicant a mark of 5 for “Professional Competence” and that the command changed it without authorization or opportunity to observe the applicant’s performance. The applicant stated that he “invested many hours studying and practicing aircraft limitations, emergency procedures and numerous aviation-specific tasks to attain/maintain proficiency in all aspects of Coast Guard aviation.” He argued that his dedication is proven by his test scores and flight critiques. He further argued that the declarations of his Supervisor and Reporting Officer “provided feedback that is relative to questioning my motivation, but is not appropriate for determining my professional competence.”

Finally, the applicant argued that he was not counseled about the low marks on his OER and was not given a chance to submit a reply to it.

APPLICABLE REGULATIONS

Under Chapter 8.C.5. of the Air Operations Manual, to be designated a First Pilot (FP), a helicopter copilot must

- Be recommended for the FP designation by the unit Operations Officer ...
- Fulfill, to a more advanced degree, all requirements for [copilot] designation.
- Have not less than 500 hours of total pilot time in military aircraft.
- Complete an appropriate flight syllabus including a check flight.
- Complete a written closed book examination on critical aircraft systems, emergency procedures, and limitations.
- Complete a written open book examination on:
 - Aircraft systems and emergency procedures
 - All applicable SAR and law enforcement directives and publications, pertinent Coast Guard manuals, and Commandant Instructions
 - Weight and balance
 - Fuel management

- Ground security of aircraft away from home unit

Under Chapter 8.C.6. of the Air Operations Manual, to be designated an Aircraft Commander (AC), a helicopter First Pilot must

- Be recommended for the AC designation by the unit Operations Officer.
- Fulfill to a more advanced degree all requirements for FP.
- Complete Incident Command System (ICS-200) training in accordance with the Coast Guard Incident Command Implementation Plan, COMDTINST M3120.15 (series).
- For rotary wing (R/W) aircraft, have not less than 700 total pilot hours in military aircraft (excluding 3rd pilot time), of which at least 150 hours is in R/W aircraft.
- Complete a formal National Search and Rescue residence or correspondence course. The Search and Rescue Fundamentals Correspondence Course (Short Title: SARFND) was designed to fulfill this requirement.
- Complete an appropriate flight syllabus including a check flight.
- Complete a closed book examination on critical aircraft systems, emergency procedures, and limitations.
- Complete an open book exam on:
 - Air Operations Manual, COMDTINST 3710.1 (series)
 - U.S. Coast Guard addendum to the United States National Search and Rescue Supplement (NSS) to the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR), COMDTINST M16130.2 (series)
 - Current directives, including unit, district, and Commandant Instructions
 - Pertinent technical data and publications concerning aircraft operations
 - Application of operations and communications plans
- Complete an oral exam that focuses on the practical application of the material examined via the open and closed book exams. Special emphasis will be placed on evaluating the candidate's judgment and maturity during this exam.
- Demonstrate, to a high degree, ability to:
 - Exercise flight discipline and aircrew supervision, including the use of Crew Resource Management principles
 - Carry out all types of SAR missions including duty as on-scene commander, as appropriate for type
 - Carry out all other types of missions normally performed by the unit (i.e., Drug or Fisheries LE, SAR, MEP, ATON, etc.)

Under Article 6.A.1.h. of the Personnel Manual, CGPC convenes an Aviator Evaluation Board (AEB) "when necessary to evaluate the performance, potential, and motivation for continued service in flight status of certain Coast Guard aviators. The Board will function in an advisory capacity to the convening authority and will recommend appropriate action to perform the duties required." Article 6.A.1.h.1. states that CGPC will normally convene an AEB within 30 days of advisement by the commanding officer that any of the following conditions are thought to exist:

- a. The aviator has demonstrated faulty judgment in flight situations. This may be evidenced by serious or repeated violations of flight discipline or mishaps involving pilot judgment.
- b. The aviator has demonstrated a lack of general or specific flight skills. This may be evidenced by mishaps or near mishaps involving pilot skill, failure to satisfactorily complete all or any part of a prescribed training syllabus, or failure to comply with minimum annual flight requirements for reasons within his/her control.
- c. The aviator has demonstrated certain habits, traits of character, emotional tendencies, lack of mental aptitude, or motivation that makes questionable his/her continuance in assigned flying duties.
- d. The aviator is considered to be professionally unfit for flying for any reason not specified above.

e. The aviator is considered by a military flight surgeon not to be aeronautically adaptable.

Article 6.A.1.h.2. states that in preparing for an AEB, the commanding officer must gather any supporting documentation, such as informal investigations, Flight Examining Board (FEB) minutes, notes to the file, evaluation reports, training records, etc.” It also states that before reporting to CGPC, the CO must discuss the deficiencies with the aviator; fly with the aviator if the CO is qualified on the type of aircraft flown by the aviator; ensure that several members of the FEB evaluate the aviator’s performance in writing; direct a plan or program for improvement with definite objectives if the aviator’s performance is substandard; and ensure that the aviator’s “[e]valuation report comments and marks should coincide with those of the aviator’s training and/or syllabus records.”

Article 6.A.1.h.3. of the Personnel Manual states that the CO will send CGPC a summary of the pertinent facts of the case, including the CO’s own evaluation of the aviator’s abilities; statements of any witnesses; a copy of the written notification of the AEB to the aviator; the aviator’s flight logs, training records, and any pertinent correspondence, such as ATC Mobile evaluation, minutes of Unit Standardization Board, etc.; a summary of the aviator’s total flight hours, total hours for the previous three months, total hours by model for the previous three months, and the types of aircraft which the aviator is currently qualified to fly; and a physical evaluation by a military flight surgeon. This case file is provided to the AEB members in advance.

Article 6.A.1.i. states that an aviator is not entitled to be represented by legal counsel before an AEB since an AEB is an informal board, but CGPC may appoint legal counsel upon an aviator’s request. Article 6.A.1.j. states that an AEB consists of one flight surgeon and three Coast Guard aviators who are senior to the aviator under evaluation and who are “completely familiar with the type of flight operations involved. No member shall be appointed who is considered to be a prospective witness or interested party.” Article 6.A.1.k.2. states that the AEB shall have informal proceedings “to permit a free exchange of information and development of additional relevant facts.” Article 6.A.1.k.3. states that both the AEB members and the evaluatee shall “be given the opportunity to cross-examine witnesses. It is also important that the Board question the evaluatee. The evaluatee and a reasonable number of witnesses should appear in person during Board proceedings.” Article 6.A.1.k.4. states that CGPC shall provide the senior member of the AEB with sample opening comments and statements to make to witnesses. Article 6.A.1.k.1. states that after considering all of the available information, the AEB will make one or more of the following recommendations:

- a. Continuation in full flight status.
- b. Probationary flight status for a definite period.
- c. Additional training.
- d. Orders to duty not involving flying.
- e. In the case of a Reserve officer, retention on or release from active duty.

Article 6.A.1.l. states that the AEB will submit to Commander, CGPC, for review all pertinent documents, as well as its finding and recommendations, including a minority report, if any. Commander, CGPC, notifies the aviator by letter of his final decision about the aviator’s flight status. Article 6.A.1.o. states that an aviator “whose flight status has been terminated as a

result of actions taken under paragraphs d., g., or h. will be reassigned to duty or released as required by the needs of the Service at that time.”

Article 10.A.4.c.4. of the Personnel Manual provides the following instructions for Supervisors completing their section of an OER (similar instructions are provided for Reporting Officers in Article 10.A.4.c.7.):

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.

• • •

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 observations, those of any secondary Supervisors, and 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.

• • •

g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. Those assigned the superlative mark of seven should have specific comments demonstrating how they exceeded the six standard block.

Article 10.A.4.c.8.a. states that on the comparison scale in an OER, a Reporting Officer “shall fill 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.g. allows an officer to submit a written OER Reply within fourteen days of receiving any OER in order to “express a view of performance which may differ from that of a rating official.” The OER Reply must be “performance-oriented” and may not address interpersonal relations or include “a personal opinion of the abilities or qualities of a rating chain member.” An OER Reply is forwarded to CGPC through the rating chain, whose endorsements may include comments about the OER Reply.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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. The application was timely.²

2. Article 10.A.1.b.1. of the Personnel Manual provides that “[c]ommanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” The applicant alleged that the low mark of 3 he received for “Professional Competence” on the disputed OER is erroneous and unfair because, contrary to his Supervisor’s written comment, he did not display a lack of motivation or leadership to upgrade to Aircraft Commander and he was not “well beyond the normally expected timeline of peers” for upgrading to Aircraft Commander. To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by (a) a “misstatement of significant hard fact,” (b) a “clear and prejudicial violation of a statute or regulation,” or (c) factors that “had no business being in the rating process.”³ The Board begins its analysis in every case 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.⁴ Absent evidence to the contrary, the Board presumes that the applicant’s Supervisor and Reporting Officer prepared the disputed OER “correctly, lawfully, and in good faith.”⁵

3. The record indicates that the applicant failed to file an OER Reply to rebut the disputed OER, as provided under Article 10.A.4.g. of the Personnel Manual. Although he complained that no one told him about his right to file an OER Reply, he is charged with knowing the OER regulations, which accord all officers the right to reply to any OER. Failure to file an OER Reply does not waive an officer’s right to seek correction of the disputed OER but may be considered evidence that he considered the OER to be correct at the time he received it.

4. The applicant alleged that the criticism of his motivation in the disputed OER was unfair because from the beginning of the evaluation period on June 1, 2003, until his flight status was removed by the AEB, he diligently worked toward acquiring the Aircraft Commander designation. The applicant argued that his motivation should not have been criticized in the OER because he did not become a First Pilot until December 4, 2002; because he submitted a request form regarding his progression to Aircraft Commander on May 20, 2003; because he diligently worked through the syllabus he was given and failed to meet the November 1, 2003, deadline through no fault of his own; and because First Pilots normally take 18 months to progress to Aircraft Commander.

5. The record shows that throughout the applicant’s five years at the air station, his command frequently commented in his OERs about his motivation, or lack thereof, to progress as an aviator. On his first OER as a copilot, his Reporting Officer noted that the applicant had made “a slow start meeting expectations.” On his second OER as a copilot, his new Reporting Officer noted that he was “progressing” and was expected to upgrade to First Pilot soon. How-

² *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding 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”).

³ *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.

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

ever, the applicant did not upgrade to First Pilot until almost two years later. On the applicant's third OER as a copilot, the Reporting Officer praised his "obvious motivation" but noted that he was still "progressing." On his fourth OER as a copilot, the Reporting Officer indicated that the applicant's apparent motivation to progress as an aviator had declined. On his fifth OER as a copilot, the Reporting Officer wrote that the applicant's "motivation is lacking." After the applicant upgraded to First Pilot, his Reporting Officer indicated on his next OER that the applicant had the potential to upgrade to Aircraft Commander as his "self-discipline, motivation, and dedication to the Coast Guard increase with maturity," although the applicant was already 38 years old.

6. Such recurrent commentary—primarily negative—on the applicant's motivation to progress as an aviator by all of the officers who served as his Reporting Officers at the air station from 1999 through 2004 indicates that the applicant's career as an aviator, although "progressing," was not, in fact, progressing at the expected rate and that his Reporting Officers determined that his slow progress resulted from a lack of motivation. However, under Articles 10.A.4.c.4.b. and 10.A.4.f.11. of the Personnel Manual, an OER may reflect only the officer's observed performance during the evaluation period. Therefore, the numerical mark of 3 and the comment about the alleged "lack of motivation & leadership to upgrade to Aircraft Cdr, well beyond the normally expected timeline of peers" in the disputed OER are required to reflect performance that occurred after the start of the evaluation period on June 1, 2003, and cannot be based on his alleged lack of motivation during prior evaluation periods.

7. The record shows that on July 24, 2003—almost eight weeks into the evaluation period for the disputed OE—a Flight Examining Board convened at the air station and determined that the applicant lacked motivation to progress to Aircraft Commander. Although the applicant had submitted a request form for the upgrade on May 20, 2003, he had done so without completing the prerequisites. Therefore, although the applicant may have become motivated after receiving his CO's August 28, 2003, letter and tried to complete the syllabus and other requirements by November 1, 2003, he has not proved by a preponderance of the evidence that the comment that he lacked motivation and leadership to upgrade during the reporting period is either erroneous or unfair. In this regard, the Board notes that his command's concerns about his motivation and leadership stemmed not only from his rate of completion of the requirements but also from his performance in the cockpit, and this concern is reflected in some of the flight critiques submitted by the applicant.

8. The applicant alleged that the OER comment that he displayed the alleged lack of motivation and leadership "well beyond the normally expected timeline of peers" is unfair because he had upgraded to First Pilot on December 4, 2002. However, the applicant's "peers" were officers who, like him, started serving as aviators for the Coast Guard in 1999. The applicant has not proved by a preponderance of the evidence that during the reporting period for the disputed OER he was not "well beyond the normally expected timeline of peers" for upgrading to Aircraft Commander.

9. The accuracy of the mark of 3 and written comments in the disputed OER is strongly supported in the declarations of the applicant's Supervisor and Reporting Officer. Moreover, in challenging the mark of 3 for "Professional Competence," the applicant has ignored the proverbial 800-pound gorilla in the living room: An Aviator Evaluation Board of senior

aviators convened during the evaluation period to assess the applicant's performance, potential, and motivation as an aviator, in accordance with Article 6.A.1.h. of the Personnel Manual, and recommended the termination of his flight status, which CGPC then approved. While many comments in the disputed OER show that the applicant was quite competent and motivated in performing his collateral duties (which became his primary duties by default after his flight status was terminated), the mark of 3 for "Professional Competence" is amply supported by the written comments in the OER as required by Article 10.A.4.c.4. of the Personnel Manual. Although the applicant argued that his level of motivation should be considered irrelevant to his professional competence as an aviator, the written standards for the "Professional Competence" mark on an OER form encompass the officer's efforts to "grow professionally."

10. Accordingly, the applicant's request should be denied because he has not proved by a preponderance of the evidence that the disputed OER was adversely affected by (a) a "misstatement of significant hard fact," (b) a "clear and prejudicial violation of a statute or regulation," or (c) factors that "had no business being in the rating process."⁶

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁶ See footnote 3 above.

ORDER

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

