

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-050

XXXXXXXXXXXXXXXXXX
XXXXXXXXXX, LT

FINAL DECISION

Author: Ulmer D.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on January 19, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated November 17, 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 correct his military record by removing an officer evaluation report (OER) for the period August 4, 2002 to May 31, 2003 (disputed OER).¹

BACKGROUND

The applicant was commissioned a LTJG in the Coast Guard Reserve on July 15, 2002 under the Direct Commission Lawyer program. He began a four-year period of active duty pursuant to an Active Duty Agreement on August 2, 2002 and was promoted to lieutenant on September 18, 2002. The OER was the applicant's first since entering the Coast Guard. He was assigned as a "Staff Attorney [for the] Legal

¹ The applicant's brief lists the OER in dispute as covering the period October 1, 2002 to May 30, 2003. There is no such report for this period. The facts match the OER for the period August 4, 2002 to May 31, 2003.

Assistance Branch" as "District 11's tax assistance program coordinator", and his duties included "consultations with clients; individual, income tax preparation; electronic filing; & coordinating Volunteer Income Tax Assistance (VITA) Program with Internal Revenue Service, California Tax Board, and VITA Volunteers." The applicant was also assigned to assist with the preparation of legal documents and to conduct pre-deployment legal-readiness training for active duty and reserve personnel.

Disputed OER

As stated above, the disputed OER was the applicant's first upon entering the Coast Guard.² The supervisor assigned the applicant marks of 3 in the planning and preparedness, using resources, results/effectiveness, and responsibility categories. She assigned the applicant marks of 4 in the adaptability, professional competence, evaluations, speaking and listening, writing, judgment, professional presence, and health and well-being categories. The applicant received marks of 5 in the teamwork, and initiative categories and marks of 6 in looking out for others and workplace climate.

The supervisor wrote the following pertinent comments about the applicant's performance in block 3:

Duties during this initial, abbreviated marking period were split between studying to re-take the bar exam . . . & assisting the sole, D11 area Legal Assistance Attorney . . . While licensing is not [a] prerequisite for Direct Commission Attorney Program, it is required during first 2 years to assure continued active duty. Successfully passed the February . . . Bar Exam . . . To assist the [legal assistance attorney], oversaw the regional VITA program & interviewed clients. Although studying for a bar exam is typically a very intense, draining & time-consuming process which could easily distract anyone from other responsibilities, this officer's performance was also compromised by a general lack of attention to detail & inadequate planning. Despite repeated counseling, repeatedly failed to submit reports or to complete tasks in a timely manner. After taking the bar exam, this officer's rejection rate for electronic tax return filing was among the CG highest at 38% . . . Some improvement noted when member followed advice to use a day-planner. Successfully organized VITA training; participated in deployment briefs for operational units in support of Operation Iraqi Freedom and routine deployments.

The supervisor further wrote in the communication skills comment section of the OER that "overall lack of attention to details when communicating to a group or w/individual clients required numerous man-hours to correct misunderstanding and to

² OER marks in the performance categories range from 1 to 7, with 7 being the highest.

produce correct documents, e.g., powers of attorney lacked basic requirements. Written documents submitted without adequate proofreading and attention to details, e.g., used the month from a sample form rather than the correct date in a client's important legal document."

In the leadership skills comment section of the OER, the supervisor complimented the applicant on his contribution to a positive work environment. She also wrote that the applicant "[d]evoted entire week to preparation of OER input, which lacked supporting details."

The reporting officer, in his portion of the OER, assigned the applicant a 3 in the responsibility category and marks of 4 in the judgment, professional presence, and health and well-being categories. The applicant received a mark of 5 in the initiative category. The reporting officer concurred with the supervisor's portion of the OER. He wrote, "it appears that increased CG-wide [operational] tempo during this period due to Iraq War & post 9/11 security buildup, lack of availability of past Reserve support for legal assistance, & the concomitant strain created by having to assign a law graduate not yet admitted to practice law to this branch, all contributed to a difficult start." In another section of the OER the reporting officer wrote the following pertinent comments:

Needs to establish a better system of checks and balances to ensure quality of work. Failed to recognize ethical error in telephonically misrepresenting self as potential buyer to opposing party on behalf of legal assistance client seeking assistance [with] dispute. As planning skills improve, expect to see reduced error rate & less "double-booking" of own time. Reported for shipboard briefings on time and well prepared . . .

The reporting officer described the applicant's potential in block 10 as follows:

Overarching concern is lack of attention to detail which ultimately affected performance in many areas. Will re-evaluate after opportunity to observe full year of work as licensed attorney undistracted by bar exam, and after completion of Naval Justice School Basic Lawyer Training. This officer will need to make substantial strides to improve on weaknesses noted above in order to meet the expected level of performance for a law specialist. The challenge is not insurmountable but will require meticulous concentration and attention to detail, coupled with enhanced communication skills.

On the comparison scale (block 9)³ where the reporting officer compares the reported-on officer with all others of that grade the reporting officer has know throughout his career, he placed the applicant in the third place from the left "as one of the many competent professional who form the majority of this grade."

APPLICANT'S ALLEGATIONS

The applicant alleged that the disputed OER is flawed and should be removed from his record. In this regard, he contended that the disputed OER does not recognize his exceptional performance, particularly that as the tax officer, which resulted in a savings of over twenty-two thousand dollars (22k) in tax preparation fees for military members and his overhaul of an antiquated tax legal assistance service.

The applicant also alleged that the OER did not include the following accomplishments: 1. The preparation of at least two 1040 schedules involving capitol gains and losses and real property depreciation. 2. The completion of tax returns covering all 50 states without training. 3. The preparation of an amended tax return in which a client received a refund of approximately \$3,000. 4. The verification of training for all VITA volunteers in California, Nevada, and Utah.

The applicant further contended that the marks of 3 and 4 on the OER are in error because they are inconsistent with the performance described in his input to the OER. He stated that the supervisor committed further error in the OER by

. . . (2) stating that the electronic tax return error rate was thirty-eight percent (38%) when [the supervisor] used incorrect criteria to document errors; (3) stating the requirements of the Direct Commission Lawyer program when this information can be found in the Personnel Manual; (4) explaining the arduousness of preparing for bar exams; and (5) stating that [the applicant] participated in deployment briefings when [he] solely conducted various deployment briefings on behalf of the legal division.

The applicant denied that he lacked attention to detail when communicating with clients and that numerous man-hours were required to correct the misunderstandings and incorrect documents he allegedly produced. The applicant stated that his supervisor was responsible for all legal advice and, therefore, ultimately responsible for passing information to clients. He further suggested that the mistakes mentioned in the OER with respect to his drafting of powers of attorney were those of an officer in training and were corrected by the supervisor with no harm to the clients. With respect to the comment that he submitted a document with a sample date versus

³ The marks on the comparison scale range from a low of 1 (unsatisfactory) to a high of 7 (a distinguished officer).

the correct date, the applicant stated that he was not responsible for disseminating any information to clients. According to the applicant, that was the supervisor's responsibility. About the comment that he "double-booked" his time, the applicant stated the supervisor misconstrued what happened. He stated that a taxpayer appeared for service at his office without calling beforehand and he could not see the client because he had another meeting to attend at that time.

The applicant contended that his supervisor placed an inordinate amount of stress on him and created a hostile work environment for him, to which the supervisor did not subject the other officers in the Legal Division. With respect to placing him under an inordinate amount of stress, the applicant stated that he was provided no training in managing a tax center and inadequate training in preparing tax returns and electronic filings. In this regard, he stated, he received four days of training on tax preparation and one day of training on filing taxes electronically. He stated that his supervisor was unable to offer him assistance because she was not familiar with the rules on managing a tax center and because of her insistence on following antiquated policies, which created friction between them. The applicant stated, "[a]lthough I was extremely frustrated by [the supervisor's] illogical policies, the chain of command supported them, which effectively limited the amount of clients who could be benefited by the VITA service." The applicant stated that his supervisor sabotaged the overall success of the VITA program by not allowing the tax program to begin until the end of February to allow the applicant to study for the bar exam, by directing the applicant to use a computer different from that which was previously used to prepare and electronically file tax returns, by not adequately informing the applicant of the type of statistics that he would be required to report, and by not providing the applicant with adequate administrative support. He stated that the supervisor made many personal attacks against him, and at one point asked him if he were dyslexic. He stated that he felt threatened and retreated to his office every day in an effort to avoid his supervisor's daily wrath. He stated that he was subjected to multiple closed-door sessions with the supervisor, with his door being closed without his permission. He stated that he experienced discomfort during these situations.

The applicant alleged that his supervisor unfairly evaluated the VITA program as being unsuccessful because the applicant had not saved clients enough in preparation fees to equal his salary for January through April. He stated that no other tax preparer's success was measured in this way.

The applicant asserted that the supervisor unfairly blamed him for not submitting VITA statistics to Headquarters, when there was no instruction or training provided that stated that he was required to report the statistics to Headquarters.

With respect to his alleged hostile work environment, the applicant stated that other attorneys were allowed to have more than an hour for lunch, but he was not. He

alleged that he was the only person in the legal division not permitted to have a regular day off (RDO). He also stated that his requests for leave days were closely scrutinized while the leave requests of other attorneys were not. He alleged that he was told that he needed to report to sick call if he were sick, while other attorneys were allowed to call in and say that they would be out due to illness. He stated that the supervisor failed to arrange a birthday party for him when she had done so for others. He alleged that, although he did not request it, he was not given time off to study for the bar examination, but another officer had been given 2 months off and allowed to study in another state. Last, he alleged that he was the only person in the legal division not allowed to participate in a Dining Out or to attend Naval Justice School.

In addition, the applicant alleged that the supervisor and reporting officer failed to provide documentation supporting the grades and comments in the OER and that he was not counseled on the OER. The applicant claimed that the only counseling he received was praise. He further contended that the rating chain failed to include his accomplishments from June to July 2003.

The applicant submitted two letters from tax clients who indicated that they were satisfied with the applicant's preparation of their tax returns. He also submitted several favorable references from individuals for whom he had worked prior to entering the Coast Guard.

VIEWS OF THE COAST GUARD

On June 15, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG stated that the applicant failed to carry his burden of proof. He stated that there is no evidence in the record to support a finding that the applicant's OER was anything but a fair and accurate portrayal of his sub-standard performance during the period in question. In support of his conclusion, the JAG offered the following comments:

[The] Applicant offers his own narrative but no evidence. Applicant argues that his OER should be removed for various reasons, to include his own self-serving evaluation of his performance; alleged bias by his reporting officer . . . in evaluating his performance of duty as the "tax officer"; stress and an unduly harsh work environment caused by [the supervisor]; and that the [supervisor] and [reporting officer] failed to provide documented proof for evaluation grades and failed to enter "crucial accomplishments" into the subject OER.

The evidence in this case supports the conclusion that the challenged OER represents the honest professional judgment of those responsible for

evaluating the Applicant under the [OES]. Applicant's Supervisor, Reporting Officer and Reviewer each provided affidavits . . . which further clarified the incidents documented in Applicant's OER. While the applicant has his own opinion of his job performance, Applicant does not provide any evidence which rebuts the strong presumption that the rating chain official executed their duties correctly, lawfully, and in good faith. Applicant also alleges that he was subject to bias by his supervisor . . . There is no evidence in the record of any bias or that Applicant was treated any differently than his peers. In fact, there is substantial evidence [that the applicant's rating chain] repeatedly counseled Applicant in hope that he would improve his performance . . .

The JAG attached comments from the Commander, Coast Guard Personnel Command as Enclosure (1) to the advisory opinion and asked the Board to accept it as part to the Coast Guard views. CGPC recommended that the Board deny the applicant's request. He stated that an evaluation of the applicant's performance after the end of the reporting period (May 30, 2003) was properly omitted from the OER since the Personnel Manual states that the rating chain will comment on and evaluate performance that occurred during the reporting period.

CGPC obtained and attached statements from the members of the rating chain who affirmed their evaluation of the applicant's performance.

1. The supervisor stated that the applicant conducted pre-deployment briefings, but since he was not licensed to practice law in any state, it was necessary for the yeoman to attend every briefing with him so that the powers of attorney could be notarized on-site. The supervisor stated that the applicant had no authority to perform legal assistance notaries.

The supervisor stated that under the division policy set by the reviewer (who was chief of the legal division), there was no regular day off (RDO) for new officer personnel. She stated that the applicant was not unique in working a 40-hour, 5-day week. She further stated that the applicant was never required by anyone to work five, 9.5-hour days, nor did he work more than 40 hours per week. The supervisor also stated that the applicant took 60-minute lunches and that he was never denied any leave requests. She stated that to the contrary, the applicant left the Division for 9 days without taking leave of any type. She stated that everyone was subject to the same regulations for sick-in-quarters. The supervisor stated that she had no funds allotted for birthday parties and had no indication that April 20, 2003 was the applicant's birthday or that he expected her to sponsor a birthday party. With respect to studying for the bar exam, the supervisor stated that she offered the applicant the entire work day off to study, if he would submit his practice exams to her. She stated that the

applicant told her that he wanted to do some branch work rather than have the entire day off to study.

The supervisor stated that the applicant electronically filed 46 returns with an error rate of 47.8% (the OER states the error rate as 38%). She stated that the applicant reported the resubmitted rejected returns in his total for electronic filings making it appear that he had filed more returns than he actually had. According to the supervisor, this was "double counting". She stated that the tax program save \$11,391 for clients in tax preparer's fees, which was misrepresented by the applicant as being \$20,000. She stated that \$6,360 of the \$11,391 savings was credited to a civilian VITA volunteer and \$4,130 was credited to another unit, which received virtually no assistance from the applicant. The supervisor stated that the applicant had no management or supervisory authority over the VITA tax preparers and merely collected their statistics after each passed the IRS and California FTB tax tests. She stated that the IRS trained the volunteers and answered their questions, as well as trained and provided support to the applicant during the tax season. She stated that she has prepared tax returns for more than 20 years and that she was always available to assist the applicant, if not in person then via her personal cell phone. She stated that when she was not available, the reporting officer was available to assist the applicant.

The supervisor stood by her comment that the applicant "double booked" his time. She stated that the applicant had the complete assistance of the clerical staff.

2. The reporting officer wrote a statement and reaffirmed his assessment of the applicant's performance in the disputed OER. On the issue of end of period counseling, the reporting officer stated the following:

[The applicant] became the subject of a disciplinary investigation involving a number of Legal Division personnel as potential witnesses. He retained an attorney to represent him in the matter. The fact that he retained an attorney in the matter presented some unusual circumstances for the Legal Division. I met with the new Legal Division Chief . . . and with the former Chief . . . on 27 August to discuss how to get the applicant's OER to him without violating the attorney rules of ethics concerning contact with an individual represented by counsel. It was our joint decision that the best means for handling the situation was for me to notify [the applicant] in writing that I was going to have the Division secretary deliver his OER in a sealed envelope. The reason [the applicant] was not counseled in his OER was specifically related to the matter under investigation, which concerned an event that occurred during the OER period but that was not known by [the rating chain] at the time the OER was prepared. [The applicant] was given an inordinate amount of feedback on his performance throughout the marking period. He was not

counseled after the marking period due to the investigation and his reassignment outside of the Legal Division.

3. The reviewer also submitted a statement to CGPC, standing by his evaluation of the applicant's performance. He stated that prior to the OER leaving his office he became aware of allegations that the applicant had forged several of his client's signatures. He stated that at that time he determined that there was not enough information to hold the OER and therefore he let it go forward. He stated that the Coast Guard Investigative Service initiated an investigation.

The reviewer indicated that based on a review of his documentation, the OER comment that the applicant had a 38% rejection rate of his electronic submissions should likely have been 28%. He stated that the 38% was likely a math error. The reviewer stated that regardless of the math, the applicant's error rate was unacceptably high for a program run by a law school graduate. He stated that the applicant's rejection rate was the third highest in the Coast Guard.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 15, 2005, a copy of the views of the Coast Guard was mailed to the applicant for his response. The BCMR did not receive a reply.

APPLICABLE REGULATION ON COUNSELING

Personnel Manual

Article 10.A.1.c.5. of the Personnel Manual states that no specific form or forum is prescribed for performance feedback except for ensigns and lieutenants (junior grade (LTJG)). It further states that feedback occurs wherever a subordinate receives advice or observation related to their performance in any area.

Article 10.A.2.c.2.f. of the Personnel Manual states that the reported-on officer "[n]otifies the Supervisor not later than 21 days before the end of the reporting period if the Reported-on officer desires an end of period conference."

Article 10.A.2.d.2.e. of the Personnel Manual states that the supervisor "[p]rovides performance feedback to the Reported-on Officer upon that officer's request during the period or at such other times as the Supervisor deems appropriate."

Article 10.A.2.d.2.f. of the Personnel Manual states that the supervisor "[c]ounsels the Reported-on Officer at the end of the reporting period if requested, or when deemed appropriate, regarding observed performance. Discusses duties and responsibilities for

the subsequent reporting period and makes suggestions for improvement and development."

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that the disputed OER is in error and unjust because it inaccurately describes his performance for the period under review. However, he submitted no evidence, except for his own allegations, to prove that his performance was other than as described in the OER. He further alleged that his supervisor's bias against him permeated the OER and that she created a hostile work environment. Again, except for his own allegations, he offered no evidence to prove that the supervisor was biased against him or that she treated him differently from the other officers in the Division. In contrast, the Coast Guard obtained statements from members of the rating chain and each attested to the accuracy of the OER. This Board has consistently held that mere allegations alone are insufficient to prove that an OER is erroneous or unjust. The applicant, who has the burden of proof, has failed to prove the OER is inaccurate or unjust.

4. However, there are two issues that merit further discussion. The first is the comment in the OER that the applicant had a 38% rejection rate for his electronic tax filings. The reviewer stated that based on the review of documentation in his possession, the applicant's rejection rate was likely 28%. He stated that the discrepancy between the numbers was likely due to a math error. Whether the applicant's rejection rate was 38% or 28%, the rating chain is in agreement that it was one of the highest for the Coast Guard tax preparers. Therefore, the Board finds that this mathematical error is not prejudicial to the applicant, and in light of the below average grades⁴ and other lackluster comments in the OER, the alleged math error is, in fact, insignificant. Accordingly, no correction is necessary in this regard.

⁴ Article 10.A.4.c.4.g. of the Personnel Manual states that a "mark of four represents the expected standard of performance."

5. The other issue that merits discussion is the lack of end-of-period counseling. The evidence supports a finding that such counseling did not occur. The Personnel Manual places responsibility on the applicant to initiate end-of-period counseling twenty-one days before the end of the period if he desires counseling and responsibility on the supervisor to conduct end-of-period counseling if requested by the applicant or at any other time deemed necessary. The applicant did not submit evidence showing that he fulfilled his responsibility by requesting end-of-period counseling.

6. Since the applicant did not request end-of-period counseling, the supervisor did not violate the Personnel Manual by not providing it. Therefore, the supervisor was only under an obligation to conduct end-of-period counseling if "deemed appropriate." The reporting officer explained that the rating chain determined that it was not ethically appropriate for any member of the rating chain to personally deliver the OER to the applicant because he was under investigation for violations of the Uniform Code of Military Justice that occurred during the reporting period, because Legal Division personnel were potential witnesses in the investigation, and because the applicant had hired an attorney to represent him against the charges. Therefore, the rating chain made arrangements for a third party to deliver the OER to the applicant in a sealed envelope. However, the applicant still could have put any questions that he had about the evaluation in writing and submitted them to the rating chain for an explanation of the grades and comments and he could have also submitted a reply to the OER, which he did not do. Also, end-of-period counseling would not have been very beneficial to the applicant because he had already been transferred from the Legal Assistance Division to the Military Justice Division, where he had a new supervisor and responsibilities.

7. Moreover, as the rating chain indicated, the applicant had received guidance and counseling on his performance during the reporting period. Although the applicant denied that he received such counseling, he wrote that he had many closed-door sessions with the supervisor, which must have included some comment on his performance. As the Personnel Manual clearly states, counseling occurs whenever a subordinate receives any advice or observation from a rating chain official. See 10.A.1.c.5. of the Personnel Manual. The applicant failed to establish that the rating chain committed an error or injustice by not providing him with end-of-period counseling.

8. As indicated above, the Board has considered all of the applicant's allegations and contentions. Those not specifically discussed within the findings and conclusions are considered not to be dispositive of this case.

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

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

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

Elizabeth F. Buchanan

(see below*)

Donald A. Pedersen

Darren S. Wall

*This Board member recused himself because of a potential conflict of interest. Under 33 CFR § 52.11, two members constitute a quorum of the Board.