

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-034

**XXXXXXXXXXXXXX
XXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to 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 November 20, 2008, upon receipt of the applicant's completed application, and subsequently prepared the final decision for the Board as required by 33 CFR § 52.61(c).

This final decision, dated June 18, 2009, 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

First Disputed Officer Evaluation Report (OER)

The applicant asked the Board to correct his OER for the period May 1, 2005, to May 31, 2006 (first disputed OER) by raising his comparison scale mark in block 9¹ to show that he was marked as an "excellent performer; give toughest, most challenging leadership assignments" rather than as a "good performer; give tough challenging assignments." The applicant alleged that when he was counseled on this OER by his reporting officer the block 9 mark was that of an "excellent performer," but when he received the final OER, the mark had been lowered to that of a "good performer." The block 9 mark was the only significant change to the OER after he was counseled. He submitted an email from the reporting officer for this OER, who stated, "I don't remember marking the "middle" in block 9. I thought it was to the right of that and that's the story I'll stick to." The applicant also argued that the block 9 mark is inconsistent with the 5.27 average score of his performance marks and the highly flattering comments in the OER, such as: "Superior aviation skills . . .," "Showcased superior piloting skills and keen judgment," and "a strong and tactful leader, provided seasoned guidance and direction to senior officers new to the C130 during numerous operational training scenarios."

¹ The comparison scale of the OER is where the reporting officer compares the reported-on officer with others of the same grade that the reporting officer has known.

Of the 18 performance dimensions on the first disputed OER, the applicant received two marks of 4, ten marks of 5, five marks of 6, and one mark of 7 (on a scale of 1 to 7, with 7 being the highest). In block 10 where the reporting officer described the applicant's potential to assume greater leadership roles and responsibilities, the reporting officer wrote the following:

A highly talented aviator and gifted educator whose maturity, judgment and attention to detail led to a well deserved assignment as C-130 Standardization Officer. [The applicant] continually displays care for members of this [command] and the local community, demonstrated an undying desire to improve himself & those around him. Gifted pilot, uncommon devotion to raising own & others aviation professionalism. Instructor Pilot and Safety Officer program potential. Possesses the intellectual ability & self discipline to excel in a post-graduate program. Is highly recommended for the same. Ready for positions of greater responsibility. My highest recommendation for promotion with peers.

Second and Third Disputed OERs

The applicant also requested that the mark of 4 in the work-place climate dimension² be raised from 4 to 5 on the OER for the period from June 1, 2006 to May 11, 2007 (second disputed OER) and on the OER for the period from May 12, 2007 to May 31, 2008 (third disputed OER). The applicant stated that he was given a mark of 5 in the workplace climate dimension on the earlier first disputed OER, but the mark in this category was lowered in the subsequent second and third disputed OERs. He argued there are no comments or documentation to support the 4 in this category and that strong statements about his leadership and potential in the comment sections of blocks 5 and 10 of the second and third disputed OERs support a mark higher than 4. The applicant stated that his supervisor for the second disputed OER told him that a change from 5 to 4 is not regression and that it was difficult to get a right of center mark in that dimension, except for the civil rights officer. However, the applicant noted that his two predecessors, who were flight examiners and not civil rights officers, received marks of 5 or higher in workplace climate.

The applicant argued that the traits he was required to demonstrate in obtaining his qualification as an Instructor Pilot and a C130 Flight Examiner, the highest position for an aviator, are evidence that he should not have been given a 4 in workplace climate. In this regard, he stated that to obtain qualification as an Instructor Pilot, he had to demonstrate patience, tact, understanding, a desire to instruct others, the ability to obtain the trust of others, and the respect of others. As a Flight Examiner, he was required to communicate, mentor, and inspire those around him. He stated that he achieved the highest qualification possible for an aviator as a flight examiner during the period covered by the second and third disputed OERs, which is a feat that is accomplished by less than 10% of Coast Guard aviators.

Failure of Selection for Promotion to Lieutenant Commander (LCDR)

² This dimension in the supervisor's portion of the OER evaluates an officer's "ability to value individual differences and promote an environment of involvement, innovation, open communication, and respect."

The applicant requested that his failure of selection before the promotion year (PY) 2009 LCDR selection board be removed from his record. The applicant argued that because he has exceeded the personal, professional and leaderships guidance set forth by the Commandant and by the Personnel Manual for selecting officers from O-1 through O-4 to the next higher grade, senior officers who reviewed his military record were of the opinion that the marks under review were the likely causal factor for his non-selection for promotion to LCDR. He argued that if the Board found the marks to be erroneous that his failure of selection be removed.

Reserve Retirement Points

The applicant also requested that his Reserve Retirement Point statements be removed from his record when reviewed by future selection boards. Although he is now an officer in the regular Coast Guard, he believes the reserve documents could confuse a selection board as to his current active duty status, especially since they occupy the last six pages in his electronic record and are the documents last seen by the selection board members upon their initial review of his record.

VIEWS OF THE COAST GUARD

On April 15, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted a memorandum from the Commander, Coast Guard Personnel Command (CGPC) as the advisory opinion. CGPC recommended that the application be denied.

With respect to the first disputed OER regarding the applicant's allegation that he should have been marked as an "excellent performer" on the comparison scale, CGPC submitted statements from the rating chain, who offered the following, in pertinent part.

1. The supervisor for the first disputed OER stated that based upon his observation of the applicant's superior performance during the period in question, he should have been marked as an "Excellent performer" in block 9, which is the mark he recommended in his evaluation input. He stated that he was neither consulted nor given any indication that the block 9 mark he recommended would be lowered to "good performer."

2. The reporting officer for the evaluation, and the individual responsible for assigning the mark, stated in contrast to the applicant's statement, OER counseling would have been done only upon completion of the OER process and not before the reviewing officer signed the OER. He stated therefore, he believes that he selected "good performer" rather than "excellent performer" to describe the applicant. He stated that he does not recall the specifics of why he marked the applicant as a good performer but he remembers that the applicant's performance was commendable. He remembers the applicant offering to help others with their work assignments and that he was always focused on his primary and collateral duties. The reporting officer stated that the mark of "good performer" may have been an error. "Given the opportunity today, I would select "Excellent" as my overall evaluation mark.

3. The reviewer wrote that he had the opportunity to observe the applicant's performance. He stated that as the reviewer, he generally did not change evaluation marks and

certainly would not have changed an evaluation mark without conferring with the supervisor or reporting officer. The reviewer stated that although he had no evidence that he changed the block 9 mark, he clearly made minor edits to the text of the OER. He stated that it is possible that the mark was inadvertently changed and not caught upon final review. He noted that OERs are edited on a screen and he has known marks to be inadvertently changed using the on-screen process. He stated that at the time he only checked to ensure that his edits were corrected on the OER, he did not check the entire OER for inadvertent changes. He recommended “that this OER be changed to reflect a [the higher mark] in block 9 comparison scale based on a likely administrative error.”

In response to the declarations from the rating chain for the disputed OER with respect to the block 9 mark, CGPC offered the following:

The rating chain for the [disputed] OER provided declarations in which there is a general consensus that the Reported-on Officer’s performance did merit a mark of “excellent” in their individual perspective views for the mark in the comparison scale dimension. However, even though the views of the supervisor and reviewer support a change in the mark, it is solely the reporting officer who assigns this mark. The criteria for this is that he must choose the one mark 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. The applicant has not provided specific evidence to dispute that the mark was inaccurate at the time the reporting officer made this judgment, and [he] did not take steps to have the record corrected prior to his non-selection. In considering the reporting officer’s statement in his declaration that given the opportunity today he would change the mark, consideration must be given to this mark’s relative ranking criteria which required a reporting officer to make a judgment this is subject to change over time, as the reporting officer increases the number of officers he has known in a particular grade.

Based on the record and [the reporting officer’s] declaration, it appears he fulfilled his responsibilities as the applicant’s reporting officer and provided an accurate and fair comparison scale [mark] of the applicant at the time of the report.

With respect to the mark of 4 in the workplace climate dimension in the supervisor’s portion of the second and third disputed OERs, CGPC obtained a statement from the supervisor for the second disputed OER and from the supervisor and reporting officer of the third disputed OER.

1. The supervisor for the second disputed OER wrote that he did not remember the specifics of the OER, but based upon his review of the available documentation, he concluded: “For the dimension of Workplace Climate (5e), my evaluation of the performance of [the applicant] was that of a 4.” His performance with regard to his ability to value individual differences and promote an environment of involvement, innovation, open communication and respect, was at the high level of performance expected of all Coast Guard officers.

2. The supervisor for the third disputed OER stated that he could not recall the specific details of the applicant's OER for the period under review. He concluded: "For the dimension of Workplace Climate (5e) my evaluation of the performance of [the applicant] was a 4. This mark was consistent with my observation of [the applicant's] performance throughout the period."

3. The reporting officer for the third disputed OER wrote that he "found that the supervisor's mark of 4 in Workplace Climate . . . was consistent with the input contained within the OER routing folder, the [supervisor's] comments in the 'leadership skills' text block and my direct observations."

CGPC did not recommend any relief with respect to raising the mark in the Workplace Climate categories of the second and third disputed OERs. CGPC stated that the marks appear to be accurate and that the pertinent members of the rating chain for the second and third disputed OERs reaffirmed the marks. CGPC also noted that the applicant failed to object to the marks at the time they were given by filing a reply to the OERs.

With respect to his record containing his earlier reserve retirement points statements, CGPC stated that boards and panels must consider an officer's entire record, and Commandant Instruction 1401.2 list the documents that may be viewed by a selection and the Coast Guard Reserve Annual/Term Point States is included.

CGPC stated that the applicant's failure of selection before the PY 2009 LCDR selection board should not be voided. CGPC stated that selection board members are charged with reviewing the entirety of an officer's record as directed by the convening precept in selecting those individuals they feel are best-qualified. CGPC stated that the applicant has not provided convincing evidence that would rebut the position he would otherwise not have been selected.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 18, 2009, the Board received the applicant's reply to the views of the Coast Guard.³ He disagreed with them.

The applicant stated that according to Article 14.A.4.d. of the Personnel Manual, the immediate previous six years of service in his current grade is considered the most significant. He argued that if the previous six years is the most significant, placing the retirement point statements immediately after his most recent OER might cause a selection board to believe it was within the previous six years and that he was a reservist. He stated that since the reserve

³ The applicant raised two new issues in his reply to the views of the Coast Guard. They are his allegation that his ensign OERs were not masked from the view of the 2009 LCDR selection board as required by COMDTINST 1410.2 § 7.b.; and his allegation that the description of his duties in block 2 of the third disputed OER is inaccurate and understates the full scope of his duties. These two issues will not be addressed in this decision because the Coast Guard has not had an opportunity to comment on them. The applicant may file a new application with the Board presenting the two new issues.

retirement point statements are more than six years old and have no bearing on his selection for LCDR they should be removed from the record that will be reviewed by the selection board.

On the issue of the mark of 4 in workplace climate, the applicant stated that the rating chain members for the second and third disputed OERs did not give a reason for his regression from the mark of 5 he received on the first disputed OER in this area, particularly when his marks increased in all other areas. He cited comments in the second and third disputed OERs that he believes proves that he should have had a higher mark in this dimension.

With respect to the Coast Guard's comments about his block 9 mark on the first disputed OER, the applicant stated that the comment that he has provided no evidence that the mark is inaccurate is incorrect. In this regard, he stated that he submitted his supervisor's draft OER and the reporting officer's draft OER showing that he had been marked as a "excellent performer." The applicant erroneously noted that the reporting officer wrote in his declaration that he counseled the applicant on an OER that had not been fully completed and signed by reviewer. (The reporting officer actually stated in his declaration "OER counseling was done upon completion of the OER process, not before the Reviewing Officer signed the document; therefore I have to believe I selected "Good" vice Excellent.") The applicant also noted, as he did in his application that the reporting officer wrote in an email that he thought he had marked the applicant right of center and that he would stick to that belief. In addition, the applicant noted that the reporting officer subsequently stated that given the opportunity today, he would mark the applicant as "excellent" on block 9. The applicant stated that all three officers in his rating chain for the first disputed OER attested that his performance met the "excellent" standard on block 9. Therefore, he argued there should be no argument against changing the mark to "excellent performer . . ."

With respect to his failure of selection for promotion to LCDR, the applicant questioned how he was not among the best qualified if he had attained the highest aviator qualification as mentioned in the description of his duties on the second and third disputed OERs. He stated that the Coast Guard did not address this contention in its response. He stated that he did not challenge the disputed OERs because he believed what his supervisors and rating chains had been saying for his entire career: "that [his] progression was normal, [his] performance excellent, and there would be no reason for [him] not to promote." He referred to many complimentary comments in his OERs, endorsement to an extension request, and on a plaque given to him upon his departure as support that he should have been selected for LCDR and that something inappropriate must have occurred since he was not selected. The applicant also noted that he was assigned to independent duty as the Coast Guard's "C130 Standardization Team Liaison to the United States Air Force." The applicant concluded his statement with the following:

I believe there are mistakes and injustices in my record. I believe that the inclusion of certain documents, especially due to their chronological placement in the record could have, and will in the future, confuse/negatively influence promotion board members. Lastly, I believe that because of the discrepancies noted . . . my record was not evaluated fairly, discounted, or simply not viewed by the PY [2009] promotion board.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The first issue is whether the block 9 comparison scale mark on the first disputed OER is in error. There are seven rating choices on the comparison scale. They range from highest to lowest, as follows: "Best Officer of this grade"; "Strongly recommended for accelerated promotion"; "Excellent performer; give toughest and most challenging leadership assignments"; "good performer; give tough, challenging assignments"; "Fair performer; recommended for increased responsibility"; "Marginal performer; limited potential"; and "Performance unsatisfactory for grade or billet." The applicant was rated as a "strong performer."

3. With respect to the comparison scale of the OER, Article 10.A.4.c.8.a.& d. state as follows:

The 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. NOTE: this section represents a relative ranking of the Reported-on Officer, not necessarily a trend of performance. Thus, from period to period, an officer could improve in performance but drop a category. [Article 10.A.4.c.8.a.]

No specific comments are required to support the Reporting Officer's judgment in this section. However, a mark other than in the center three circles is strengthened considerably if there are comments in the report from which one could reasonably draw a conclusion why this particular officer has been identified as different from the majority of this grade. [Article 10.A.4.c.8.d.]

4. In each case, the Board presumes that Coast Guard officials have carried out their duties "correctly, lawfully, and in good faith." *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 presumption is rebutted by "clear, cogent, and convincing evidence to the contrary." See *Muse v. United States*, 21 Cl. Ct. 592 (1990). See also decision of the Deputy General Counsel in BCMR No. 2000-037.

5. With respect to the accuracy of the block 9 comparison scale mark, the applicant offered statements from the rating chain. Although the supervisor had no responsibility for rating the applicant on block 9, he stated that he recommended that the reporting officer mark the applicant as an "excellent performer." The reporting officer was free to accept or reject the supervisor's recommendation. As evidenced by the disputed OER, the reporting officer rejected the supervisor's recommendation and marked the applicant as a "good performer." The

supervisor's opinion does not prove that the reporting officer's judgment and evaluation of the applicant as a "good performer" was inaccurate.

6. Additionally, the reviewer's statement suggested that the OER was presented to him for review with the applicant marked as a "good performer" because it was not his practice to change evaluation marks, and if he had done so he would have conferred with the reporting officer. There is no evidence of any consultation between the reporting officer and reviewer about the comparison scale mark. Although the reviewer indicated that the block 9 comparison scale mark was likely an administrative error due to an inadvertent key stroke, he never stated that the mark of "good performer" in block 9 of the disputed OER was inaccurate even though he stated that he had an opportunity to observe the applicant's performance. The reviewer's statement is speculative and does not persuade the Board that the mark is erroneous.

7. The reporting officer's statement is the most relevant because it was his responsibility to evaluate and rate the applicant on the block 9 comparison scale. However, his statement is not a definite, clear, cogent, and convincing piece of evidence. In this regard, he could not remember the specifics of the OER, but after reviewing the OER recently he believes that he must have marked the applicant in the "good performer category" on the comparison scale. More importantly, the reporting officer never stated that the mark was a mistake, but rather he stated that it "may have been an error." The reporting officer never explained how any such alleged possible error could have occurred. The reporting officer's statement is weak and offers only conjecture about the accuracy of the comparison scale mark and is therefore not persuasive to the Board.

8. The Board is further persuaded as to the accuracy of the disputed mark because of the applicant's behavior and that of the rating chain. In this regard, the applicant admitted that he knew that he had received a mark of "good performer" rather than "excellent performer" on the comparison scale when he received the finalized OER and apparently accepted it until he was not selected for promotion to LCDR. Further, both the reporting officer and the reviewer were aware that the applicant had been marked as a good performer at the time the OER was prepared, even though now they speculate that it may have been an error. It appears to the Board that the alleged administrative error, if it existed, should have been caught and corrected contemporaneously with the OER process.

9. Finally, with respect to the first disputed OER, the Board finds that the comments and marks in the other categories of the OER are not inconsistent with the mark of "strong performer" on the comparison scale. Nor is a mark in block 9 dependent on the other OER marks. Article 10.A.4.c.8.a. of the Personnel Manual states that the 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. The applicant's argument that the block 9 mark is inconsistent with other OER marks is not persuasive.

10. The applicant has also failed to prove that the mark of 4 in workplace climate on the second and third disputed OERs should be raised to 5. The supervisors for the second and third disputed OERs indicated that the mark of 4 in Workplace climate was correct. The applicant argued that there is no explanation why he received a 4 on the second and third disputed OERs,

when he 5 on the earlier first disputed OER. He further argued that the positive comments about his leadership and potential on the second and third disputed OERs support a higher mark. However, the mark in workplace climate is dependent on how the applicant measures up to the predetermined standard for workplace climate and not on the marks he received in other evaluation categories. Article 10.A.4.c.4.d. of the Personnel Manual states that for each evaluation area, the supervisor shall . . . carefully read the standards and compare the reported-on officer's performance to the level of performance described by the standards." Workplace climate standard are different from those of leadership and potential. Further, the applicant fails to mention that he had new supervisors for the second and third disputed OERs who judged his performance in this category as rating a mark of 4. The fact that he had a higher mark by an earlier supervisor does not mean that the marks in workplace climate on the second and third disputed OERs by different supervisors are erroneous; nor does the fact that applicant disagrees with the marks assigned by his supervisors prove the disputed marks are erroneous. The marks represent the judgment of the rating chain and they have reaffirmed the accuracy of the marks. The applicant has not provided evidence that rebuts the accuracy of the 4s he received in workplace climate on the second and third disputed OERs.

11. The applicant's argument that his earlier reserve retirement point statements should be temporarily removed from his record so that they are not viewed by a selection board is without merit. Enclosure (1) to COMDTINST 1410.2 list "CG Reserve Annual/Term Point Statement" as documents permitted to be viewed by an ADPL selection board. Therefore, the Coast Guard did not commit an error by maintaining them in the applicant's record that was reviewed by the LCDR selection board. The applicant's argument that the members of the selection board could have been confused as to whether he was a regular Coast Guard officer because the retirement points statements followed his most recent OER is speculation. Article 14.A.4.d. of the Personnel Manual states that the six years of immediate previous service or all service in the present grade, whichever is greater is most significant. However this provision does not require removal of the retirements points statements. The applicant has failed to prove an error or injustice with respect to the retirement points statements.

12. Accordingly, the applicant's requests should be denied.

ORDER

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

