

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-184

FINAL DECISION

AUTHOR: Ulmer, D.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on September 9, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated June 9, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to remove an officer evaluation report (OER) for the period July 1, 2001, to May 31, 2002, from his record. He further requested that if the OER is removed that he be promoted to lieutenant commander (LCDR) retroactive to July 1, 2004. The Board interpreted this portion of the applicant's request as one for the removal his failure of selection for promotion to LCDR, and if selected by the first board to consider him based on a corrected record for promotion to that grade, that his date of rank be backdated, with back pay and allowances.

APPLICANT'S ALLEGATIONS

The applicant alleged that the OER does not accurately portray his performance during the period in question. He claimed that his illnesses requiring him to be absent from duty on occasion during the reporting period negatively influenced the supervisor's evaluation of his performance. He further stated that his supervisor never provided any justification or feedback that his performance was of the quality described in the OER.

The applicant stated that he had no reason to believe that he was performing at the level indicated on the OER. He stated that when he received the OER, he was shocked and surprised with the marks, especially the 3 in writing. He stated that when he questioned the supervisor about the OER and the 3 in particular, the supervisor replied "I had to give you a 3 in something and this was your weakest area." The applicant stated that he further questioned the 3, to which the supervisor replied: "you were sick a lot and not here all the time." The applicant claimed that he was amazed that the supervisor gave him a low mark because he was ill, especially in an area that had nothing to do with his physical ability. The applicant further stated that his performance was never an issue during the marking period, since as a new executive officer (XO) he frequently asked his supervisor how he was doing and the supervisor replied that that he was doing fine.

The applicant alleged that the disputed OER caused his failure of selection for promotion to LCDR. He stated that he did not challenge the OER while working for the supervisor because he feared the supervisor would retaliate against him. The record indicates that applicant worked for the supervisor from July 2001 to August 2004.

The Disputed OER

This was the applicant's first OER while serving in the position of Deputy Group Commander. The applicant received one below-average grade, which was a 3 in writing.¹ He also received eight marks of 4, six marks of 5, and two marks of 6. He was rated as a "good performer" which corresponds to a mark of 4 in block 9, where the reporting officer compared the applicant with others of the same grade that the reporting officer has known in his career. The reporting officer recommended the applicant for promotion. The Group Commander was both the supervisor and reporting officer for the OER, as permitted under the Personnel Manual. (The Group Commander is referred to as the supervisor in this opinion.) The applicant did not submit a reply to the OER.

APPLICANT'S SUBMISSIONS

1. The applicant submitted a statement from a lieutenant (LT) who reported to the command in July 2003 and served as the operations officer (OPS). This individual stated that within a few weeks of reporting aboard, the supervisor engaged her in conversation about the applicant's constant illnesses. The OPS stated that over the course of the year, the supervisor made comments about the applicant's illness ranging from "Oh, he's sick . . . again' to 'who knows if [the applicant] will even be here, he might be 'sick again.'" In the OPS opinion, the supervisor did not believe that the applicant was ill and he gave the applicant no credit for his good work product. The OPS stated that the supervisor was fond of using the evaluation systems, both enlisted

¹ OER marks range from a low of 1 to a high of 7. A 4 is considered an average mark.

and officer, as punishment tools rather than as documentation of performance and counseling tools. The OPS concluded the statement with the following:

I firmly believe that [the applicant] received lower than deserved marks and unfair documentation of his performance from [the supervisor] . . . because of [his] disbelief in [the applicant's] health conditions, his distrust for [the applicant's] professional abilities as the Deputy Group Commander, and finally because of [the supervisor's] stated use of the evaluation systems for punishment and/or payback, rather than for documentation of performance.

2. The applicant also submitted a statement from a chief yeoman and another from a warrant officer. In their opinions, the applicant would have suffered retribution from the supervisor, if he had appealed his OER while at the command.

VIEWS OF THE COAST GUARD

On January 26, 2005, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The JAG stated that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992). He stated that the applicant has the burden of proving error. In this regard, he stated that the applicant offered only his own self-serving statement that the OER was unfair. Moreover, he stated that the three statements offered by the applicant were from individuals (the OPS, CWO, and chief yeoman) who were not present during the OER period. He further stated, "Although it is apparent that Applicant had a higher opinion of his performance than the officer charged with the duty of evaluating applicant's performance, it is the latter officer's opinion that matters."

The JAG attached a memorandum from the Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion and requested that it be considered a part of the advisory opinion. CGPC stated that the applicant had provided no evidence to support his claim that his supervisor did not accurately portray his performance on the OER. CGPC further stated that the applicant has provided insufficient evidence to support his claim that his OER was adversely affected by his supervisor's unusual and unwarranted focus on medical issues during the performance period. CGPC further stated the following:

The only below average mark assigned in the writing performance dimension was sufficiently justified in Section 4, Communications Skills of the disputed OER. In his declaration, [the supervisor] provided amplifying information that further supports the below average mark in

Writing, and specifically states that he counseled the Applicant numerous times on his poor writing skills. All other marks were well justified, with no mention at all of the Applicant's medical conditions or resulting absences from work . . .

Applicant failed to take responsibility for managing his performance. The Reported-on officer assumes ultimate responsibility for managing their own performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards . . . Applicant states that he was "shocked and surprised" when he first received the disputed OER. This should not have been the case if the applicant had fulfilled his rating chain responsibilities by obtaining sufficient performance feedback from his Supervisor throughout the period. Applicant provides no evidence . . . to support his statement that he frequently asked his supervisor how he was doing. In his sworn written declaration [the supervisor] provided specific details on the counsel that he provided the applicant to improve his writing skills.

CGPC obtained a statement from the supervisor, who wrote that the applicant did not perform his duties at the level expected by the Coast Guard during the period in question, despite his claim that the supervisor unfairly focused on his medical conditions. The supervisor spoke of the applicant's poor writing skills and the counseling that he provided in that regard. The supervisor stated that the applicant also failed to perform at expected levels in the areas of preparedness, task direction, and responsibility. The supervisor further stated:

If one were to think that I had an unfavorable bias toward [the applicant] or his physical health, one only need to look at the subsequent OER's to disprove that notion. His health problems and missed workdays continued throughout the duration of his full tour . . . The factor that changed, however, was his performance -- he began to do the work that was expected of him. It took a "below average" mark on his OER to make him realize that he wasn't going to get to skate through his tour. While he never rose to the level of performance or work habits expected of a Deputy Group Commander, he did start completing the tasks that he was given at a higher level of quality, and in a more timely manner.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 14, 2005, the BCMR received the applicant's reply to the views of the Coast Guard. He stated, "It is obvious to me now that this entire matter boils down to my supervisor's word against mine, and it is obvious which person's word carries the most weight with the Coast Guard." He stated that despite his frustration at the

exaggerations and false statements made by the supervisor, he understood the Coast Guard's position and would not continue to argue the issue.

APPLICABLE REGULATIONS

Article 10.A. of the Personnel Manual governs the preparation of OERs. Article 10.A.1.b.1. provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." Each OER is prepared by the reported-on officer's "rating chain" of senior officers: the supervisor, the reporting officer, and the reviewer.

Article 10.A.4.f. states that members of the rating chain shall not "[m]ention any medical or psychological conditions, whether factual or speculative. Restriction applies to Reported-on Officer and family members."

Article 10.A.4.g. states an officer may submit a reply to any OER within 14 days of receiving it and have this reply filed with the OER. The purpose of the reply is 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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant has failed to prove by a preponderance of the evidence that his supervisor, who was also the reporting officer for the OER, unfairly focused on the applicant's medical issues in the evaluation of the applicant's performance for the period in question. The OER supervisor wrote a statement affirming his evaluation of the applicant's performance for the period in question and denying that the marks and comments were based on the applicant's absence from work due to his medical conditions. The applicant did not submit any evidence showing that his performance was other than as described by his supervisor. For example, he was given a 3 in writing with the comment that his written work "lacked adequate proofreading or format on occasion." The applicant offered nothing, other than his own statement, to rebut this statement or to show that his written work during the period deserved a mark higher than 3. The statement from the LT is of little value because she was not at the command during the period covered by the OER.

4. Moreover, the supervisor did not violate Article 10.A.4.f. of the Personnel Manual because the applicant's illnesses are not mentioned anywhere in the OER. Absent specific evidence to the contrary, the Board presumes that an applicant's rating officials acted correctly, lawfully, and in good faith in preparing officers' OERs.²

5. The applicant has failed to prove that the OER is in error or unjust. Therefore no basis exists on which to consider removing his failure of selection for promotion to LCDR.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

² 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).

ORDER

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

James E. McLeod

J. Carter Robertson

Darren S. Wall