

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

Application for Correction of
Coast Guard Record of:

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

BCMR Docket
No. 2002-150

FINAL DECISION

ULMER, 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 August 2, 2002, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated May 22, 2003 is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to correct his officer evaluation report (OER) for May 1, 1998 to September 30, 1999 (disputed OER), by deleting the supervisor's portion of the OER, or in the alternative deleting the entire OER. He also asked the Board to remove all of his failures of selection for promotion to commander (CDR)

Subsequent to filing his application with the Board, the applicant notified the Board that he had been selected for promotion to CDR. He amended his application to request backdating of his CDR date of rank to the date he would have received if he had been selected by the first CDR selection board that considered his record with the allegedly incorrect OER, with back pay and allowances.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant stated that his selection for promotion to CDR in no way moots his request for correction of his record. In this regard he stated as follows:

I have been selected for promotion. Obviously, the subject Supervisor's evaluation did not prevent my promotion. However, I assert it was still prejudicial. It appeared at a critical time, just as I was coming into the promotion zone. As a result I was passed over once, then again. Subsequent performance reports eventually offset the subject marks, resulting in my selection. However, for two years I was still compensated

at a lower level. Additionally, the delay in that one promotion will delay all others that may follow.

The applicant had a change in supervisors during the reporting period. He contended that the new supervisor (also referred to as the rating chain supervisor), whom he never met, had no basis for evaluating him because she served as his rating chain supervisor for only the last two months of the reporting period at which time he was away on temporary additional duty (TAD). He stated that he never received any assignments from the rating chain supervisor and she did not review any of his work. He stated that he completed all assignments given to him by his previous supervisor.

The applicant did not allege any specific inaccuracies in the OER but asserted that the OER itself is grossly inaccurate as it consistently minimizes his activities resulting in low marks. He attributed the low marks by the supervisor to her lack of an opportunity to observe his performance.

As proof of his contention, he stated that the marks on the disputed OER are lower than marks he received on his previous and subsequent OERs. He also submitted a statement from his previous supervisor, a CDR. This individual served as the applicant's supervisor for most of the marking period covered by the disputed OER. This CDR stated that he was the applicant's supervisor for approximately five years that included four evaluations cycles. He acknowledged that although he had served as the applicant's supervisor for much of the reporting period, responsibility for documenting the applicant's performance fell to the rating chain supervisor. He stated that he has reviewed the disputed OER and found the rating chain supervisor's marks and remarks to understate the impact of the applicant's accomplishments. He recommended expunging the supervisor's portion of the OER.

The Disputed OER

The supervisor's portion of the OER contains seven 4s and six 5s (on a scale of 1 to 7 with 7 being the highest. A 4 is considered an average mark). A majority of the supervisor's comments include phrases like the following: demonstrated solid planning and preparedness skills; quickly established priorities; volunteered to prepare nomination package; strong writing skills; championed personnel issues; etc. With respect to the evaluations category, the supervisor wrote "proposed logical extension for own OER reporting period to aid supervisors; submitted package included excellent documentation."

The reporting officer's portion of the OER contains four 5s and two 4s including a 4 on the comparison scale where the reporting officer compares the applicant with all of the other LCDRs that he had known in his career. The 4 in this category represented the reporting officer's judgment that the applicant was a good performer who should be given tough, challenging assignments. In his comments, the reporting officer concurred with the marks and comments of the supervisor.

The Applicant's other LCDR OERs

The applicant's other LCDR OERs contain mostly marks of 5s and 6s, with occasional 4s and 7s. His comparison scale marks for the six LCDR OERs in his record (with the mark on the disputed OER in bold face) are 5, **4**, 5, 5, 5, and 5. A 5 in this category represented the reporting officer's judgment that the applicant was an excellent officer who should be given the toughest and most challenging leadership assignments.

Views of the Coast Guard

On December 31, 2002, the Board received an advisory opinion from the Chief Counsel of the Coast Guard recommending that the applicant's request be denied. The Chief Counsel included a declaration from the supervisor that contained the following:

I reported to [the command] 08Aug99 . . . I served as [the applicant's] supervisor, according to the unit's OER instruction, through the end of the period, 30Sep99. Since [the applicant] had already completed his annual drill for the year, I did not have an opportunity to personally meet him or actively supervise his work. We did communicate several times via email regarding the progress of his OER and occasionally by telephone. This was the major substance of our contact during this period. [The applicant] continued to provide reasons why he was unable to meet the required deadlines for submission [of the OER]. [The applicant] submitted his OER package approximately one month late.

Shortly after reporting, I was informed that an OER was required for the applicant due to a PCS transfer. I contacted [the applicant's] former supervisor regarding the OER assuming he had a long working relationship with the member. Once I received the OER package from [the applicant], I completed a draft of the OER, taking for granted the statements and accomplishments sighted by the member were accurate. [The previous supervisor] provided significant comments for preparation of the OER via telephone and I incorporated these comments into the OER. I then requested [the previous supervisor] review my prepared OER draft. I also worked closely with [the reporting officer] for this period. [He] had a good working relationship with the applicant, good knowledge of his work, and provided good counsel and feedback on my evaluation of this officer. The three of us had a review of my prepared section of the OER, including the marks, and were satisfied with the final evaluation. Based on my professional experience and knowledge of the Officer Evaluation System, the information submitted by the member, and my discussions with both his former supervisor and reporting officer, I feel I had more than sufficient information and support documents to provide a fair and accurate evaluation of this officer.

The Chief Counsel attached a memorandum from Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. CGPC stated that the outgoing supervisor did not provide the new supervisor with a draft OER as instructed by Article 10.A.2.d.2.j. of the Personnel Manual, which states: "the supervisor provides the new supervisor with a draft of OER sections (3-6) when the Supervisor changes during the reporting period. The draft may be handwritten and shall include marks and comments for the period of observation. It shall be prepared and signed by the departing supervisor prior to departing." He stated that although the departing supervisor did not follow the letter of the law, the new supervisor gained input for the OER from the departing supervisor through telephone conversations and by providing the departing supervisor with an opportunity to review the completed supervisor's portion of the OER.

CGPC stated that the statement from the applicant's previous supervisor does not provide sufficient evidence to prove the inaccuracy of the disputed OER. In this regard, the previous supervisor stated, "I have reviewed the OER . . . and found the Supervisor's marks and remarks understate the impact of [the applicant's] accomplishments." CGPC noted, however, the previous reporting officer offered no examples of any inaccuracies in the OER.

The Chief Counsel stated that the applicant has failed to prove that his OERs were erroneous or unjust. He stated that the applicant has not rebutted the presumption of regularity with respect to the OER. Nor has he offered evidence that the disputed OER was not the honest professional judgment of his rating chain supervisor. In addition, the Chief Counsel noted that the applicant failed to file a reply to the OER, which was his opportunity to raise any issues of concern in an immediate and proactive manner.

Applicant's Response to the Views of the Coast Guard

On January 6, 2003, a copy of the views of the Coast Guard was mailed to the applicant for a reply. The applicant did not submit a response.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10 of the United States Code. It was timely.
2. The applicant has not shown by a preponderance of the evidence that the disputed OER, particularly the supervisor's portion, is an inaccurate assessment of his performance. Although the previous supervisor wrote that he found the rating chain supervisor's marks and remarks to understate the impact of the applicant's accomplishments, he did not point to any particular inaccuracy in the OER. Nor did he

provide any additional details about the applicant's performance. In addition, the reporting officer, who was familiar with the applicant's performance, wrote in his section of the OER that he agreed with the supervisor's marks and comments.

3. The applicant claimed that the supervisor had no basis on which to evaluate his performance because they never met, she was his supervisor for only the last two months of the reporting period, and she did not supervise any of his work. The contention is without merit. The Personnel Manual does not require that a rating chain supervisor serve in that capacity for the entire reporting period. It has compensated for this fact by requiring the detaching (previous) supervisor to leave a draft OER for the new rating chain supervisor. Although this was not done in the applicant's case, significant input was obtained from the previous supervisor. The supervisor stated that she consulted with the previous supervisor over the telephone and afforded him an opportunity to review the OER after it was completed. Therefore, the previous supervisor had input into the applicant's OER and the applicant was not prejudiced by the fact that the previous supervisor did not leave a draft OER for the new supervisor.

4. Moreover, the supervisor, in preparing an OER, is not restricted to personal observation of an applicant's performance, but may rely on input from secondary supervisors and other information accumulated during the reporting period. See Article 10.A.4.c.4.d. of the Personnel Manual. In this case, the supervisor stated that she consulted with both the previous supervisor as well as the reporting officer in preparing her portion of the disputed OER.

5. The applicant contended that the disputed OER is inaccurate because when compared with previous or subsequent OERs, the grades and comments on the disputed OER are lower. Performance evaluations can differ from one performance period to the next. The Board notes that the disputed OER is complimentary and contains no below average marks or negative comments. A performance evaluation is not invalidated because grades and comments may differ from previous or subsequent OERs. The applicant must demonstrate a prejudicial error or injustice on the disputed OER to cause it to be removed from his record.

6. The applicant has failed to demonstrate any error or injustice in his record. Therefore, no basis exists on which to consider removing the failure(s) of selection for promotion to CDR. The inclusion of the disputed OER in the applicant's record was proper.

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

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXX for correction of his military record is denied.

Julia Andrews

Margot Bester

Francis H. Esposito