

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-128

**DECISION OF THE DEPUTY GENERAL COUNSEL
ACTING UNDER DELEGATED AUTHORITY**

I approve the recommended Order of the Board.

I disapprove the recommended Order of the Board.

I concur in the relief recommended by the Board.

Date: _____

Rosalind A. Knapp
Deputy General Counsel
as designated to act for the
Secretary of Transportation

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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 docketed on May 9, 2000, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated May 31, 2001, 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 xxxxxxxxxx in the Coast Guard Reserve, asked the Board to correct his military record by raising six performance marks in the officer evaluation report (OER) he received for the period April 1 through May 31, 1998, and by removing his 1999 and 2000 failures of selection for promotion to xxxxx. He further asked that, if he is selected for promotion by the first xxxxxx selection board to review his record as corrected, the Board backdate his date of rank to what it would have been had he been selected for promotion by the first such board that reviewed his record, and award him the back pay and allowances he would then be due.

APPLICANT'S ALLEGATIONS

The applicant alleged that in the spring of 1999, his command originally prepared an OER for the entire year from April 1, 1998, through March 31, 1999. However, this OER was returned to his command by the Coast Guard Personnel Command (CGPC) for revision on June 21, 1999, because it covered his job performance both while serving in the Reserve for two months from April 1, 1998, through May 31, 1998, and while serving on active duty for ten months from June 1, 1998, through March 31, 1999.

CGPC stated that his performance while in the Reserve and while on active duty must be evaluated on two separate OERs. He alleged that in the rush to prepare two new OERs before the xxxx selection board met on August 2, 1999, the OER for the two-month period he was still in the Reserve was prepared hurriedly. As a result, he alleged, he received six marks that were lower than his performance merited.

APPLICATION TO THE PRRB

On March 1, 2000, the applicant applied to the Personnel Records Review Board (PRRB) for correction of the two-month OER. In his application, he alleged that because he was scheduled to be considered for promotion by a xxxxx selection board that convened on August 2, 1999, his rating chain had to prepare the two replacement OERs very quickly because the deadline for entering documents into personal data records (PDRs) being reviewed by the selection board was July 2, 1999. As a result of this hurried preparation, he alleged, the marks assigned for the two-month replacement OER covering his performance in the Reserve were lower than they should have been. He alleged that the narrative description of his performance in the OER “fully supported higher marks in six categories.”

Along with his application, the applicant submitted statements signed by each of the three members of his rating chain endorsing his request. His supervisor stated that he “fully concur[red]” with the applicant’s request for the reasons given in the application. His reporting officer “strongly concur[red]” in the applicant’s request, stating that “[d]ue to the fast turn around time needed to complete these two OERs, I agree that the subject OER was not looked at as closely as it would have been under normal circumstances. A further review shows that the new marks are justified.” The reviewer of the OER wrote that he “highly support[ed]” the applicant’s request, stating that he had “exhibited outstanding performance both on Reserve and Active Duty. I fully agree that the attached OER should replace the existing one in [the applicant’s] permanent record.” Each of the members of the applicant’s rating chain also signed a proposed substitute OER. However, the PRRB dismissed his case due to untimeliness.¹

SUMMARY OF THE APPLICANT’S RECORD

In 197x, the applicant was appointed an ensign in the Reserve after graduating from the xxxxxx Merchant Marine Academy and began serving on extended active duty as a marine inspector and investigator. He was released into the Selected Reserve after four years of active duty on xxxxxxxx, 198x. For the next 17 years, he served in the Selected Reserve by drilling and occasionally performing short-term active duty for

¹ Paragraph 8 of COMDTINST 1070.10C states that “PRRB applications must be received at Coast Guard Headquarters within 1 year of the date on which the contested information was entered or should have been entered into the official record.” The applicant applied to the PRRB within one year of when the disputed OER was entered in his record, but the PRRB may have decided that the disputed OER covering April 1 through May 31, 1998, “should have been entered into [his] official record” in 1998.

special work (ADSW) assignments of several days' duration. He was regularly promoted and attained the rank of xxxxxxxxx on July 1, 199x. He has received several commendations and medals for his service.

In the mid 1990s, the applicant served as a Reserve deputy and group commander. The two OERs for this service are summarized in the table below as Reserve OER 1 and OER 2. From July 1, 1995, to April 30, 1996, he served as a Reserve port safety officer and senior investigation officer at xxxxxx. OER 3 in the table shows his marks for this period.

From May 1, 1996, through May 31, 1998, the applicant served as the Reserve Chief of the xxxxxxxxxxxx, augmenting the xxxxxxxxxxxxxxxx branches of the division. OER 4 in the table below is a regular biennial OER covering his performance in this position from May 1, 1996, through March 31, 1998. The disputed OER covers his performance for his last two months at this Reserve position, from April 1 through May 31, 1998. According to the Reserve rating chain published by xxxxxxxxx, his rating chain during these two months was the same as the rating chain for OER 4. During this period, he supervised marine investigators and planned and oversaw, as acting chief of the division for two weeks, the Coast Guard's participation in a xxxxxxxxxxxx, with two xxxxxxxxx.

On June 1, 1998, the applicant began serving on an extended active duty contract as Chief of the xxxxxxxxx. On March 10, 1999, he submitted an OER form to his rating chain for the period April 1, 1998, through March 31, 1999, which included the last two months of his work in the Selected Reserve and the first ten months of his extended active duty. The numerical marks assigned in this OER appear in the table below under the heading "Rejected 12-month OER Res. & AD." The OER was signed by his supervisor on April 18, 1999, by his reporting officer on May 4, 1999, and by his reviewer on May 5, 1999. This rating chain was his active duty rating chain, but two of the officers had also served on his Reserve rating chain: the supervisor was the same person who served as his supervisor for the biennial OER 4, and the reporting officer had served as the reviewer for OER 4. On June 21, 1999, this OER was returned to his command by CGPC because it covered periods of both Reserve and active duty.

On July 7, 1999, the applicant's rating chain signed and submitted two new OERs to replace the one CGPC had rejected: one for his two months of Reserve duty and ADSW in April and May 1998 and one for his ten months of active duty from June 1, 1998, through March 31, 1999. The rating chain for both replacement OERs was the applicant's active duty rating chain. The senior Reserve officer who had served as the reporting officer on the applicant's Reserve rating chain had been transferred from xxxxxxxxx on July 1, 1998.

Being Prepared/Planning	5	5	5	5	6	4 ^b	6	6
Using Resources	6	6	5	5	6	5	6	6
Getting Results	6	5	5	5	6	5	5	6
Responsiveness ^c	5	6	5					
Work-Life Sensitivity ^c	6	4	5					
Adaptability ^c				5	6	5	5	6
Specialty Expertise/ Professional Competence	5	5	5	5	6	5	6	6
Collateral Duty ^c	5	6	5					
Speaking & Listening	4	6	5	5	6	6	6	6
Writing	6	4	5	5	5	5	5	5
Looking Out for Others	6	6	4	6	6	5	6	6
Developing Subordinates	5	5	5	5	6	5	5	6
Directing Others	5	5	4	5	6	5	5	6
Teamwork	5	6	6	6	6	4	5	6
Human Relations/ Workplace Climate	4	4	4	5	5	4	6	5
Evaluations	4	4	4	4	4	4	4	4
Initiative	6	5	5	6	6	5	5	6
Judgment	5	5	5	5	6	6	6	6
Responsibility	5	4	5	5	6	5	5	6
Stamina ^c	4	4	4					
Military Bearing ^c	4	4	4					
Professional Presence	5	5	5	6	6	6	6	6
Health & Well-Being	6	5	5	4	5	4	4	5
Dealing with the Public ^c	6	5	5					
Average Mark in OER	5.1	5.0	4.8	5.1	5.7	4.7	5.3	5.7
Comparison Scale ^d	5	4	4	5	5	5	5	5

^a Some categories' names have changed slightly over the years. Supervisors fill in the marks for the first 16 categories, from "Being Prepared/Planning" to "Evaluations." Reporting officers complete the remaining blocks.

^b Marks disputed and proposed by the applicant and his rating chain appear shaded.

^c Category nonexistent until later years, or category discontinued.

^d The comparison scale is not actually numbered. However, as with the performance categories, there are seven possible marks. Officers are supposed to be marked in comparison with all other officers of the same rank known to the reporting officer. In this row, "4" means the applicant was rated to be an "good performer; give tough, challenging assignments." A "5" means the applicant was rated to be an "excellent performer; give toughest, most challenging leadership assignments." A "6" means that the officer is "strongly recommended for accelerated promotion."

VIEWES OF THE COAST GUARD

Advisory Opinion of the Chief Counsel of the Coast Guard

On December 21, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The

Chief Counsel argued that Board should apply the following standards in deciding whether to grant relief:

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 officials 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 ([Fed. Cir.] 1992); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979). An applicant may only rebut this presumption by clear, cogent, and convincing evidence to the contrary. Decision Deputy General Counsel in BCMR Case No. 2000[-037] dated November 20, 2000 *citing Muse v. United States*, 21 Cl. Ct. 592, 602 (1990). In the absence of compelling circumstances, an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect or unjust material from the appropriate material. BCMR No. 151-87, cited in BCMR 106-91, et al.

The Chief Counsel argued that the applicant did not present sufficient evidence to overcome the presumption that his rating chain completed an accurate OER in July 1999. He alleged that the applicant’s rating chain had 16 days between receiving notice from CGPC on June 21, 1998, and July 7, 1998, to prepare the OER and that the applicant did not prove that this was insufficient time to prepare an accurate OER. He argued that 16 days was quite sufficient for the applicant’s supervisor to assign accurate marks in accordance with Article 10.A.4.c.4.b. of the Personnel Manual, especially in light of the fact that the supervisor had already collected and reviewed information about the applicant’s performance when he prepared the first OER, which CGPC had to reject.

The Chief Counsel argued that when the applicant stated that the written comments in the disputed OER support higher marks, he was misapplying the regulation governing the relationship between OER marks and comments. The Chief Counsel argued that under Article 10.A.4.c.4.7., narrative comments in an OER are intended only to support the assigned marks, not the opposite. Therefore, he alleged, the applicant is wrong to argue that his numerical marks must be erroneous because the comments added by his rating chain could support higher marks.

The Chief Counsel also stated that “the rationalizations offered by Applicant’s Supervisor and Reporting Officer to explain the alleged error fail to prove error by clear and convincing evidence.” He pointed out that the supervisor had not explained how the error occurred other than to concur with the applicant’s explanations, which are meritless. He described the reporting officer’s endorsement as “inconclusive” and insufficient to constitute the “clear and convincing evidence” required to prove error.

In addition, the Chief Counsel argued, the endorsements submitted by the applicant's rating chain "are presumptively retrospective as they were made eight months after the OER was signed and after Applicant had failed of selection to O-6." He alleged that "retrospective reconsideration of an OER is not a basis for correction," citing the Decision of the Deputy General Counsel in BCMR Docket No. 84-96; *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990); *Tanaka v. United States*, 210 Ct. Cl. 712 (1976); and BCMR Docket Nos. 67-96, 189-94, 24-94, 265-92, and 311-88. Therefore, the Chief Counsel concluded, the applicant has not presented clear and convincing evidence that the six disputed numerical marks in his OER for April 1, 1998, through May 31, 1998, are erroneous.

The Chief Counsel pointed out that the applicant failed to challenge the disputed OER by filing an OER reply in accordance with Article 10.A.4.g. of the Personnel Manual. This failure, he argued, should be considered as relevant evidence that he accepted his rating chain's evaluation of his performance as shown in the disputed OER.

The Chief Counsel stated that in "the interests of administrative efficiency," a nexus analysis concerning whether the alleged error could have caused the applicant's failure of selection for promotion to xxxxx would not be submitted unless specifically requested by the Board.

Memorandum of the Coast Guard Personnel Command

The Chief Counsel attached to his advisory opinion a memorandum on the case prepared by the CGPC. The memorandum provided the following explanation of the Chief Counsel's argument that the applicant was misapplying the regulation in stating that the marks should be raised because of the corresponding written comments:

3. ... Rating chain officials are instructed to read the written descriptors for each performance dimension on the OER, consider the overall performance of the ROO [reported-on officer] for the period, and select the numerical mark that most closely corresponds. They are then required to provide written comments to justify any mark that deviates from a four for the purpose of documenting that officer's performance and character. However, raters are not prevented from providing comments for a mark of four. In the disputed OER, many comments are provided to document performance even though a mark of four was assigned. The comments provided correlate closely to and support the numerical marks.

4. Neither sheer number of comments, nor singular comments that describe performance above the standard for the numerical mark assigned, justify a higher numerical mark. The marks assigned reflect the rater's opinion of the overall level of performance for the ROO during the period. Comments support the mark assigned and elaborate on performance.

CGPC further stated that the Officer Evaluation System is structured to ensure that the assigned marks are carefully considered by all of the members of the rating chain, who must sign the OER. CGPC pointed out that the reviewer of the disputed

OER was also the applicant's commanding officer and had personal knowledge of his performance. CGPC also stated that the marks in the disputed OER were consistent with the marks the applicant had previously received as a reservist. In addition, CGPC alleged that it was not surprising that the disputed marks were lower than the marks he received in the next, ten-month OER for his active duty because while on active duty, the applicant "has the opportunity to perform his duties continuously and as a fully integrated member of the unit."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 21, 2000, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within 15 days. On December 29, 2000, the applicant asked for an extension of the time to respond until February 15, 2001, due to his involvement in a "xxxxxxxxxxxxx." The extension was granted.

On February 14, 2001, the BCMR received the applicant's response to the Chief Counsel's advisory opinion. The applicant first alleged that his application to the PRRB had been timely because he submitted it within a year of when the disputed OER was entered in his record. Therefore, he argued that his case should have been considered by the PRRB. The remainder of the applicant's comments indicate that he misunderstood the advisory opinion as being the opinion of the BCMR rather than the opinion of the Chief Counsel.

The applicant indicated that he first saw the disputed OER the week before the xxxxx selection board convened in August 1999. He alleged that as soon as he saw the marks, he "verbally dispute[d]" them with his supervisor and pointed out that they were "too low for the quality of [his] performance" and "substantially lower than the prior reserve OER, which was in the same chain of command." However, his supervisor told him not to worry because it was only a Reserve OER and only covered two months of his performance, so "it should not make a difference to the board." As a result of his supervisor's advice, the applicant alleged, he made the mistake of not appealing the OER, although an appeal could not have resulted in a correction of his performance marks.

The applicant stated that since that time, he himself has served on a selection board and knows "how important every OER is, reserve or active duty." He alleged that because of the large number of OERs the members of a selection board review, a two-month OER is treated the same and given the same weight as an OER covering a full year.

The applicant argued that the endorsements by his rating chain do not constitute "retrospective reconsideration" resulting from his failure of selection. He alleged that he began challenging the OER shortly after he first saw it at the end of July 1999. He

alleged that he “followed the chain of command” by first speaking with his supervisor in July 1999 and then discussing it with his reporting officer in September 1999. He alleged that after the reporting officer promised to review the OER, he “purposely did not badger anyone about this issue” and waited patiently for his reporting officer to complete his review. “Sometime after the new year, 2000,” he alleged, he asked his reporting officer to make a decision since he knew he needed to apply to the PRRB within a year. He alleged that his reporting officer then reviewed the OER and told him that he thought six marks should be raised. Thus, he applied to the PRRB to have the six marks raised on March 1, 2000, well within a year of when he received the OER.

The applicant also alleged that the disputed OER was signed by the wrong rating chain. He submitted a copy of the Reserve rating chain for xxxxxxxxxx dated May 16, 1998, which shows that his rating chain while serving in the Reserve until June 1, 1998, continued to be the rating chain that signed his previous OER for the period ending March 31, 1998. Moreover, he argued, his new rating chain received no input from the xxxxx who supervised his work during the two months covered by the OER. The applicant alleged that during the two months, he was assigned to serve as the Reserve counterpart to this xxxxx and that they were planning a xxxxxxxxxxxxxx. He alleged that the xxxxx was out of town during the xxxxxxxx and so he “became the on scene Commander and Coast Guard liaison officer for the xxxxxxxxxxxx.” He alleged that his rating chain did not seek input from this xxxxx because of the short time allowed for creating the substitute OERs. He also contested the Chief Counsel’s allegation that the 16 days between June 21, 1999, and July 7, 1999, was adequate time for his rating chain to prepare both substitute OERs carefully. He stated that preparing the substitute OERs that quickly was a “Herculean task” because his command was “preparing for a major marine event, the xxxxxxxxxxxxxx on the xxxxxxxxxxxxxx, held on xxxxxxxx.” He also alleged that members of his rating chain took leave during the time the substitute OERs were being prepared and that he himself “had already scheduled time off to close on the selling of one home, closed on the purchasing of another home, and move [his] family” because his active duty contract was ending.

The applicant alleged that the inaccuracy of the disputed OER is proved by the much higher marks shown on the original OER prepared by his rating chain, which was rejected by CGPC. He also strongly contested that Chief Counsel’s argument that performance marks are not based on written comments:

The [Chief Counsel’s] statement that narrative comments support the mark assigned and elaborate on performance sounds good, but is not the normal practice. That is not how my OERs have been completed or any other officer’s that I have worked on while I was in their rating chain, in any command, through my entire Coast Guard career. Bullets and narrative information is provided by the Reported-on Officer. All the information is compiled and the important highlights are written into a narrative. The more information written to support a specific category determines your numerical mark. The last step is always the assignment of marks by blackening the circles. That is the way it is done in

the Coast Guard. Although it may not be in accordance with the written procedures, it is the practice Coast Guard wide. And that is, in fact, how my disputed OER was prepared.

The applicant submitted with his response to the Chief Counsel's advisory opinion another signed statement from the rear admiral who served as the reviewer for the disputed OER. The reviewer stated that when the original OER was returned by CGPC, his command was primarily concerned with preparing the substitute OERs quickly and that they were "not handled with the care that is normally given to these reports under my command." He corroborated the applicant's allegation that no input was received from the xxxxx who supervised his work during the two months covered by the OER and argued that "[t]hat in itself should justify that the disputed OER be expunged." The reviewer "strongly disagreed" with the Chief Counsel's allegation that the rating chain's endorsement of the application was mere "retrospective reconsideration." He stated that they were only concerned with "fairness" and that the applicant's performance during the two months covered by the disputed OER justified the higher marks endorsed by the rating chain. He concluded that "it is time to correct this injustice."

APPLICABLE REGULATIONS IN THE PERSONNEL MANUAL

Submission of OERs

Reserve xxxxxxxx receive regular OERs covering two-year periods ending on March 31st. There is no provision in either the Personnel Manual or the Reserve Policy Manual that expressly prohibits a single OER from covering both Reserve and active duty.² Article 10.A.3.a.3. of the Personnel Manual states that when a member is detached from a unit on permanent change of station (PCS) orders, "OER submission is optional for the PCS detachment if the previous regular reporting period ended ... within the last 92 days. The days between the end of the previous regular OER and the detachment date ... will be reflected as "Days Not Observed, Other" on the first OER from the next unit, with a short explanation in Section 2 (e.g. Detached USCGC DAUNTLESS on 89 01 01). A 'For Continuity Purposes Only' OER is not desired." Under the Joint Federal Travel Regulations (JFTR), PCS orders are defined to include orders received by a Reservist under a call to active duty for 20 or more weeks. JFTR, App. A. However, the applicant was not detached from his unit but assumed a similar billet at the same unit when his PCS orders and active duty contract went into effect.

Composition of the Rating Chain

² The BCMR asked the Chief Counsel's office to state the regulatory basis for CGPC's rejection of the original OER. In response, the Chief Counsel's office cited a provision in Article 10.A.3.c.(3)(a) of the Personnel Manual, which was enacted in 2000 and did not exist at the time of CGPC's decision. However, the Chief Counsel's office alleged that CGPC's decision was in accordance with a long-standing policy in effect because of a perceived difference in the way Reservists and active duty officers are evaluated, although the OER forms and written standards used for evaluating Reserve and active duty officers are the same.

Each OER is prepared by the reported-on officer's "rating chain" of three senior officers: the supervisor (usually the officer to whom the reported-on officer answers on a daily basis), the reporting officer (usually the supervisor's supervisor), and the reviewer (usually the reporting officer's supervisor, who need not have actually observed the reported-on officer's performance). Articles 10.A.2.d.1., e.1., and f.1. The commanding officer, rating chain, and reported-on officer are all mutually responsible for ensuring that OERs are initiated timely. Articles 10.A.2.b.2., c.2., d.2., and e.2.

Article 10.A.2.g.1. provides that when "a Supervisor, Reporting Officer, or Reviewer is unavailable or disqualified to carry out their rating chain responsibilities, the commanding officer or the next senior officer in the chain of command shall designate an appropriate substitute who is capable of evaluating the Reported-on Officer. Other members in the rating chain may be adjusted and designated, as appropriate." Article 10.A.2.g.2. defines "unavailable" as being dead, discharged, retired, transferred, or "any other situation which prevents or substantially hinders the Supervisor, Reporting Officer, or Reviewer from properly carrying out their rating chain responsibilities."

Duties of the Rating Chain

Article 10.A.2.c.2. provides that the reported-on officer must submit an OER form to his supervisor "not later than 21 days before the beginning of each reporting period." He may also submit "a listing of significant achievements or aspects of performance which occurred during the period." The reported-on officer also must ensure that "all days of commissioned service are covered by OERs. If an OER is missing or a gap in coverage exists, [he] informs the appropriate rating chain. The rating chain shall take necessary action to correct the discrepancy."

Article 10.A.2.d.2. provides that the supervisor must prepare his section of the OER and forward it with "any other relevant performance information to the Reporting Officer not later than 10 days after the end of the reporting period." Prior to preparing his section, the supervisor receives evaluation input from "secondary supervisors." Article 10.A.2.d.1.d.

Article 10.A.2.e.2. provides that the reporting officer must prepare his section of the OER based on direct observation and reliable reports of the officer's performance. He also reviews that supervisor's work on the OER and returns the report "for correction or reconsideration, if the Supervisor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer may not direct that an evaluation mark or comment be changed (unless the comment is prohibited under --> Article 10.A.4.f.)" Article 10.A.2.e.2.c. Finally he ensures that it is "forwarded to the Reviewer not later than 30 days after the end of the reporting period." If a reporting officer leaves a unit without preparing an OER for a subordinate

officer, he must prepare a draft OER with proposed marks and comments for consideration by the next reporting officer. Article 10.A.2.e.2.i.

Article 10.A.2.f.2. states that the reviewer “[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential.” In addition, the reviewer “shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer may not direct in what manner an evaluation mark or comment be [sic] changed.” Article 10.A.2.f.2.d. Finally, the reviewer, “[e]xpedites the reviewed report in a reasonable time to permit the OER Administrator to ensure the OER is received by Commander, (CGPC-opm-3) 45 days after the end of the reporting period.” Article 10.A.2.f.2.f.

Instructions for Preparing an OER

Article 10.A.4.d.4. instructs supervisors to assign marks and write comments for the first 16 performance categories on an OER as follows (virtually identical instructions are provided in Article 10.A.4.d.7. for reporting officers, who complete the rest of the OER):

(b) For each evaluation area, the Supervisor 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 Supervisor shall carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer’s performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

• • •

(d) In the “Comments” sections following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary supervisors, and from other information accumulated during the reporting period.

(e) Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct 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. . . .

• • •

(g) A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. . . .

Article 10.A.4.d.8. contains instructions for completing the comparison scale:

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.

Replies to OERs

Article 10.A.4.g. allows the Reported-on Officer to file a reply to any OER within 14 days of receiving it to "express a view of performance which may differ from that of a rating official." However, a reply to an OER does not constitute an appeal or request for correction. OERs may only be corrected by the PRRB or the BCMR.

CASES CITED BY THE CHIEF COUNSEL

In *Tanaka v. United States*, 210 Ct. Cl. 712 (1976), the Court of Claims held that the Air Force BCMR was not arbitrary or capricious in refusing to remove or modify three OERs in the plaintiff's record. The plaintiff had submitted two letters by members of his rating chain who indicated that they had rated his performance too low in the disputed OERs. The court found that the letters did not identify any misstatements of fact, "only opinions they no longer entertained."

In *Paskert v. United States*, 20 Cl. Ct. 65 (1990), the Court of Claims upheld an Army BCMR decision not to remove an OER from the plaintiff's record. The plaintiff submitted a statement by his senior rater, who wrote that the applicant should have been promoted and retained by the Army. However, the senior rater repeatedly affirmed the validity of the disputed OER. The Court stated that "[t]he supporting statement by the senior rater is a case of retrospective thinking motivated by the knowledge of the applicant's nonselection for promotion to major." Because the senior rater had confirmed the validity of the disputed OER, the Court found that his statement did not prove that the OER was not accurate, fair, or objective.

In BCMR Docket No. 67-96, the applicant had drafted the three disputed OERs for himself at the request of his civilian supervisor and reporting officer. He alleged that he had marked himself lower than he deserved because he was afraid that higher marks would be interpreted as undeserved grade inflation by a selection board. He submitted affidavits from the supervisors for the disputed OERs supporting these allegations. The Board denied relief, agreeing with the Chief Counsel that the supervisors' statements constituted "retrospective reconsideration" induced by the applicant's failure of selection.

In BCMR Docket No. 84-96, the applicant, in challenging several OERs, submitted a statement from his commanding officer stating that, "were it possible to adjust [his OER marks] for today's 'rules' and standards, I would readily raise more than half of

the marks assigned.” The applicant also submitted a copy of the commanding officer’s directions to a rating chain, which indicated that, for some of the unit’s officers’ OERs, he required marks to be lowered to be more like those officers’ historical averages. Such “historical averaging” is a direct violation of OER regulations. The Board refused to remove the disputed OERs, finding that the applicant had not proved his own marks were lowered as a result of historical averaging. The Board’s decision was reviewed by the Deputy General Counsel over another issue. Citing *Tanaka v. United States*, 210 Ct. Cl. 712 (1976), in her decision, the Deputy General Counsel characterized the commanding officer’s statement as retrospective reconsideration, which should be afforded little weight when applied to matters of opinion. She also pointed out that the commanding officer’s statement did not identify any misstatements of fact in the disputed OERs.

In BCMR Docket No. 189-94, the applicant submitted a statement from his supervisor indicating that one comment in a disputed OER contained criticism about an aspect of performance about which the applicant had never been counseled. Because he had never received feedback about the deficiency, the supervisor recommended that the Board remove it and raise the corresponding performance mark from a 4 to a 5. The Board denied relief because the criticism was accurate even if the applicant had not been counseled about it. The Board held that the supervisor’s comments constituted “retrospective reconsideration” and did not justify, by themselves modifying the applicant’s OER.

In BCMR Docket No. 24-94, the applicant submitted a letter from his reporting officer, who stated, “had I known then what I now know I would have marked him differently” in the disputed OER. The reporting officer stated that he should have added two comments and assigned the applicant a higher mark in one of the performance categories. The Board denied relief, finding that the reporting officer’s letter constituted retrospective reconsideration that did not justify correction of the OER.

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. No regulation in the Personnel Manual required the applicant’s rating chain to prepare an OER when his status changed on May 31, 1998, or required CGPC to reject the original one-year OER prepared by the applicant’s rating chain. Although the applicant’s status changed from that of a Reservist drilling and performing two weeks of ADSW during April and May 1998 to that of a Reservist on extended active

duty, he did not change units. During those two months, he was serving as the Reserve Chief for the xxxxxxxxxxxxxxxx Branches of the division. On June 1, 1998, he became the active duty Chief of the xxxxxxxxx Branch.

3. Although no regulation expressly required separate OERs for Reserve and extended active duty, the Chief Counsel stated that long-standing policy did require it. If the applicant's command had acted in accordance with this unwritten but long-standing policy, he would have received an OER for April and May 1998 prepared by the same rating chain that was, during those two months, preparing OER 4 for the biennial evaluation period that ended on March 31, 1998. This rating chain would have included a Reserve officer as the reporting officer and would have received input from the xxxx who was the applicant's active duty counterpart and whose job the applicant had been performing on ADSW. OER 4 contains five higher marks but two lower marks than those in the disputed OER. The average mark in OER 4 is 5.1, whereas the average mark in the disputed OER is 4.7. In addition, under Articles 10.A.2.c.2., d.2., e.2., and f.2., the rating chain would have had at least two months to prepare the OER after receiving the applicant's "listing of achievements and aspects of performance," which usually becomes the basis for most of the comments in an OER.

4. Because the applicant's command was apparently unaware of the unwritten policy enforced by CGPC, he received an OER for April and May 1998 prepared more than a year later and without input from his Reserve reporting officer or his active duty counterpart, although the revised rating chain did include two members of his Reserve rating chain. The rating chain had 12 working days to prepare two new OERs, and before it could begin work, the applicant had to prepare a new "listing of significant achievements or aspects of performance" to remind the rating chain of what he had done during April and May 1998. In addition, one or more members of the chain apparently took leave around the Fourth of July holiday. All three members of the rating chain signed it on July 7, 1999, which supports the applicant's allegation that they were working under significant time constraints and did not carefully consider the marks assigned in the disputed OER after modifying the original OER to cover only his 10 months on active duty.

5. All three members of the rating chain have renounced the disputed OER. The supervisor and reporting officer expressly supported the applicant's allegation that the marks in it were made inaccurately because of the time constraints they were under. All three members have prepared and signed a proposed substitute OER with six higher marks and an average mark of 5.3 instead of 4.7. In comparison with OER4, whose average mark is 5.1, this proposed substitute OER has six higher and two lower marks.

6. The applicant alleged that the comments in the disputed OER support the higher marks proposed by his rating chain. The Chief Counsel stated that this argu-

ment is inapposite because rating chain members are supposed to assign numerical marks first (after considering the reported-on officer's performance) and then add comments about the officer's work to support the marks. Article 10.A.4.d.4. of the Personnel Manual supports the Chief Counsel's statement. However, before the rating chain begins work, it receives from the reported-on officer a "listing of achievements and aspects of performance." Personnel Manual, Article 10.A.2.c.2. This listing is often used as the basis for many of the supervisor's comments in an OER. Therefore, in practice if not under the rules, the applicant's allegation that the comments come first and support the marks has some merit.

7. Furthermore, the Board finds that the comments in the disputed OER (see page 4 for large excerpts) are inconsistent with the lower marks in the disputed OER and fully support the six higher marks proposed by the applicant's rating chain, as shown below, especially in light of the fact that he accomplished the significant achievements cited in the comments not while serving on continuous active duty over the course of a year, but as a Reservist drilling and performing two weeks of ADSW over the course of two months:

- The comments indicate that the applicant, though serving as a Reservist, was notably "proactive" in his work on at least four projects and "backfilled" for a division chief in planning the Coast Guard's participation in a xxxxxxxx. Yet he received a mark of 4 for the performance category "Planning and Preparedness" on the disputed OER. On the OER form, a mark of 4 is appropriate for an officer who was "consistently prepared," "used sound criteria to set priorities," and "kept his supervisors informed." A mark of 6 is for an officer known for "exceptional preparation," who "always looked beyond immediate problems," and who "developed strategies with contingency plans." The Board finds that the comments in the disputed OER support the mark of 6 proposed by his rating chain.
- The comments indicate that the applicant innovatively used a xxxxxxxx xxxxxxxxxxxxxxxx. Yet he received a mark of 5 for "Using Resources" on the disputed OER. On the OER form, a mark of 5 falls between a 4 and a 6. A mark of 4 is appropriate for an officer who "effectively managed a variety of activities with available resources" and who "budgeted own and subordinates' time productively." A mark of 6 is for an officer who was "unusually skilled at bringing scarce resources to bear on the most critical of competing demands" and who "optimized productivity through effective delegation, empowerment, and follow-up control." The Board finds that the comments support the mark of 6 proposed by his rating chain.
- The comments indicate that the applicant's rating chain was highly impressed with his knowledge of the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx management skills, and with his professional representation of the Coast Guard. Apparently, they were

impressed enough to facilitate his appointment as the branch chief in lieu of getting a regular Coast Guard officer to fill the post. Yet he received a mark of 5 for "Professional Competence" on the disputed OER. The mark of 5 falls between a 4, which is appropriate for an officer who was a "competent and credible authority" in his field, and a mark of 6, which is for an officer who shows "superior expertise" and "remarkable grasp of complex issues" and whose "advice and actions showed great breadth and depth of knowledge." The Board finds that the comments support the mark of 6 proposed by his rating chain.

- The comments indicate that he mentored junior officers and coached them in their writing skills, made himself and his staff xxxxxxxxxx, used an "open door policy [and] effective weekly meetings to inspire teamwork," "[w]orked excellently [with] federal and state agencies," "[p]romoted improved communications," "foster[ed] teamwork," and guided an investigator to " xxxxxxxxxxxxxxxx ." Yet he received marks of 5, 4, and 4 in the categories "Looking Out for Others," "Teamwork," and "Workplace Climate," respectively. These marks are appropriate for officers who "cared for people," "recognized and responded to their needs," were "valued team participants," "skillfully used teams to increase unit effectiveness," were "sensitive to individual differences," and who "encouraged open communication and respect." The higher marks proposed by the rating in these categories are for officers who were "always accessible," whose "insightful use of teams raised unit productivity," who "established relationships and networks across a broad range of people and groups," who "excelled at creating an environment of fairness, candor, and respect," and who "quickly took action against behavior inconsistent with Coast Guard human resources policies." The Board finds that the comments support the marks of 6, 5, and 6 proposed by his rating chain.

8. The Chief Counsel argued that the statements by the rating chain supporting the applicant's request must be considered "retrospective reconsideration," inspired by the applicant's failure of selection. As he argued, mere "retrospective reconsideration" is not a legitimate basis for correction. *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990); *Tanaka v. United States*, 210 Ct. Cl. 712 (1976). In the past, the Board has denied relief when it found that submitted statements constituted "retrospective reconsideration." See BCMR Docket Nos. 84-96, 67-96, 189-94, 24-94. However, in none of these cases did all three members of the rating chain support the applicant's allegations and sign a proposed substitute OER with higher marks. Moreover, in none of these cases were there so many other circumstances that suggest that the marks in the disputed OER are inaccurate, such as the one-year delay in its preparation; the lack of input from the Reserve reporting officer and the applicant's active duty counterpart; the higher marks assigned in OER 4, which was prepared during the two-month reporting period for the disputed OER; the significantly diminished time in which the disputed OER had to be prepared by the applicant, supervisor, and reporting officer and checked by the

reviewer; and, especially, the inconsistency between the marks and comments in the disputed OER.

9. In light of the inconsistency between the comments and marks in the disputed OER, the circumstances under which it was prepared, and the statements of the applicant's rating officials, the Board finds that the applicant has proved by clear, cogent, and convincing evidence that the six marks in the disputed OER are erroneous and unjust. Moreover, he has proved that the six marks should be raised as proposed by his rating chain.

10. The applicant did not submit a reply to the disputed OER. However, by the time he received a copy of it in late July 1999, it was too late to prepare a reply with the endorsements of his rating chain in time for it to be included in his record before the selection board, which convened on August 2, 1999. Therefore, the Board finds that the applicant reasonably determined that an OER reply would be of little help and that his best chance for relief would be an application to the PRRB, even though that board dismissed his application for untimeliness.

11. To determine whether the applicant's failures of selection should be removed because of the erroneously low marks in the disputed OER, the Board must answer two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?" *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

12. In answer to the first question, the Board finds that the lower marks in the disputed OER do make the applicant's record appear significantly worse than it would with the higher marks proposed by the rating chain, which are amply supported by the corresponding comments.

13. The second question is harder to answer. The Board has had cases in which xxxxxxxxxx with better OERs than those of the applicant have failed of selection for promotion to xxxxxx. *See, e.g.*, BCMR Docket No. 1999-083. However, OERs are not the only basis on which selection boards make their decisions; the criteria for selection are myriad. In addition, an officer's chances of being promoted depend in part upon the number of slots open in the next higher grade, which changes from year to year. Nothing in the Personnel Manual or selection board precepts required those boards to accord lesser weight to OERs covering short periods. Therefore, this Board cannot say with confidence that the selection boards did so. In light of these considerations, and given the presence of several commendations and medals in his record and the absence of any report of poor performance, the Board cannot find that without the disputed OER in his record, it is "unlikely that he would have been promoted in any event."

Therefore, the applicant's failures of selection for promotion to xxxxxxx should be removed from his record.

14. Accordingly, relief should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXX, USCGR, for correction of his military record is granted. His officer evaluation report (OER) covering the period April 1, 1998, to May 31, 1998, shall be corrected as follows:

- Block 3.a. shall be corrected to show that he was assigned a mark of 6 for "Planning and Preparedness."
- Block 3.b. shall be corrected to show that he was assigned a mark of 6 for "Using Resources."
- Block 3.e. shall be corrected to show that he was assigned a mark of 6 for "Professional Competence."
- Block 5.a. shall be corrected to show that he was assigned a mark of 6 for "Looking Out for Others."
- Block 5.d. shall be corrected to show that he was assigned a mark of 5 for "Teamwork."
- Block 5.e. shall be corrected to show that he was assigned a mark of 6 for "Workplace Climate."

The applicant's failures of selection for promotion to xxxxxxxx shall be removed from his record. If the applicant is selected for promotion by the first selection board to review his record after it is corrected according to this order, his date of rank shall be changed to what it would have been had he been selected for promotion by the first xxxxxx selection board that reviewed his record, and he shall receive any back pay and allowances due.

Barbara Betsock

George J. Jordan

John A. Kern