

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 44-97

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on December 26, 1996, upon the BCMR's receipt of the applicant's request for correction of his military record.¹

This final decision, dated January 16, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

Applicant's Request for Correction

The applicant, a lieutenant commander (LCDR) in the Coast Guard failed of selection for promotion to commander (CDR) by the 1995 and 1996 CDR Selection Boards. He alleged that both passovers were based on an inaccurate officer evaluation report (OER) for the period from May 1, 1993 through May 25, 1994 (disputed OER).

The applicant asked the Board, with respect to the disputed OER, to :

- raise the marks in blocks 3.c.; 3.f.; 5.c.; and 9.b. from "4" to "6".
- raise the numerical scores in blocks 5.a.; and 9.c. from "5" to "7".
- raise the numerical scores in blocks 3.a.; 3.b.; 3.g.; 4.a.; 6.a.; 9.a.; 10.b.; and 10.c. from "5" to "6".
- raise the numerical scores in blocks 5.d.; 9.d.; and 10.a. from "4" to "5".
- move the comparison scale marker in block 12 two spaces to the right;

¹ On January 7, 1996, the application was sent to the Coast Guard for its views. The Board received the views of the Coast Guard on October 30, 1997. On November 26, 1997, the Board sent a copy of those views to the applicant. On December 12, 1997, the applicant's attorney asked the Board to grant him additional time to respond to the advisory opinion of the Coast Guard. The extension tolled the 10-month rule until January 5, 1998 when the applicant's views were received.

Alternatively, the applicant asked the Board to remove the disputed OER from his record and to replace it with an OER for continuity use only.

The applicant also asked, inter alia, that he be permitted to be considered by the next two commander selection boards as an LCDR within the zone and that his relief be backdated if she is selected.

The applicant alleged that he received two OERs while at Air Station [REDACTED] an undisputed OER (5/18/92 to 4/30/93) and the disputed OER (5/1/93 to 5/25/94). "Without a single mention of any wrongdoing or shortcoming," the numerical marks in nearly all sections of the disputed OER dropped by at least one numerical mark and, in section 12, the comparative scale mark dropped by two levels. The applicant alleged that the reviewing officer (same on both OERs) breached his duty "to properly monitor the OER and allowed the gross discrepancy in marking to occur, without narrative justifications." He alleged that that reviewing officer failed to obey the section of the CGPM (Coast Guard Personnel Manual) "which required the Reviewer to ensure a reasonable consistency."

The applicant's case is summarized as follows: "Numerical marks assigned in [disputed] OER are artificially low, given the similarity in narrative to the previous reporting period's OER. The stark contrast in numerical marks between the two evaluations, without narrative justification for the decline, is attributed to an investigation that improperly tainted completion of the OER."

The applicant was being investigated during this period, at his own instigation. The applicant alleged that his own rating chain used "[c]omments regarding any pending investigation where the rated party was not made a party." The rating chain allegedly "used disputed information from an incomplete investigation; an investigation which did not afford Petitioner the rights of a party, to lower his numerical scores in the challenged OER." The applicant's attorney called that "the infliction of punishment without due process."

The applicant concluded that the inaccurate numerical scores in the challenged OER created a record that was unjust and unfair" and that the "inaccuracies created a manifest injustice" to the applicant.

Views of the Coast Guard

On December 8, 1997, the Board received a recommendation and attachments from the Chief Counsel of the Coast Guard. The Chief Counsel recommended that relief be denied to the applicant. He said that the applicant has not alleged a misstatement of "hard fact" and has not provided evidence of a violation. "In

attacking the substance of the challenged OER," the Coast Guard wrote, "Applicant provides little more than his own more favorable view of his performance[; he] has not shown that the OER was an inaccurate reflection of that performance."

The applicant's command felt it was necessary to have the applicant undergo a psychological evaluation. The applicant disagreed, but he provided no evidence that this action constituted an error or injustice, particularly in light of the strong presumption that rating officials have acted correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (1992).

The Chief Counsel said it was not error or injustice for the applicant's rating chain to consider a report of investigation evaluating him during the rating period. The Chief Counsel said that was no "prohibition against using an administrative investigation as a basis for performance information in an OER."

The Coast Guard said that the applicant was not entitled to be made a party to the investigative proceeding, and it says he has not shown that his OER would have been better if he has been provided with a copy of the report of investigation. The applicant disagreed with several marks on OER, but he provided "no proof that the marks assigned were inaccurate or the result of error or injustice."

The Coast Guard Personnel Command (CGPC) commented on the applicant's assertion that the reviewer was responsible "for leveling performance across multiple contiguous periods." CGPC stated that the applicant's reviewer did not oblige him to "ensure continuity of the evaluation process' from one reporting period to another." (emphasis added). CGPC declared further that rating officials are prohibited from mentioning performance outside the period of the disputed OER.

CGPC said that rating officials sometimes avoid mentioning performance weaknesses in order to maintain a positive tone for an evaluation. The Command said that documentation of performance shortcomings on the basis of investigation results "would not have changed the marks" but may have been "perceived as more prejudicial to [the applicant] by casting an antithetical perspective."

Applicant's Response to Coast Guard Views

On January 5, 1998, the Board received a response from the applicant to the Coast Guard's views.

Among other things, he argues that it is a violation of Article 10-A-4g.(1) of the CGPM to say that the "evidence" from an investigation to which the applicant is not a party may be used to downgrade an OER evaluation, and to say that allegations

of an "inappropriate relationship" for which "there was no evidence" may be used to downgrade an OER.

The applicant also alleges that the Coast Guard abdicates the responsibility of the Reviewer "to ensure a consistent rating standard." The applicant's attorney asked if Reviewer and the Quality Review Staff "do not ensure uniformity, who will?" He insists that the disputed OER represents an inaccurate and unjust entry in the applicant's record.

APPLICABLE REGULATIONS

Article 10-A-2f.(2):

(2) Responsibilities. The Reviewer:

(a) Ensures the OER reflects a reasonably consistent picture of the Reported-On Officer's performance and potential.

(b) Checks for obvious errors, omissions, or inconsistencies between numerical evaluations and written comments . . .

(c) If necessary, adds comments on a separate sheet of paper . . .

(d) Ensures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. . . . The Reviewer may not, however, direct in what manner an evaluation mark or comment is to be changed

Article 10-A-4g.(1)

(1) Members of the rating chain shall not comment on or make reference to any pending criminal proceeding . . . , disciplinary action, PRRB, CGBCMR, or any other ongoing investigation (including discrimination investigations). Reference to a final proceeding is only proper if the officer concerned has been made a party to an accorded full party rights during the course of the proceeding This restriction does not preclude comments on appropriate, undisputed, supportable, and relevant facts, so long as no reference is made to the pending proceedings. . . .

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard, the military record of the

applicant, and applicable law:

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

2. The applicant, an LCDR who failed of selection for promotion to CDR in 1995 and 1996, asked the Board to correct or expunge a disputed OER in his record and asked that he be permitted to be considered by the next two CDR selection boards as an LCDR within the zone.

3. The Reviewer on the disputed OER, who was also the Reviewer on the undisputed OER, found that his authority under Article 10-A-2f.(2) of the Coast Guard Personnel Manual (CGPM), with respect to the disputed OER, because the Supervisor and the Reporting Officer had adequately executed their responsibilities under the officer evaluation system. The Reviewer checked for inconsistencies between numerical evaluations and written comments, but he did not direct any mark or comment to be changed.

4. Under Article 10-A-2f.(2) of the CGPM the Reviewer did not add comments on disparities between the undisputed and the disputed OERs. It is not the responsibility of a Reviewer to assure that there is a reasonably consistent picture of the applicant over time. In the words of the Coast Guard, the Reviewer was not responsible "for leveling performance across multiple contiguous periods," and the Reviewer was not obliged to "ensure continuity."

5. The applicant's attorney argued that the Coast Guard abdicated the responsibility of the Reviewer "to ensure a consistent rating standard." He said that military records would be in a state of "chaos" if the Coast Guard is not required to ensure consistency. The CGPM prohibits the Reviewer from taking the one action that could assure consistency between OERs. Article 10-A-2f.(2)(d) of the CGPM states that a Reviewer may not direct (emphasis in original) how a mark or comment is to be changed. In the absence of authority in one member to direct changes in order to achieve consistency, different rating chains may produce very different results.

6. The essence of the applicant's case was that "[i]nformation from an investigation was impermissibly used because [the applicant] was not made a party to the investigation." That allegation is wrong as a matter of law. Article 10-A-4g.(1) of the CGPM prohibits reference to a pending proceeding and prohibits reference to a final proceeding (emphasis added). The provision does not, however, prohibit use of information from an investigation. The applicant's attorney averred that the applicant's marks were substantially lower on the disputed OER because of the investigation. The attorney did not identify a single

improper mark and he did not set forth any authority for the proposition that evidence from an investigation could not be used to lower an OER evaluation.

The attorney's observations are incorrect because Article 10-A-4g.(1) only prohibits reference to a pending proceeding or a reference to a final proceeding. The last sentence of clause (1) says that "[t]his restriction does not preclude comments on . . . supportable and relevant facts, so long as no reference is made to the pending proceeding." No reference was made to a pending or final proceeding, and the applicant has not pointed to any marks or comments in the disputed OER that are the result of the investigation.

7. The applicant claims that the supervisor on the applicant's rating chain admitted "that allegations of an incident which were proven false by the Command's own investigation were used in drafting the challenged OER." The applicant has not introduced evidence of knowing falsehood in the disputed OER.

8. The applicant asked the Board to void the disputed OER and to void his 1995 and 1996 passovers for promotion to the grade of CDR. This requested relief is not, for the reasons set forth above, merited.

9. Since the applicant has failed to establish an error or injustice in his record, no basis exists to consider removing the 1995 and 1996 failures of selection for promotion to CDR.

10. Accordingly, the application should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application to correct the military record of [REDACTED]
[REDACTED] USCG , is denied.

