

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-105

FINAL DECISION

ANDREWS, Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was commenced on August 10, 1998, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated May 20, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant, a xxxxxx on active duty in the Coast Guard, asked the Board to correct his record by "reevaluating" and raising the low comparison marks he was assigned on two of his officer evaluation reports (OERs). He also asked the Board to delete comments from two subsequent OERs that, he alleged, refer to his performance during the rating periods covered by OERs with low comparison marks.

APPLICANT'S ALLEGATIONS

The applicant alleged that he had been assigned inaccurately low comparison marks of 3¹ in his OERs for the reporting periods April 1, 1993, to November 30, 1993 (OER1), and December 1, 1993, to May 31, 1994 (OER2). He alleged that the other marks he received in these OERs are all average or above average and therefore do not support a lower than average comparison mark.

¹ There are no numbers on the comparison scale but there are 7 possible marks, each described in words (7 being best). The reporting officer is instructed to compare the reported-on officer to other officers of the same rank whom the reporting officer has known. The written description of a comparison scale mark of 3 is shown in the footnote on page 5.

The applicant alleged that comments in two other OERs, for the reporting periods June 1, 1994, to November 30, 1994 (OER3), and December 1, 1994, to May 31, 1995 (OER4), make reference to his performance during previous reporting periods. Such references, he alleged, are impermissible under Article 10.A.4.g.(3)(g) of the Personnel Manual.

Specifically, the applicant alleged that the comments in blocks 8 and 11 of OER3 and block 8 of OER4 impermissibly allude to his performance in previous reporting periods. He alleged that the comments in block 8 of OER3 that state "shown marked improvement this period" and "xxxxx & operational expertise are being honed" could be interpreted as indicating past poor performance. The applicant alleged that these comments are not only impermissible but misleading, because no poor performance had ever been documented and "all comments as to [his] xxxxxxxx abilities and judgment were exemplary." He further stated that the comment "continues to show positive improvement in all areas" in block 8 of OER4 could also be misinterpreted to denote a previous, undocumented performance problem.

Finally, the applicant alleged that the inaccurate comparison marks and impermissible comments caused his failures of selection to the rank of xxxxxxxx.

VIEWS OF THE COAST GUARD

On April 27, 1999, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant's request for relief due to lack of proof. The Chief Counsel alleged that the Board should apply the following standards in determining whether to remove the disputed OERs:

To establish that an OER is erroneous or unjust, the applicant must prove that the challenged OER was adversely affected by a clear, material error of objective fact, factors "which had no business being in the rating process," or a clear and prejudicial violation of a statute or regulation. Germano v. United States, 26 Cl. Ct. 1446, 1460 (1992); Hary v. United States, 618 F.2d 11, 17 (Cl. Ct. 1980); CGBCMR Dkt. No. 86-96. In proving his case, an applicant must overcome a strong presumption that his rating official acted correctly, lawfully, and in good faith in making their evaluations under the Coast Guard's Officer Evaluation System. Arens v. United States, 969 F.2d 1034, 1037 (1992); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979).

The Chief Counsel alleged that the applicant's allegations regarding the comparison marks in OER1 and OER2 are "based on a fundamental misunderstanding of the officer evaluation system. There is no direct relationship or correlation between an officer's performance evaluation marks and the comparison scale mark." Article 10.A.4.d.(4)(e) and (9), Personnel Manual (COMDTINST M1000.6A). Furthermore, the Chief Counsel alleged that the mark of 3 on the comparison scale "is consistent with the predominant marks of 4 and 5 in [OER1 and OER2]." He also argued that the applicant

had provided no evidence that the reporting officer's opinion of his abilities in comparison to his fellow officers' abilities was wrong.

In regard to the allegedly impermissible comments in OER3 and OER4, the Chief Counsel argued that they "do not allude to past reporting periods and are, therefore, authorized comments." He argued that the comments "refer to improved performance within the period of the report," rather than to poor performance in previous periods.

The Chief Counsel also pointed out that the applicant had failed to submit replies to these OERs. This failure, he argued, "may be considered as evidence that he accepted the rating official's characterization of the performance described in those OERs."

The Chief Counsel stated that the applicant's record would appear stronger if OER1 and OER2 were removed but not if OER3 and OER4 were removed. Therefore, he argued, the Board should only remove the applicant's failures of selection if it removes OER1 and OER2 from his record. However, the Chief Counsel stated, "all the disputed OERs are a fair and accurate representation of his performance and, therefore, this nexus analysis is irrelevant."

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

The Chairman sent the applicant a copy of the Coast Guard's views. The applicant responded on May 10, 1999. The applicant stated that he "understand[s] this mark is a subjective opinion of the Reporting Officer, but contend[s] it should reflect the rest of the OER." He alleged that he had consulted his supervisor upon receiving the low comparison marks and was told that "it was common to see a decrease in marks when an officer gets his first OER from a new unit" He stated that "[h]ad I realized this "subjective" mark was career ending, you can be assured I would have rebutted the OER without hesitation." Furthermore, the applicant argued, he was never counseled that his performance and OERs "were potentially career ending." Finally, the applicant argued that a nexus exists between his failures of selection and OER3 and OER4 because the allegedly impermissible comments strongly suggest that his performance during previous reporting periods was poor.

RELEVANT REGULATIONS

Article 10.A.4. of the Coast Guard Personnel Manual describes how members of a rating chain should prepare an OER. Article 10.A.4.d.(7) states the following:

(b) For each evaluation area, the Reporting Officer 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 Reporting Officer shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. . . . After

determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Reporting Officer fills in the appropriate circle on the form in ink.

• • •

(d) In the "Comments" sections following each evaluation area, the Reporting Officer shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a "4." The Reporting Officer shall draw on his/her own observations, from information provided by the Supervisor, and from other information accumulated during the reporting period.

(e) Comments should amplify and be consistent with the numerical evaluations in the evaluation area. They should identify specific strengths and weaknesses in performance or qualities. Well-written comments must be sufficiently specific to paint a 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. . . .

Article 10.A.4.d.(9)(a) contains the following instructions for filling out the comparison scale on OERs: "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."

Article 10.A.4.g.(3)(g) prohibits comments "discuss[ing] Reported-on Officer's performance or conduct which occurred outside the reporting period."

Section 10.A.4.h. allows the Reported-on Officer to reply to any OER and have the reply filed with the OER if they are submitted within 14 days of receipt of the OER copy from the commandant. The provision for reply is intended to "provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official."

SUMMARY OF APPLICANT'S RECORD

The applicant began serving in the xxxxxxxx in 1982. On September 27, 198x, he accepted an appointment as a xxxxxxxx in the Coast Guard Reserve and began serving on a four-year contract as a xxxx assigned to xxxxxxxx. On August 26, 199x, the applicant received a commission in the regular Coast Guard. He was promoted to xxxxxxxx on September 27, 1992. In the seven OERs that he received while serving at xxxxxxxxxx, the applicant earned the following marks on the comparison scale: 4, 4, 4, 5, 5, 4, and 4. The last four of these marks were assigned by the same reporting officer and appear as the first four OERs in the chart on page 5, below.

On April 1, 1993, the applicant was transferred to xxxxxxxxxx, where he received the four disputed OERs, with comparison marks of 3, 3, 4, and 4. These disputed OERs appear shaded in the chart below. He received OER1 for his first nine months of service

as a xxxxxxxx in xxxxxx. OER2, OER3, and OER4 are the first three OERs he received after he was promoted to xxxxxx in December 1993. The comments in OER1, OER2, OER3, and OER4 are fairly laudatory.

In the five subsequent OERs he received as an xxxxxxxx in xxxxxx, the applicant was assigned comparison marks of 4, 4, 5, 5, and 5. (The first four of these appear in the chart below.) The same person served as the applicant's reporting officer for OER1, OER2, OER3, OER4, and the two next, undisputed OERs.

The applicant's record contains many awards and citations. However, he has failed of selection twice and thus will be discharged.

APPLICANT'S MARKS IN TWELVE OERs FROM 7/1/9x THROUGH 5/31/9x

CATEGORY					OER 1	OER 2	OER 3	OER 4				
Being Prepared	5	5	5	5	4	4	4	4	4	4	5	5
Using Resources	5	5	4	4	5	4	4	5	5	5	6	6
Getting Results	5	5	4	5	4	5	5	5	5	5	5	6
Responsiveness	5	5	4	4	4	4	5	5	6	5	6	6
Work-Life Sensitivity/ Expertise ^a			4	4	4	4	4	4	4	4	4	4
Operational/Specialty Expertise	5	5	4	4	5	5	5	5	5	5	6	5
Collateral Duty/Admin- istrative Expertise	5	5	5	5	5	5	6	6	5	5	5	5
Working with Others	5	5	5	5	5	5	5	6	6	6	6	6
Human Relations	4	4	4	4	4	4	4	4	4	4	4	4
Looking Out for Others	4	4	5	4	4	5	6	5	5	6	6	6
Developing Subordinates	4	4	4	5	4	4	4	4	4	4	5	5
Directing Others	4	4	4	4	5	4	5	6	6	5	5	6
Evaluations	4	4	4	4	NO ^b	4	4	4	4	4	5	5
Speaking and Listening	5	5	5	5	5	4	5	5	5	5	5	5
Writing	5	5	4	4	4	5	5	5	5	4	5	5
Initiative	6	5	5	5	4	5	5	5	5	5	6	6
Judgment	5	4	5	4	5	5	5	5	5	5	6	6
Responsibility	5	5	4	4	4	4	4	5	5	5	5	5
Stamina	5	5	5	5	5	4	5	5	5	5	5	6
Health and Well-Being	4	4	4	4	4	4	5	5	5	5	4	4
Military Bearing	4	4	5	5	4	4	5	5	5	5	5	5
Professionalism	5	5	4	5	5	6	5	5	5	5	5	5
Dealing with the Public	5	5	4	4	6	5	5	6	6	6	6	6
Average Mark^c	4.7	4.6	4.4	4.4	4.5	4.5	4.8	5.0	5.0	4.9	5.2	5.3
Comparison Scale^d	5	5	4	4	3	3	4	4	4	4	5	5

^a Category added in 1992.

^b A score of "NO" means there was no opportunity to observe this category of performance.

^c The average marks for the OERs do not include the comparison scale marks. The averages have been rounded.

^d The comparison scale is not actually numbered. Reporting officers are instructed to compare the reported-on officer with other officers of the same rank they have known. In this row, a "3" means the applicant was rated to be an "excellent performer; recommended for increased responsibility." A "4" means the applicant was rated to be an "exceptional performer; very competent, highly respected professional." A "5" means the applicant was rated to be a "distinguished performer; give tough, challenging, visible leadership assignments."

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 of the United States Code. The application was timely.

2. The applicant alleged that OER1 and OER2 were incorrect because he received a comparison mark of 3 even though none of the comments in the OERs are negative and his marks in the performance categories are 4s, 5s, and one 6. Article 10.A.4.d.(7) of the Personnel Manual requires rating chain members to assign to each officer the mark in each performance category whose written description "best describes" the officer's performance. In contrast, Article 10.A.4.d.(9)(a) requires the reporting officer to assign a mark on the comparison scale by comparing the reported-on officer with others of the same grade whom he has known throughout his career. Therefore, there is no requirement that comparison scale marks correspond to numerical performance marks.

3. Article 10.A.4.2.(7)(d) requires marks in performance categories that deviate from a 4 to be explained by appropriate comments. However, marks on the comparison scale are not required to be explained, and there is no space on the disputed OERs for comments after the comparison scale.

4. A mark of 3 on the comparison scale is said to describe an "excellent performer," even though it is on the lower end of the scale. Comparison marks are often somewhat lower than the average performance mark on an OER. Therefore, it is not surprising that an officer who received very "average" performance marks also received a mark of 3 on the comparison scale. Thus, the applicant's comparison scale marks of 3 are not so extreme or unusual in comparison with his performance marks and comments as to convince the Board that they are necessarily inaccurate.

5. A mark on the comparison scale is an inherently subjective decision on the part of an officer's reporting officer, and the Board will not change or remove such a mark absent clear evidence that the mark is wrong. The applicant has not proved by a preponderance of the evidence that the Coast Guard erred or committed an injustice by assigning him marks of 3 on the comparison scales in OER1 and OER2.

6. The applicant alleged that the following comments in OER3 and OER4 were impermissible under Article 10.A.4.g.(3)(g) of the Personnel Manual because they referred to performance in previous reporting periods: "shown marked improvement this period"; "xxxxxxxxx & operational expertise are being honed"; and "continues to show positive improvement in all areas." These comments all refer to progress the

applicant made during the reporting periods for OER3 and OER4. They do not describe or refer to his performance during previous reporting periods. Therefore, they do not violate Article 10.A.4.g.(3)(g).

7. Therefore, the Board finds that the Coast Guard committed no error or injustice by including the disputed marks and comments in the applicant's OERs.

8. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of XXXXXXXX, USCG, is hereby denied.

Angel Collaku

James G. Parks

L. L. Sutter