

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-134

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 July 5, 2002, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated April 8, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct three officer evaluation reports (OERs) in his record by including recommendations for promotion in block 11, where the reporting officer (RO) makes comments about an officer's leadership and potential. As a less preferred alternative, he asked the Board to remove the three OERs from his record.

The applicant alleged that the three OERs, which cover the consecutive periods from December 1, 1992, to May 31, 1993 (OER1); June 1, 1993, to November 30, 1993 (OER2); and December 1, 1993, to June 7, 1994 (OER3), are inconsistent in that they contain high marks and positive comments but no recommendation for promotion. He alleged that the absence of such recommendations is unjust because selection board members expect to see them. He alleged that the RO for OER2 and OER3 told him that he could not expect to be recommended for promotion on his OERs because he had only recently been promoted to lieutenant, on September 4, 1992. The applicant also

The applicant was integrated into the regular Coast Guard on August 24, 1992, and promoted to LT on September 4, 1992. On his third OER while serving at MSOX, he received an average mark of 4.96, a comparison scale mark of 4, and he was “strongly recommended for promotion [with his] peers” in block 11.

In December 1992, the applicant changed jobs and departments at the MSOX. As an Investigating Officer, he investigated marine casualties and accidents to determine their causes and any violations of law. The three disputed OERs are the semi-annual evaluations that he received as an Investigating Officer.

OER1 covered his service as an Investigating Officer from December 1, 1992, to May 31, 1993. He had a new rating chain in this position,² except that the commander who had been serving as the reviewer on his rating chain as a Marine Inspector became his reporting officer (RO). The applicant received an average mark of 4.83, several positive comments, and a comparison scale mark of 3 on OER1. In lieu of a recommendation for promotion, the RO made the following comments in block 11:

... Has good potential to assume tasks of greater responsibility including Dept. Head at small MSO, Ass't. Dept. Head at large MSO; presently concentrating on becoming even more competent [investigating officer], leading to full quals & possible Asst. Dept Head position. Needs Port Operations exposure to complete Marine Safety officer quals/ experience.

OER2 covered his service as an Investigating Officer from June 1 to November 30, 1993. The members of his rating chain were all new. The applicant received an average mark of 4.74, several positive comments, and a comparison scale mark of 4 on OER2. In lieu of a recommendation for promotion, his new RO made the following comments in block 11:

... An excellent candidate for positions of increased responsibility within marine inspection field. Recommended for assignment requiring trustworthy, qualified officer able to make independent decisions such as Activities Europe [Vessel] Inspection Duty or, to further develop [leadership] potential, Asst Chief INSP Dept at large MSO.

OER3 covered his service as an Investigating Officer from December 1, 1993, to June 7, 1994. The supervisor and RO for OER3 were the same as for OER2, but the reviewer was new. The applicant received an average mark of 4.30, several positive comments, and a comparison scale mark of 3 on OER3. In lieu of a recommendation for

² Coast Guard officers are evaluated by a “rating chain” of three officers: the “supervisor,” who completes the first half of the OER by assigning marks and comments in the various performance categories; the “reporting officer,” who completes the second half of the OER, by assigning marks and comments in various performance categories, assigning a comparison scale mark, and providing comments about the officer’s potential and leadership abilities; and a “reviewer,” who checks the OER for errors and inconsistencies. Personnel Manual, Article 10.A.2.

promotion in block 11, his RO wrote that he was “recommended for & needs increased responsibility to further test leadership/management/technical capabilities.”

In June 1994, the applicant became the assistant supervisor of an inspection detail at MSOX, with nine subordinate inspectors and a new rating chain. On his semi-annual OER in November 1994, he received an average mark of 5.22 and a comparison scale mark of 5, and he was “strongly recommended for promotion” in block 11 by his RO.

In December 1994, the applicant became the assistant supervisor of the Foreign Vessel Section at MSOX. In this position, he received three semi-annual OERs. On the first, he received an average mark of 4.96 and a comparison scale mark of 4. On the second, he received an average mark of 5.09 and a comparison scale mark of 4. On the third, he received an average mark of 5.00 and a comparison scale mark of 4. On each of these OERs, he was “highly recommended for promotion” by his RO in block 11.

In June 1996, the applicant became an Inspection Coordinator and Reviewer for MSOX. On the OER he received in November 1996, he received an average mark of 4.83 and a comparison scale mark of 5. In December 1996, the applicant became the supervisor for Inspection, Coordination, and Review at MSOX. On the three OERs that he received in this position he received, on the first, an average mark of 5.00 and a comparison scale mark of 5.00; on the second, an average mark of 5.39 and a comparison scale mark of 5; and on the third, an average mark of 5.22 and a comparison scale mark of 5. On all of these OERs, the RO either “highly” or “strongly” recommended him for promotion and also recommended him for a position as either a department head or an assistant department head at an MSO. On September 1, 1998, he received a letter of commendation from the Commandant for protecting people and property from a car on fire in a Coast Guard parking lot.

From June 1, 1999, to May 31, 2000, the applicant served as the supervisor of a Port State Control inspection detail at MSOX. He supervised twelve subordinates conducting safety inspections of foreign commercial vessels. On his annual OER for this work, he received an average mark of 5.89 and a comparison scale mark of 5. He was also “highly recommended for promotion.” Upon leaving MSOX, the applicant received an Achievement Medal for superior performance from July 1994 to June 2000.

In June 2000, the applicant was transferred to another MSO, and began working as a Marine Inspector again. On his first annual OER, he received an average mark of 5.06 and a comparison scale mark of 5. On his most recent OER, as a Senior Marine Inspector, he received an average mark of 5.33 and a comparison scale mark of 5. On both OERs, the applicant was “strongly recommended for promotion” by his RO. In addition, on both OERs, the reviewer added an extra page of comments to concur in the RO’s assessment, strongly recommend the applicant for promotion to lieutenant commander, and also recommend him for a supervisory position at a small or medium-sized MSO.

VIEWS OF THE COAST GUARD

On January 27, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request for "lack of proof, lack of merit and lack of timeliness."

The Chief Counsel argued that the application was untimely because the applicant was aware of the lack of recommendations for promotion in the disputed OERs in 1993 and 1994. He alleged that it is not in the interest of justice to waive the three-year filing requirement under 33 C.F.R. § 52.22. Therefore, he asked the Board to dismiss the case.

The Chief Counsel argued that the applicant has failed to prove that either the lack of recommendations for promotion or the comparison scale marks in the disputed OERs constitute error or injustice. The Chief Counsel argued that "[p]romotion recommendations are within the discretion of the Reporting Officer based on his or her subjective evaluation of the Reported-on Officer's ability to assume the duties of the next higher grade. PERSMAN 10.A.4.d.8.(b) From the evidence in the record, it cannot be said that the Reporting Officer's decision not to include a promotion recommendation was either erroneous or arbitrary and capricious." He alleged that the same holds true for the comparison scale marks. He argued that the content of applicant's prior and subsequent OERs does not prove that the disputed OERs are erroneous because "[e]ach OER is independent ... designed to capture the performance during a specific marking period without regard to prior marking periods."

The Chief Counsel also pointed out that the applicant did not take advantage of his opportunity to file replies to the disputed OERs. He alleged that the applicant's failure to file replies "should be considered as relevant evidence that he accepted his rating official's characterization of his performance."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 3, 2003, the Chairman forwarded a copy of the Chief Counsel's advisory opinion to the applicant and invited him to respond. No response was received.

APPLICABLE REGULATIONS

Under 33 C.F.R. § 52.12, the function of the BCMR is to determine "[w]hether an error has been made in the applicant's Coast Guard military record, whether the applicant has suffered an error or injustice as the result of an omission or commission in his or her record, or whether the applicant has suffered some manifest injustice in the

treatment accorded him or her; and ... [w]hether the Board finds it necessary to change a military record to correct an error or remove an injustice.”

Under 33 C.F.R. § 52.24(b), “[t]he board begins its consideration of each case presuming administrative regularity on the part of the Coast Guard and other Government officials. The applicant has the burden of proving the existence of an error or injustice by the preponderance of the evidence.”

Article 10.A. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) governs the preparation of OERs. Each OER is prepared by the reported-on officer’s “rating chain” of three senior officers: the supervisor (the officer to whom the reported-on officer answers on a daily basis), the reporting officer (the supervisor’s supervisor), and the reviewer (normally the reporting officer’s supervisor). Article 10.A.4.d. of the Personnel Manual governs the preparation of OERs. In 1993 and 1994, paragraphs (4) and (7) of that article instructed the rating chain members as follows:

(b) For each evaluation area, the Reporting Officer [or 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 Reporting Officer [or Supervisor] shall carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Reporting Officer [or 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.³ After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Reporting Officer [or Supervisor] fills in the appropriate circle on the form in ink.

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(d) In the “Comments” sections following each evaluation area, the Reporting Officer [or Supervisor] shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a “4.” . . .

Paragraph (8) of Article 10.A.4.d. provided the following regarding the completion of block 11:

- (a) The Reporting Officer shall comment on the Reported-on Officer’s leadership ability and potential for greater responsibility in the Coast Guard. . . .
- (b) Comments in this section reflect the legitimate judgment of the Reporting Officer and may include, but are not limited to, the following:
- How qualified the Reported-on Officer is to assume the duties of the next grade.
 - For what specialties, or types of assignment, such as command, the Reported-on Officer is qualified or shows aptitude. . . .

Paragraph (9)(a) of Article 10.A.4.d. provided the following regarding the reporting officer’s completion of the comparison scale:

³ The shaded language appears only in the instructions for supervisors in paragraph (4) of Article 10.A.4.d., not in the instructions for reporting officers in paragraph (7).

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 in relation to peers of the Reported-on Officer, and not necessarily a trend of performance. Thus, from period to period, an officer could improve in performance but drop a category. This could occur if peers had improved more, or if the Reporting Officer had the opportunity to observe other peers who performed at a higher level.

According to Article 10.A.2.f.(2) of the Personnel Manual, which listed the responsibilities of the reviewer, the reviewer

- (a) [e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential.
- (b) [c]hecks for obvious errors, omissions, or inconsistencies between numerical evaluations and written comments and any failures to comply with instructions. . . .
- (c) [i]f necessary, adds comments on a separate sheet of paper further addressing the performance and/or potential of the Reported-on Officer. ...
- (d) [e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the [Officer Evaluation System]. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. . . .

Article 10.A.4.h. allows the reported-on officer to reply to any OER and have the reply filed with the OER in order to "provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official."

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. Under *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994), the application was timely since the applicant continued to serve on active duty between the date of the alleged error and the date he filed his application.

2. The applicant alleged that the quality of his overall record and of the marks and comments in OER1, OER2, and OER3 prove that (a) his ROs' failure to include a recommendation for promotion in block 11 of those OERs and (b) their assignment of a mark of 3 on the comparison scales in OER1 and OER3 were erroneous and unjust. Apart from his own claims and military record, he submitted no other evidence in support of his allegations.

3. Absent specific evidence to the contrary, the Board presumes that an applicant's rating officials acted correctly, lawfully, and in good faith in making their evaluations.⁴ Once an applicant has rebutted the presumption of regularity by presenting at least some evidence that "specifically and convincingly contradicts his rating officials' marks and comments," the Board weighs the evidence in the record to determine whether the applicant has met his burden of proof—the preponderance of the evidence—with respect to the challenged OER.⁵ The Board determines whether the applicant has proved by a preponderance of the evidence that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁶ With this standard in mind, the Board has carefully considered all of the evidence presented regarding the OERs disputed in this case and draws the following conclusions with respect to the evidence.

4. The applicant has failed to overcome the presumption of regularity accorded to the challenged OERs. Although the OERs each contain positive comments and marks, nothing in them is clearly inconsistent with the ROs' choice of comments about the applicant's potential and leadership in lieu of a recommendation for promotion. Moreover, the fact that other ROs chose to recommend him for promotion when

⁴ 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ Final Decision, BCMR Docket No. 2000-194. Moreover, in determining the preponderance of the evidence, the Board continues to consider the evidentiary weight of the rating chain's assessment even though the presumption of regularity has been rebutted. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 n.10 (1981).

⁶ *Hary v. United States*, 618 F.2d 704, 708 (Cl. Ct. 1980); CGBCMR Docket No. 86-96.

he was serving in other positions at other times does not prove that the ROs for OER1, OER2, and OER3 erred or committed an injustice in failing to include express recommendations for promotion. Although Article 10.A.4.d.(8) of the Personnel Manual certainly allowed the ROs to make express recommendations for promotion, they were not required to do so.

5. Moreover, the applicant's own testimony indicates that the lack of such a recommendation in OER2 and OER3 was intentional and not an accidental omission by the RO. He alleged that, when he asked the RO about the absence of a recommendation for promotion, the RO indicated that he felt that the applicant had been promoted to lieutenant too recently to receive a recommendation for promotion to lieutenant commander. Article 10.A.4.d.(8) clearly makes the recommendation for promotion in block 11 of an OER a discretionary matter for the RO. Although the three disputed OERs contain positive marks and comments and although the applicant received recommendations for promotion from his other ROs, the Board cannot find that the RO for OER1 or the RO for OER2 and OER3 abused their discretion in failing to recommend him for promotion.

6. The same holds true for the comparison scale marks in OER1 and OER3. No comment or other mark in those OERs is clearly inconsistent with a comparison scale mark of 3, denoting an "excellent performer; recommended for increased responsibility," as indicated on the OER form. Moreover, the ROs' comments about the applicant's potential seem quite consistent with the description for the comparison scale mark of 3. In addition, the fact that the RO for OER3 chose to assign the applicant a comparison scale mark of 4 on OER2 and the fact that other ROs at other times have assigned the applicant higher comparison scale marks do not prove that the comparison scale marks on OER1 and OER3 are erroneous or unjust. Article 10.A.4.d.(9)(a) of the Personnel Manual indicates that a comparison scale mark is inherently a highly subjective mark that the RO assigns based on his or her experience with other officers of the same rank as the reported-on officer. There is no basis in the record for the Board to find that the RO for OER1 or the RO for OER3 abused their discretion in failing to assign the applicant higher comparison scale marks.

7. The Board finds that the applicant has failed to submit any specific and credible evidence to indicate that his ROs for OER1, OER2, or OER3 committed any error or injustice in completing the comparison scales, assessing his potential and leadership, and omitting an express recommendation for promotion in those OERs. Nor has he alleged or proved any irregularity or bias on the part of the rating chains for the disputed OERs. The applicant has failed to overcome the presumption of regularity accorded the marks and comments in the disputed OERs.

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

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

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

James K. Augustine

Quang Nguyen

Dorothy J. Ulmer