

		Questioned the value of a superior officer's performance of assigned National Special Observance duties in a manner that negatively impacted the entire Command and that was interpreted by individuals to be a negative statement based on race. This action was observed to be a significant negative change from previous performance.
8. Reporting Officer Comments	NA ²	... Concur w/ Supervisor's evals & comments. ... He was always a dependable officer. However, a lapse in judgment caused the command to lose faith & confidence in his abilities to effectively lead in his position of leadership in the xxxxxx.
9.b. Judgment	3	... Lacked good judgment sending e-mail in contrast to Comdt's Human Relations Policy & was indifferent towards accountability of the action.
9.c. Responsibility	3	
11. Leadership and Potential	NA ²	[The applicant] is a very capable officer with high potential to be an excellent officer & leader. He has demonstrated sound project management and xxxxxx skills in numerous demanding and dangerous xxxxxx and has performed superbly. He clearly has the capacity for solid performance and is deserving of additional opportunities to demonstrate his full potential. His lapse in judgment is a concern and hopefully he will be able to overcome this incident.[³]
12. Comparison Scale ⁴	3	NA

Regarding the mark of 3 for the category Human Relations and the corresponding comments, the applicant alleged that “[t]here is no proof that I did not support the Commandant’s requirements for leadership on diversity, nor did the e-mail negatively impact the command.” He argued that the e-mail did not undermine the diversity policy because it was not discriminatory and did not hinder equality of opportunity. Furthermore, he argued, there is no proof that his e-mail negatively affected the command or that it was interpreted as a racist comment because no one complained even after his subordinate forwarded it to about 190 members of the command.

In addition, he alleged that his e-mail did not “question the value of a superior officer’s performance of assigned National Special Observance duties.”

² This block contains only a reporting officer’s written comments. No numerical mark is permitted.

³ Commonly, reporting officers use this block to recommend officers for promotion.

⁴ The Comparison Scale is not actually numbered. However, there are 7 possible marks, and the applicant received the third lowest mark on the scale. A mark in this position is supposed to reflect an “Excellent performer; recommended for increased responsibility.” No written comments are required. See Coast Guard Personnel Manual, Article 10.A.4.d.(9)(b).

Rather, the e-mail message “directed my subordinate to take an action that would decrease my workload.”

Regarding the mark of 3 for the category Judgment and the corresponding comments, the applicant alleged that his sending of the e-mail was “an administrative action, not a judgmental decision. There were no risks or costs to be weighed.” Moreover, he argued, because he immediately requested to meet with his commanding officer and because he met three times with his supervisor and the command’s civil rights officer to try to correct their misperception of his actions, he was not “indifferent” to the matter, as indicated in the corresponding comments.

Regarding the mark of 3 for the category Responsibility, the applicant argued that the corresponding comments do not support the mark, as required by Article 10.A.4.C.7.d. of the Personnel Manual.

Regarding the comments in block 11., on Leadership and Potential, the applicant alleged they are in error because he committed “no lapse in judgment.” Moreover, he argued, because his reporting officer wrote that he was “deserving of additional opportunities to demonstrate his full potential,” he should have been recommended for promotion after the incident and appointed to a position as department chief, executive officer, or commanding officer. Instead, he was transferred to “a staff job with no supervisory responsibilities.”

Regarding the mark he received on the Comparison Scale, the applicant stated that it is “substandard” and based on the three erroneous marks of 3 for Human Relations, Judgment, and Responsibility. Therefore, it is also in error.

Finally, the applicant argued that the disputed OER will diminish his chances for promotion and that promotion to the rank of commander is necessary for him to reach his full potential. Therefore, he alleged, the OER violates the Commandant’s Human Relations Policy, one goal of which is to allow each member to reach his or her full potential.

VIEWS OF THE COAST GUARD

Upon receipt of the application, the BCMR sent a copy to the Chief Counsel of the Coast Guard in accordance with 33 C.F.R. § 52.82(a). Under 33 C.F.R. § 52.82(c) and (d), the Chief Counsel may submit an advisory opinion on each application, and if he does, the applicant must receive a copy of it and have at least 15 days in which to respond. However, under 14 U.S.C. § 425, the Board must issue a decision on each completed application within 10 months.

While the burden is not on the BCMR to remind the Chief Counsel's office of these statutory and regulatory requirements, the BCMR staff reminded the Chief Counsel's office of the 10-month deadline in this case both orally and by e-mail in January and early February 2000. In addition, the BCMR staff informed the Chief Counsel's staff that the Board would have to consider the case without the benefit of the advisory opinion if it arrived too late in the statutory period for the Board to comply with 33 C.F.R. § 52.82(d) and duly deliberate the case.

The Board did not receive an advisory opinion in this case until February 18, 2000, more than nine months after the application was received on May 5, 1999. Insufficient time remained in the 10-month statutory period for the applicant to review the Chief Counsel's advisory opinion and for the Board to issue a decision based on a careful review of all submissions, including the applicant's response to the Chief Counsel's advisory opinion. Therefore, the Chief Counsel's advisory opinion was not read or relied on by the Board in reaching its decision. The advisory opinion was sealed and set aside, and this decision is based solely upon the applicant's submissions and military record and applicable law.

RELEVANT REGULATIONS

Article 10.A.1.b. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) in effect in 1994 states that "[c]ommanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command."

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."

The applicant submitted a copy of COMDTINST 5350.21, which contained the Commandant's Human Relations and Sexual Harassment Policy Statements issued on October 9, 1990. Paragraph 3.b. of the instruction states that "all Coast Guard personnel [are] to actively demonstrate their own commitment and support of these policies."

The Human Relations Policy Statement in COMDTINST 5350.21 includes the following language:

... Our greatest resources for meeting the challenges of change are the men and women who respond daily, unselfishly in their operational and support roles, to carry out our various missions. I am committed to seeing that all Coast Guard personnel ... are provided the opportunity to work and develop so as to achieve their full potential. ...

[W]e must take positive steps to avoid any vestige of discrimination based on race, color, religion, gender, age, national origin, or mental or physical handicap in any thoughts or actions affecting our personnel, those seeking employment with us, or those entitled to benefits under any Coast Guard sponsored programs....

This policy is important to maintain a Coast Guard where each of us is morally committed to ensuring equality of opportunity for every individual, and where we all assume a personal responsibility for assuring that this concept works throughout the Service. This means that each one of us must not only practice nondiscriminatory behavior, but we must also educate others regarding the benefits of a nondiscriminatory environment on the Coast Guard's ability to function.

The Human Relations Policy Statement in COMDTINST 5350.21, was superceded in 1996 by COMDTINST 5350.21A. The new statement's message is very similar to that in COMDTINST 5350.21. It further provides that "we must

be dedicated to instilling these core values in ourselves and our people, and providing a working environment in which we appreciate and gain strength from our individual differences.”

COMDTINST 5354.5, issued on June 26, 1992, lists Black History Month as a National Special Observance. It directs area and district commanders to effect program planning that will “(1) provide the Coast Guard work force with a greater understanding of the contributions made to our national heritage, (2) recognize the contributions of these groups, and (3) develop an appreciation for the richness and variety these cultures have brought to our diverse nation.”

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions 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. Under 14 U.S.C. § 425, the Board must issue a decision within 10 months of its receipt of an application. Therefore, the Chairman determined not to include the Chief Counsel's advisory opinion in the record reviewed by the Board because it was received too late for the Board to comply with the 10-month deadline and with 33 C.F.R. § 52.82(d), under which the applicant must have 15 days to respond to the advisory opinion. The Board concurs in the Chairman's decision.

3. The applicant's superiors could reasonably have construed his e-mail message to communicate the following information: (a) He considered the receipt of black history facts during Black History Month to be a “complete waste” of his and other people's time; (b) he resented having to take a few seconds each day to read the black history facts or just to delete them without reading them; (c) he did not think it was important for him or other members of the Coast Guard to learn about black history; and (d) he did not support his superiors' decision and order to distribute black history facts in accordance with COMDTINST 5354.5. Moreover, his superiors could reasonably have concluded that the last line of his e-mail message strongly suggested that he questioned the truth of the information being distributed.

4. In reviewing the applicant's allegations, the Board is not unmindful of the presumption of regularity accorded to personnel evaluations, and that the burden is on the applicant to counter such a presumption. Applying that presumption, the Board finds that the applicant's rating chain could reasonably have

concluded that he showed poor judgment in deciding to send this e-mail. While he could have asked his supervisor if he could be removed from the distribution list, he should not have communicated these attitudes to a subordinate, especially via "insecure" e-mail. Therefore, the applicant has not persuaded the Board that the mark of 3 for Judgment in the disputed OER was unjustified, and the corresponding comments support the mark.

5. Again, applying the presumption, the Board finds that the applicant's rating chain also could reasonably have concluded that, by sending the e-mail message, the applicant communicated to his subordinate his resentment at being encouraged to learn and appreciate the cultural history of his country and fellow Coast Guard members. Therefore, the applicant has not persuaded the Board that the mark of 3 for Human Relations in the disputed OER was unjustified, and the corresponding comments support the mark.

6. The applicant also challenged the mark of 3 he received for Responsibility in the disputed OER. A mark of 4 for Responsibility requires that, during the evaluation period, the officer "[p]laced goals of Coast Guard above personal ambitions and gains. ... Held self and subordinates accountable. ... Supported organizational policies/decisions which may have been counter to own ideas." Again, applying the presumption, the Board finds that the applicant's rating chain could reasonably have concluded that, by sending the e-mail message, he did not support the Coast Guard's Human Relations Policy or place the Service's goals above his own desires. Moreover, the applicant has not proved that his reporting officer's comment in block 9.c., which stated that the applicant was "indifferent towards accountability of the action," was in error. Therefore, the applicant has not persuaded the Board that the mark of 3 for Responsibility was unjustified, and the corresponding comments support the mark.

7. Marks on the Comparison Scale in block 12 are inherently subjective, as each reporting officer must compare the reported-on officer with other officers of the same rank whom the reporting officer has known. In light of Findings 4, 5, and 6, above, the applicant has not persuaded the Board that the mark received by the applicant on the Comparison Scale in the disputed OER is either in error or unjust.

8. The applicant alleged that he was transferred from the xxxx in xxx only because his commanding officer wanted to avoid interference from his superiors. However, the applicant has not requested that the Board provide him with any specific relief with respect to his transfer. Even had he requested some relief, the applicant has not proved that there was any impropriety with respect to his transfer, and he has not persuaded the Board that it was unjust. Moreover, it is unclear what relief, if any, the Board could order with respect to the

applicant's transfer given the limitations to the Board's jurisdiction under 10 U.S.C. § 1552.

9. The applicant alleged that he should have been made a department chief, executive officer, or commanding officer to have additional opportunities to fulfill his potential, and that failure to have such opportunities violated the Commandant's Human Relations Policy. However, the applicant has not requested that the Board provide him with any specific relief with respect to his current position. Even had he requested specific relief, the applicant has not proved that his current assignment violates the Commandant's Human Relations Policy. Moreover, it is unclear what relief, if any, the Board could order with respect to the applicant's current duties given the limitations to the Board's jurisdiction under 10 U.S.C. § 1552.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

James K. Augustine

Jay R. Gordon

Julia A. Rhodes