


DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 57-96

FINAL DECISION

 Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on January 16, 1996, upon the receipt of an application for relief by the BCMR.

This final decision, dated February 14, 1997, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a former chief warrant officer (CWO3, pay grade W-3), asked the BCMR for the following relief:

1. removal of an officer evaluation report (OER) from his record for the reporting period July 31, 1992 to January 31, 1993 (disputed OER);
2. another opportunity to be considered by a selection board for promotion to CWO4;
3. deletion from his record of all prior non-selections for promotion;
4. award of appropriate back pay and allowances;
5. reinstatement to active duty.

The applicant alleged that the disputed OER was an inaccurate reflection of his performance at his duty station, and that he received those marks because he was evaluated subjectively by an inappropriate officer in his rating chain.

On December 16, 1996, the Coast Guard recommended that the applicant's request for relief be denied. The applicant was sent a copy of the Coast Guard's

recommendation and was encouraged to respond. No response was received from the applicant.

SUMMARY OF RECORD AND SUBMISSIONS

Summary of the Disputed OER

The majority of the applicant's marks in the disputed OER were 3s and 4s (on a scale of 1 to 7, with 7 being the highest score). The applicant received a mark of 5 in blocks 3.e. (work-life sensitivity/expertise), 5.a. (looking out for others), and 10.b. (professionalism). He received a mark of 2 in blocks 9.a. (initiative) and 3.d. (responsiveness). His block 12 score (comparison with officers of the same rank) was 3.

The following comments are excerpts from the disputed OER:

Block 3.h. (performance of duties): "Technically knowledgeable. Correctly handled federal custody & security of seized [REDACTED] vsl Correctly set up & ran sobriety checkpoints. Excellent rapport w/local agencies.... Saw & used talent, often didn't provide adequate oversight--didn't correct ltrs, didn't question expenditures. Balked at assuming add'l responsibilities due to inadequate equipment...; in front of subordinates, criticized superiors for adding these duties. Mooring/beaching of 5 state-seized vsIs snarled somewhat due to lack of in-depth inquiry into condition of vsIs. Failed to inquire & follow-up w/animal control contract, though aware contractor not pd. . . . Did not do homework; ran into obstacles, then quit; had problems getting contractor to tow vehicles. . . ; did no further work on issue until pushed. Briefed no one on specific procedures during intentional beaching of 3 state-seized vsIs; some damage to . . . beach resulted. . . Rarely met deadlines even of own making; didn't indicate when changes needed or why unless probed."

Block 5.e. (leadership skills): "Very aware of individual needs w/in Security. Stepped in to counsel & assist; Failed to challenge subordinates to take on add'l responsibilities; didn't provide adequate oversight when subordinates took initiative; Did not get work to watches effectively, at time seriously confusing customers, incl the public.

Block 8 (reporting officer comments): "I concur with [the supervisor's] assessment of this officer. [Applicant] is a good

technical warrant officer, however, he needs to improve overall administrative and leadership skills."

Applicant's Request for Relief and Submissions

The applicant contended that his rating chain was invalid. He stated that in October, 1992, the division at which he was stationed had been restructured and he was placed under a different supervisor. He alleged that the "restructuring was a confusing time for all involved" and that "[n]o one was certain of what their duties were or to whom they were responsible." He also stated that during this period of reorganization, there was no rating chain published for the subsequent reporting period, so no one was sure to whom they were responsible.

The applicant alleged that as a result of these changes, he was placed under the supervision of an officer who was not authorized to evaluate him. He stated that as a result of the new supervisor's unfamiliarity with his duties, or his previous work record, he was given low marks and subjective statements on his officer evaluation report. He also stated that the reporting period ended on January 31, 1993, but his report was not signed or forwarded for authorization until April 7, 1993 and that this delay resulted in the inclusion of the report in the applicant's records at almost the same time as the CWO4 selection board met. The applicant stated that the improperly comprised rating chain, tardiness of the report, and his inability to rebut its contents in an OER reply for inclusion in his record before the selection board ultimately resulted in his pass over for promotion.

In support of his application, the applicant also submitted his reply to the disputed OER, dated May 13, 1993, and the endorsements of the reply from his command. In his reply, the applicant addressed the comments his supervisor made in the disputed OER about his performance in several operations. With respect to the supervisor's comments in blocks 3.h. and 6.c., the applicant responded that he "proofread nearly every piece of correspondence that was generated by [the] office." He also stated that with regard to the claim that he "balked at new duties", he was not avoiding his duties, but was only trying to get the right equipment so that his men could properly perform their jobs. He stated that in that situation, the equipment available to his staff was not sufficient or compatible with the work of his staff, and he stated that he alerted his supervisor about the problem. The applicant stated that the supervisor acknowledged the problem and took steps to rectify the situation, but labeled his behavior as "balking duties" on the evaluation.

The applicant also addressed his supervisor's comments regarding his handling of an intentional beaching operation. He stated that the beaching

operation was under a contractual license agreement between the state and the Coast Guard, and that all "[m]aintenance, inspections and custodial watches were handled by the state. He stated that the damage that occurred to the beach during the operation was "commensurate with what would be expected from a large bulldozer being used to drag three sixty foot vessels through loose gravel."

The applicant asserted that no mention was made in the disputed OER of his collateral duties or of his successes while he was officer on deck (OOD). He stated that the disputed OER constituted a "personal attack, not an evaluation." He alleged that his "overall performance was trivialized. Petty incidents were blown out of proportion, most of the good that [he] did was glossed over or omitted." He stated that "[n]one of the [listed] personality flaws were noted in the previous 13 evaluations [he] received as warrant officer." He stated that he "had consistent average or above average evaluations and was always recommended for promotion" in his previous OERs. Finally, he stated that it was his "opinion that [his] performance for the period was not fairly considered or was lost in the transition between Admin Officers."

In the endorsements submitted with the applicant's OER reply, the applicant's supervisor reiterated the points she made in the disputed OER regarding the applicant's performance. The applicant's previous reporting officer was away from the base during the reporting period of the disputed OER, but in his endorsement of the applicant's reply, he stated that he did review a draft of the applicant's OER prior to its submission. He stated that the disputed OER is the same one that he reviewed, and that it was properly signed by an acting executive officer authorized to do so in his absence.

In support of his allegation that the rating chain was improperly established, the applicant submitted a statement from a chief warrant officer (CWO3) who worked with him during the period of the disputed OER. The CWO3 stated that the rating chain in effect from August 1992 through January 1993 was not published at that time, but it has been published since then.

The applicant's military record shows that in three OER's submitted in subsequent reporting periods, his supervisor was still the supervisor who evaluated him on the disputed OER. The three later OER's showed a gradual increase in the applicant's marks in the disputed sections.

Views of the Coast Guard

On December 16, 1996, the Coast Guard recommended that the applicant's request be denied. The Coast Guard stated that the applicant "has not established that the comments in the contested OER were factually erroneous, an abuse of discretion, or the product of bad faith or impermissible consideration."

The Service also stated that the applicant's rating chain was properly established. It stated that the administrative reorganization at the station resulted in the change in the applicant's supervisor. The Service asserted that the new supervisor had sufficient time to review the applicant's performance for that reporting period and that the applicant failed to make reasonable efforts to clarify any confusion he had regarding the composition of his rating chain. It stated that the substitution of the acting executive officer in the absence of the regular reporting officer was proper, and that the applicant was not prejudiced by that substitution.

In addressing the applicant's assertion that he was prejudiced by the delay in the submission of the disputed OER, the Coast Guard stated that the entire rating chain, including the applicant, failed to meet the time requirements for timely submission of the disputed OER. The Service stated that overall the disputed OER was more than 21 days late when it finally arrived at Coast Guard Headquarters for final review.

The Coast Guard stated that the CWO4 Selection Board that considered the applicant met on April 19, 1993. An "advance copy" of the applicant's OER was included in his record on April 14. His record was complete with respect to inclusion of the OER in the record. The Coast Guard stated that given the correlation between the date of the meeting of the selection board and the time that the OER was validated and presented to the applicant, it would have been impossible for the applicant to submit a reply to the OER in time for inclusion in his record for review by the selection board. The Coast Guard asserted that the applicant's record was complete when presented to the selection board because a reply to an OER is not a required component of a military record. The applicant was able to submit a reply, and it was included in his record in May, 1993.

The Service added, however, that the applicant's reply did not significantly enhance the OER as submitted, and therefore, it was unlikely that the reply had any positive effect on diminishing the negative qualities of the disputed OER. To underscore that point, the Service noted that the applicant had been passed over for promotion by the April 1994 selection board, and at that time, the applicant's reply to the disputed OER was a part of his record. The Coast Guard added that there were two more recent OERs in the applicant's record that were more positive than the disputed OER, and that were reviewed by the April 1994 selection board. The Service stated that even with those good OERs in his record, the applicant had still been passed over for selection.

RELEVANT REGULATIONS

Articles 10-A-1.b.(1) and (2) of the Coast Guard Personnel Manual (COMDTINST M1000.6A) state, in part, as follows:

1) Each commanding officer must ensure that accurate, fair, and objective evaluations are provided to all officers under their command. All supervisory personnel will see to it that evaluations of their subordinates are completed on schedule and in accordance with the prescribed standards.

2) There is only one person responsible for managing the performance of an individual officer. . .and that is the officer himself or herself. He or she is ultimately responsible for finding out what is expected on the job, for obtaining sufficient feedback or counseling, and for using that information in adjusting as necessary to meet or exceed standards.

Article 10-A-2.g(1) states, in part, that "[i]n instances where a Supervisor, Reporting Officer, or Reviewer is unavailable or disqualified to carry out the responsibilities of a member of the rating chain, the next senior officer in the chain of command will designate an appropriate substitute who is capable of evaluating the Reported-on Officer."

Article 10-A-4.a(2) states "[n]ormally OER's shall be forwarded to arrive at Headquarters not later than 45 days following the end of the reporting period."

Article 10-A-4.d(1) states, in part, that "[t]he Reported-on Officer will complete all items in [Section 1] and Section 15 (Return Address), no later than 21 days before the end of the reporting period."

Article 10-A-4.h(1) states that the "Reported-on Officer may reply to any OER regardless of its content, and have this reply filed with the OER. Replies must be submitted within 14 days of receipt of the OER copy from Commandant (G-PIM-3)."

Article 10-A-4.h(2) states that the "Reported-on Officer replies provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official."

Article 10-A-4.h(3) states that the "Reported-on Officer replies do not constitute a request for correction of a record. An officer who believes his/her OER contains a major administrative or substantive error should exercise the procedures for correction of military records outlined in article 10-A-6 [Correction of Military Records]. This includes requests to have the OER, or a part thereof removed from the record." (emphasis in original)

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The applicant requested an oral hearing before the BCMR. The Chairman, acting pursuant to 33 CFR §52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant asserted that his rating chain had been improperly comprised as a result of administrative restructuring at his duty station. He stated that he was unsure to whom he was responsible. However, it is evident from his submissions and the record that he reported regularly to the lieutenant (LT) who was his supervisor on the disputed OER. Based upon his daily interaction with the LT, it is clear that he knew the LT was his supervisor.

4. Article 10-A-2.g(1) provides that the next senior officer in the chain of command will designate a substitute on the officer's rating chain where a supervisor, reporting officer, or reviewer is unavailable. In the applicant's case, his reporting officer from past OERs was unavailable to report on him for the reporting period in question. The acting executive officer at the applicant's duty station was appropriately assigned to act as reporting officer in the absentee's place. Additionally, the absentee reporting officer reviewed a draft of the OER before its submission, and the absentee reporting officer verified that the disputed OER is the same one which he reviewed. The acting executive officer was correct in signing the final version of the disputed OER in his capacity as a substitute for the absentee reporting officer.

5. The applicant also asserted that his new supervisor made subjective statements on his OER and gave him low performance marks which were unsubstantiated by his actual performance. An officer's challenge to an OER "must overcome the strong, but rebuttable presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith." (citations omitted) Hary v. United States, 223 Ct. Cl. 10, 17, 618 F.2d 704, 707 (1980). This presumption applies to officers in a rating chain. The language in the comments of the disputed OER indicates explicit problems with the applicant's performance which were observed not only by the applicant's supervisor, but also by the reporting officer. The applicant's complaint regarding the OER does not prove that the OER is factually erroneous.

It indicates only that his opinion as to his performance differs greatly from that of his rating chain. A differing opinion as to performance is not sufficient to warrant invalidating or removing an OER.

6. The applicant asserted that the tardiness of the entry of the official OER in his record, resulted in his inability to submit a reply to the disputed OER before it was presented with his record to the 1993 CWO4 selection board. He stated that because the reply was not included in his record, the record was not "substantially complete" and therefore did not "fairly portray" his record. The Coast Guard stated that the OER was late as a result of delay on the part of the applicant and his command, but that the delay began with the applicant's failure to submit his portion of the form within the period of time prescribed in Article 10-A-4.d(1) *supra*.

The Service did not breach its duty to provide the applicant opportunity to reply to the OER; it was merely that there was insufficient time for the applicant to complete his reply and include it in his record before the CWO4 selection board met. A reply is an option for comment available to a Reported-on Officer. See Article 10-A-4.h *supra*. It is not a necessary component of a record, and therefore absence of a reply in a record does not make that record incomplete. Therefore, the Weiss rule does not apply in the applicant's case. See Weiss v. United States, 187 Ct. Cl. 1,7, 408 F. 2d 416, 419 (documents presented to a selection board must be substantially complete and must fairly portray the officer's record). The applicant's record, as presented to the selection board, was complete, and as discussed in the foregoing, it was an accurate, objective representation of his performance for that reporting period.

7. There is nothing to indicate that the applicant's reply would have changed the negative comments in the disputed OER. The provisions of Article 10-A-4.h *supra* explicitly state that the purpose of a reply is to allow a reported-on officer to express a difference of opinion from his rating official regarding his or her performance, but replies do not constitute applications to correct or change the OER.

8. In reviewing the applicant's record, it is evident that after the April 1993 CWO4 selection board, the applicant was considered for promotion by April 1994 CWO4 selection board. At the time that selection board met, the applicant's reply to the disputed OER was included in his record, as well as two more recent OERs which portrayed the applicant's performance in a more positive light than the disputed OER. Even with the improved OERs and the reply in his record, the applicant was passed over for promotion by the 1994 selection board. Therefore, his argument that the inclusion of his reply would have impacted significantly on his potential for selection by the 1993 CWO4 board is not persuasive.

9. It is the responsibility of each individual officer to seek clarification of his job responsibilities, and feedback on his or her individual performance. Article 10-A-1.b *supra*. Here, if the applicant had questions about the correct chain of command, or who his supervisor or reporting officer in the rating chain should have been, he should have presented those concerns to the command, or other individuals, for clarification. He did not do so.

10. The applicant has not shown that there was error or injustice on the part of the Coast Guard in the creation of the disputed OER, nor has he shown a correlation between the disputed OER and the applicant's two pass-overs for promotion. There is no basis on which to order removal of the two failures of selection from the applicant's record or to authorize his reconsideration for promotion to CWO4. Therefore, he is ineligible for back-pay and allowances and ineligible for reinstatement.

11. Accordingly, the application is denied.

ORDER

The application for correction of the military record of former [REDACTED]
[REDACTED] is denied.

[REDACTED]