

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-007

**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, Deputy Chair:

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 November 14, 2001, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated July 18, 2002, 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 asked the Board to replace an officer evaluation report (OER) covering his performance from June 1, 1998, to June 29, 1999, with a draft OER that had previously been prepared for him and that contained five marks that are higher than those in the disputed OER.¹ He also asked the Board to remove his failure of selection for promotion. If he is selected for promotion after his record is corrected, he asked that his date of rank be changed to what it would have been had he been selected for promotion in August 2001, and that the Board award him back pay and allowances. Finally, he asked that he be reinstated in a post-graduate educational program.

APPLICANT'S ALLEGATIONS

The applicant alleged that in June 1999, when he was assigned to an overseas unit, his supervisor prepared an OER for him, signed it, and had his reporting officer (RO) sign it before the RO was transferred from the unit. The marks in this original

¹ In an email message to the Chair of the BCMR dated November 26, 2001, the applicant indicated that he was only asking for removal of the disputed OER. However, on July 10, 2002, he clarified his request, indicating that his preferred relief would be to retain the OER in his record but have the five marks raised to their original level. However, if that were not possible, he would like the entire OER to be expunged.

OER, he alleged, were all 5s and 6s. (Officers are rated in various performance categories on a scale of 1 to 7, with 7 being best.) The supervisor used this OER to counsel him about his performance. However, after the RO signed the OER and before it was submitted to the reviewer, the supervisor lowered five marks on the OER without the RO's knowledge or approval. In support of this allegation, the applicant submitted a copy of the original OER that his RO reviewed and signed and an email message from his RO.

The applicant alleged that he did not realize that the lower marks would harm his career until he was passed over for promotion and lost his "post graduate school slot." In addition, he alleged that, by the time he saw the final OER, "following the chain of command was unable to communicate [his] position (at that time) to the CO and XO who were in [another country]," and he was "consumed in a new job." The applicant alleged that the lower marks on the disputed OER, especially the mark of 4 in technical expertise, are clearly erroneous in light of his efforts and record. He alleged that the supervisor who lowered the marks harbored "ill will" toward him.

SUMMARY OF THE RECORD

The applicant served in the xxxx for six years before joining the Coast Guard Reserve in 19xx to attend Officer Candidate School. In 19xx, he was appointed an ensign and began serving on active duty as a marine safety inspector. The marks in his ten most recent OERs and the original draft of the disputed OER are shown in the table below. He received the first four OERs as a lieutenant junior grade working at a marine safety office (MSO). He was awarded an Achievement Medal for this work.

In 19xx, the applicant was promoted to lieutenant and transferred to an overseas MSO. He received a Letter of Commendation and OER 5 through the disputed OER 8 for his work at this office. The comments in OER 8 are all quite positive. They indicate that he was the office's acting supervisor for six months and did the work of four officers during "peak transfer season." The RO wrote that he "[f]ully concur[red] w/ supervisor's marks & comments" and that the applicant was "[s]trongly recommended for promotion with peers." The RO signed the disputed OER on June 16, 1999; the supervisor signed it on July 13, 1999; and the reviewer signed it on August 19, 1999.

In the draft OER 8 that was allegedly reviewed by the RO on June 16, 1999, a few of the comments on the first two pages (which are completed by the supervisor) are slightly different than those on the disputed OER. They are all quite positive and very similar to those on the disputed OER, but there are small stylistic differences. However, as shown in the table below, five of the marks are higher than those in the disputed OER. The RO's page is identical to the RO's page in the disputed OER, including the statement that he "[f]ully concur[red] w/ supervisor's marks & comments."

In xxxxxxxx 1999, the applicant was transferred to another overseas marine safety office, at which he received OER 9 and OER 10, as shown in the table below.

OER 10 was the last OER in his record before the selection board met in August 2001. In it, the applicant was "[m]ost strongly recommended for promotion w/ best of peers."

On October 11, 2001, the applicant was informed that he had been passed over for promotion by the selection board that met in August 2001. On October 16, 2001, he was informed that because of his failure of selection, he was no longer eligible to attend the Advanced Education Program for which he had been selected.

On October 24, 2001, the RO for the disputed OER wrote the applicant an email, in which he stated that he had signed the third page of the original OER but returned it for editing to the supervisor because of the "poor quality of his comments and the level of marks." He stated that because he was transferred, he never saw or approved the final comments and marks. He stated that when he saw them, he was "appalled at the comments and marks made by [the supervisor] "and would never have written "[f]ully concur w/ supervisor's marks & comments."

APPLICANT'S MARKS IN TEN OERs FROM 7/6/xx THROUGH 5/31/01

CATEGORY ^a	OER 1	OER 2	OER 3	OER 4	OER 5	OER 6	OER 7	Draft OER 8	Disp. OER 8	OER 9	OER 10	AVE ^b
Being Prepared/Planning	5	5	5	5	5	6	5	6	6	6	6	5.3
Using Resources	5	5	5	5	5	6	6	6	6	6	6	5.4
Getting Results	4	4	5	6	5	5	5	6	6	6	6	5.1
Responsiveness ^c	5	5	5	5	5	5						5.0
Work-Life Sensitivity ^c	4	5	4	4	4	4						4.2
Adaptability ^c							4	5	4	6	7	5.7
Professional Competence	4	5	5	5	5	5	5	5	4	6	6	5.1
Collateral Duty ^c	5	4	4	4	5	5						4.5
Teamwork	5	5	5	5	6	5	5	5	5	6	7	5.4
Workplace Climate	5	5	4	4	5	4	4	5	4	5	6	4.7
Looking Out for Others	4	5	5	6	6	5	5	6	6	6	6	5.3
Developing Subordinates	4	4	4	4	4	5	6	5	5	6	6	4.8
Directing Others	5	5	5	5	5	5	4	6	5	5	6	5.0
Evaluations	4	4	4	4	4	4	4	5	4	5	5	4.2
Speaking & Listening	5	5	5	5	5	5	6	5	5	5	6	5.2
Writing	5	4	5	4	5	4	5	5	5	5	5	4.7
Initiative	5	5	5	6	6	5	5	5	5	6	6	5.4
Judgment	4	5	5	5	5	5	5	5	5	6	6	5.1
Responsibility	5	5	5	5	6	6	4	5	5	6	6	5.3
Stamina ^c	4	5	5	5	6	6						5.2
Health & Well-Being	5	4	5	5	5	5	4	5	5	5	6	4.9
Military Bearing	4	4	5	5	5	5						4.7

Professionalism ^c	5	5	5	5	6	6	5	5	5	6	6	5.4
Dealing with the Public ^c	5	5	5	5	6	5						5.2
Average Mark in OER	4.6	4.7	4.8	4.9	5.2	5.0	4.8	5.3	5.0	5.7	6.0	5.1
Comparison Scale ^d	5	5	5	5	5	5	5	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, and reporting officers complete the remaining marks.

^b Averages are rounded and do not include marks from shaded columns.

^c Category discontinued or nonexistent until later years.

^d The comparison scale is not 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. A "5" means the applicant was rated to be a "distinguished performer; give tough challenging, visible leadership assignments," or, in the new format of OER 8, OER 9, and OER 10, an "excellent performer; give toughest, most challenging leadership assignments."

VIEWS OF THE COAST GUARD

On April 29, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case.

The Chief Counsel argued that the applicant has proved that the disputed OER was improperly processed and reviewed by his rating chain and should be expunged. He argued that the RO's email and the dates on the OER prove that it was improperly prepared and reviewed. Moreover, he stated, in response to the applicant's BCMR application, an officer in the Coast Guard Personnel Command (CGPC) spoke with the supervisor, who stated that he "recalled preparing an OER with the 5/6s, not one with 4s. He stated that the OER with the 4s in his section wasn't the one he submitted and he does not recall having his submission returned to him for correction. He further went on to say that the [applicant] was his 'right-hand' and did a very good job for him." Therefore, the Chief Counsel recommended that the Board expunge the disputed OER.

The Chief Counsel further argued, however, that the applicant has not proved that any nexus exists between the disputed OER and his failure of selection for promotion to lieutenant commander (LCDR).² He admitted that the disputed OER "makes Applicant's record as a whole worse" and that the "opportunity of selection by the 2001 LCDR selection board was 88%." But he argued that, because the lowest mark in the OER was a 4 and it contained many positive comments, it was not an adverse evaluation. Moreover, the Chief Counsel argued, none of the applicant's assignments have been supervisory positions. He alleged that the development of leadership skills is a very important criterion for promotion to LCDR, as stated in the selection board precept and the Personnel Manual. Therefore, he argued that the Board should "conclude that the Applicant has not demonstrated the leadership growth required for promotion."

Finally, the Chief Counsel recommended that the Board issue an "interim decision" granting partial relief before the next LCDR selection board meets in August 2002. He stated that, if the Board were to grant full relief, the case would have to be reviewed by the Deputy General Counsel, which might indefinitely delay the final decision. "However, if the Board were to issue an interim decision ordering the expulsion of the disputed OER prior to August 2002 and Applicant was selected by the August 2002 [LCDR] selection [board] on the basis of a corrected record, the Coast Guard would be willing to concede nexus and remove its objection to Applicant's request to have his failure of selection removed."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

² In its memorandum on the case, CGPC recommended removing the applicant's failure of selection. However, the Chief Counsel rejected CGPC's recommendation.

On May 20, 2002, the applicant responded to the Chief Counsel's advisory opinion. He stated that his preferred relief was to have the five erroneous marks in the OER raised, but if that were not possible, he agreed that the OER should be expunged. However, he disagreed about the alleged lack of nexus between the OER and his failure of selection. He stated that several high ranking officers had reviewed his entire record and told him that "the single most glaring area of concern" were the marks of 4 in the disputed OER. He repeated his request to be eligible for post graduate school.

RELEVANT LAW

Under Article 10.A. of the Personnel Manual, each OER is prepared by the reported-on officer's "rating chain" of senior officers: the supervisor, the reporting officer (RO), and the reviewer. Article 10.A.3.a.2.a. provides that an OER must be prepared when an RO leaves the unit "if more than six months have elapsed since the ending date of the last regular OER"

Article 10.A.4.d.(4) instructs supervisors to prepare their sections of an OER by assigning the reported-on officers marks in the various performance categories in accordance with the written descriptions of performance on the OER form. Written comments are to be added to support marks that are higher or lower than a 4. Supervisors' comments are supposed to be consistent with the marks.

Article 10.A.2.d.2. provides that the supervisor first prepares his section of the OER and then forwards it to the RO for further completion and review. The RO completes his section of the OER and, under Article 10.A.2.e.2., "[e]nsures the Supervisor fully meets responsibilities for administration of [the evaluation system]. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a 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" The RO then forwards the OER to the reviewer, who "[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential," but is not necessarily personally familiar with the reported-on officer's performance. Personnel Manual, Article 10.A.2.f.

Article 10.A.4.g. allows the Reported-on Officer to file a reply to any OER, within 15 days of receiving a copy of it, to "express a view of performance which may differ from that of a rating official." The reply is forwarded up the rating chain, like the OER itself, before being entered in the record by CGPC. The reply procedure does not permit rating chain members to correct an OER if an error is discovered. Instead, a member of the rating chain who agrees that an OER was prepared erroneously is supposed to help the reported-on officer seek a correction of the record through the Personnel Records Review Board (PRRB) or this Board.

Under 14 U.S.C. § 283, a lieutenant who twice fails to be selected for promotion to LCDR by selection boards must be separated from the service.

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 10 U.S.C. § 1552. The application was timely.

2. The record indicates that the RO did not review the final version of the OER that was forwarded to the reviewer, as required under Article 10.A.2.e.2. of the Personnel Manual. Instead, it was apparently signed by the RO before it was finished by the supervisor, and the supervisor submitted it directly to the reviewer because the RO had been transferred. Moreover, according to CGPC, the supervisor has stated that he did not assign the applicant the marks of 4 that appear in the disputed OER. Therefore, the Board agrees with the Chief Counsel that the applicant has rebutted the presumption of regularity normally accorded military records and proved by a preponderance of the evidence that the disputed OER was not prepared in accordance with regulation.

3. The RO indicated that the marks on the OER he did review were higher than those on the OER in the applicant's record. He stated that he would not have concurred in those marks, as one of his comments in the disputed OER states, if he had seen them. Furthermore, the supervisor has repudiated the lower marks that appear in the disputed OER and has indicated that he submitted (or intended to submit) an OER with higher marks of 5 and 6. The applicant has submitted what appears to be a draft of the OER, signed by both the supervisor and the RO, with five higher marks. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that the disputed OER in his record is erroneous and unjust. Moreover, the preponderance of the evidence in the record indicates that the five higher marks shown on the draft OER are the marks that the supervisor and the RO intended to submit. There are sufficient positive comments in the OER to support the higher marks.

4. The Chief Counsel argued, based on the applicant's modified request for relief on November 26, 2001, that the entire OER should be expunged, but the applicant has indicated that his preferred relief is to retain the OER but to have the marks that his supervisor originally assigned and that the RO approved. In BCMR Docket No. 151-87, it was held that "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/unjust material from the appropriate material." In this case, the Board finds that the entire OER is not infected with errors

and that raising the five marks is the most appropriate and fairest way to correct the disputed OER. Expunging the OER in its entirety would leave an obvious gap in the applicant's record and remove important information about his work and abilities.

5. The applicant might have avoided having the disputed OER in his record before the August 2001 selection board if he had filed a reply, in accordance with Article 10.A.4.g. of the Personnel Manual. If he had filed a reply, the erroneous marks would have been discovered in 1999, and his record could have been corrected by the PRRB or this Board before August 2001. Although the applicant was aware in 1999 that the official OER contained marks of 4, he was not aware until the RO's 2001 statement that those marks were assigned in violation of the Personnel Manual. Therefore, and in light of the extra difficulties in replying to the OER posed by the applicant's transfer to another overseas station before he saw the disputed OER and the RO's transfer to still another overseas station, the Board finds that the applicant's failure to file a reply to the OER or to seek correction of his record before the selection board met in August 2001 should not bar his request to have his failure of selection removed from his record.

6. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine whether the applicant's failure of selection before the board that met in August 2001 should be removed because of the errors in his record when it was reviewed by that board, this 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?"

7. With respect to the first part of the *Engels* test, the Board agrees with the applicant and the Chief Counsel that the lower marks in the disputed OER, especially the mark of 4 for professional competence, make the applicant's record appear worse than it would in the absence of the error even though the disputed OER is not adverse as a whole.

8. With respect to the second part of the *Engels* test, the Chief Counsel opined that the applicant did not have very much leadership experience, so he would not have been promoted in any event. However, the opportunity of selection by the 2001 LCDR selection board was 88 percent. The applicant's record contains no negative information that would necessarily have precluded his promotion even if his record had not contained the five erroneous marks. Moreover, one of the performance marks that the Board is raising is the mark for Directing Others, which reflects directly on his ability to lead. Therefore, the Board cannot state with any confidence that, absent the erroneous marks, it is unlikely that he would have been promoted in any event. Thus, the Board finds that the applicant's failure of selection by the August 2001 LCDR selection board should be removed.

9. The applicant asked that his eligibility for post graduate studies be restored. The record indicates that he lost his eligibility because he failed of selection in

August 2001. Therefore, the Board finds that, if the applicant is selected for promotion by the first LCDR selection board to review his record as corrected, his selection and eligibility for post graduate studies should be restored.

10. The Chief Counsel recommended that an interim decision with a partial grant of relief be issued lest another selection board review the applicant's record in an uncorrected state if the Deputy General Counsel's review of this decision is delayed. However, the Board believes that there remains sufficient time before the next LCDR selection board meets in August 2002 for the Deputy General Counsel's review.

11. Accordingly, the applicant's request should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted as follows:

The officer evaluation report (OER) covering the period June 1, 1998 to June 29, 1999, shall be corrected by raising the marks for Adaptability, Professional Competence, Workplace Climate, and Evaluations from 4s to 5s and by raising the mark for Directing Others from 5 to 6.

His failure of selection for promotion to LCDR shall be removed from his record. If he is selected for promotion to LCDR by the first selection board to review his record after it is corrected according to this order, (1) his date of rank shall be changed to what it would have been had he been selected for promotion by the first LCDR selection board that reviewed his record, (2) the Coast Guard shall pay him any back pay and allowances he would then be due, and (3) his selection and eligibility for the Advanced Education Program shall be restored.

John A. Kern

Astrid Lopez-Goldberg

Coleman R. Sachs